

MEDICAL EXAMINATION OF THE ACCUSED IN A RAPE CASE

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INTRODUCTION

While adjudicating a rape case,¹ despite popular belief, the medical evidence does not have a "decisive role" in making decisions.² In cases where there is no other evidence to corroborate the victim's account, the testimony of the victim can be served as the "sole" basis for convicting the accused.³ Medical evidence from both the victim and the alleged is crucial in corroboration, especially when it comes to proving the penetrating act and to establishing its link to the accused.⁴ Medical examinations of both the victim and the accused are authorised by Sec. 164A and 53A of the Code of Criminal Procedure, 1973⁵, but neither section specifies the steps involved in or the method used to conduct these exams. Textbooks on medical jurisprudence serve as guides for actual procedures of medical examination, gathering evidence, forming an opinion, and the Court's interpretation of that opinion.⁶

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NEED OF MEDICAL EXAMINATION (Accused)

Because the judge presiding over a criminal trial may lack the specialised knowledge necessary to fully understand the technical aspects at play in any given case, he or she must rely on the testimony and analysis of various experts in order to hone in on the essential facts. The expert witness provides testimony in the form of an opinion based on the facts he has gathered in the

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¹ In this paper, unless otherwise specified, the term 'rape' shall jointly refer to the offence under Sec. 375 and 376 of IPC (Indian Penal Code, 1860 ("IPC")) and the offence of 'penetrative sexual assault' under Secs. 3 and 4 of (Protection of Children from Sexual Offences Act, 2012 ("POCSO Act")). The terms 'victim' and 'accused' should be understood accordingly. Further, 'accused' does not include non-male persons accused under POCSO Act.

² Mahindra v. Sajjan Galfa, MANU/SC/0458/2017 (Supreme Court) (speaking in the context of offences against the body and post-mortems, the Court observed that medical evidence plays a 'decisive' role); *But see* Rao Harnarain Singh v. State, AIR 1958 Punj 123 (Punjab and Haryana High Court); Rafiq v. State of Uttar Pradesh, (1980) 4 SCC 262, at ¶ 5 (Supreme Court); Bharwada Bhoginbhai Hirjibhai, (1983) 3 SCC 17, at ¶11 (Supreme Court); Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204, at ¶23; State of Punjab v. Gurmit Singh, (1996) 2 SCC 384, at ¶ 9 (Supreme Court).

³ Id.

⁴ Mrinal Satish, *The Law and Practice of Rape Adjudication in India* in DISCRETION, DISCRIMINATION AND RULE OF LAW 34, 45 (2016).

⁵ The Code of Criminal Procedure, 1973 ("Cr.P.C.").

⁶ Durba Mitra and Mrinal Satish, *Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India*, ECONOMIC AND POLITICAL WEEKLY 51, 52 (2014).

course of his investigation. The judge's assertions are bolstered by this evidence, and the two work together to form the foundation of the judgement. The court has the discretion to accept or reject the expert's opinion, so the value of the evidence they provide is not inviolable. Section 45 of the Indian Evidence Act, 1872 vests the court with the authority to exclude or admit expert testimony at its discretion, ostensibly because such testimony is considered to be merely corroborative in nature.

In any case, involving rape, a medical examination of the alleged offender and the alleged victim is crucial. In cases where there was no direct witness to the crime and where both the accused and the victim were motivated by self-interest, medical evidence can be an important piece of the puzzle in piecing together what really happened. The victim was always required to undergo a medical exam⁷. However, the Act was recently amended to make a mandatory provision for a medical examination of the accused.⁸

‘REASONABLE GROUND’ FOR MEDICAL EXAMINATION

There were three distinct ways that police officers requested a medical exam for the suspect:

- i not requested in any case;⁹
- ii requested in all cases;¹⁰
- iii requested only in ‘fresh’ cases.¹¹

Officers at one station stated flatly that it was "not practise" to have suspects medically examined in rape cases. An officer, when asked if this could result in the destruction of crucial evidence,¹² said that "nothing [could] help the accused escape conviction" because of the seriousness of the rape charge. However, some law enforcement officials have testified that

⁷ Section 53, The Code of Criminal Procedure, 1973

⁸ Section 53A, The Code of Criminal Procedure, 1973

⁹ Fieldnotes from Lucknow, at PS 1. Out of the 42 case records reviewed at District and Sessions Court, Lucknow, 29 had no mention or record of medical examination of the accused. Only 8 case files contained the medico-legal report. In the remaining, recordings in the case diary or receipt of samples sent for forensic examination suggested that such medical examination was conducted. In none of the decided cases, the testimony of examining doctor was recorded or mentioned. When questioned about the missing records, the special public prosecutor said that the investigating officers often did not provide the report of the accused's examination.

¹⁰ Fieldnotes from Delhi, at PS 1 and PS 2; Fieldnotes from Pune, at PS 1 and PS 2; Fieldnotes from Lucknow, at PS 3.

¹¹ Fieldnotes from Lucknow; at PS 2; Fieldnotes from Dehradun, at PS.

¹² Jagadeesh N., *Appreciation of Medical Evidence by Special Courts in POCSO Cases* in IMPLEMENTATION OF THE POCSO ACT, 2012 BY SPECIAL COURTS: CHALLENGES AND ISSUES 97 (CCL, NLSIU) (2018)

any suspect accused of rape is always taken to the hospital for an examination. There is always a need, one of them concluded. Even the slightest touch can be interpreted as rape, but we do it anyway.

Depending on the nature of the alleged crime and the amount of time that has passed, police in two separate cases suggested that a medical examination of the accused might produce relevant evidence.¹³ If the accused was not immediately apprehended (not "fresh"), a medical examination was not mandated because it would be futile. One of them wrote down the rationale for skipping the medical checkup, while the other argued that it could be deduced from the case diary's notation of the incident date and arrest date. They had never seen a case of a sex act other than a penile-vaginal penetration before. Some people have the opinion that if the suspect's digital devices were penetrated, then the examination wouldn't matter. Nonetheless, one cop noted that swabs from the hands would be relevant in the case of immediate arrest in the event of penetration by body parts such as fingers.

DETERMINING THE 'NECESSARY' EXAMINATION

A "*police requisition*" is a written request to the hospital for a medical examination. Usually, it includes the accused person's name, address, date of birth, date of the alleged crime, and a request for a medical examination and/or sample collection. Examining physician performs "*such examination*",¹⁴ and "*such other tests*" as he deems *appropriate* according to his understanding in that particular case.¹⁵

Discussions with medical professionals and police officers,¹⁶ as well as a review of police requisitions received by some hospitals,¹⁷ have revealed that in the vast majority of cases, the only information on the alleged offence contained in the police requisition is the relevant "section number" under the IPC. In two cities.¹⁸ , in addition to the section number, a brief

¹³ Fieldnotes from Dehradun, at PS; Fieldnotes from Lucknow, at PS 2.

¹⁴ See Secs. 53A, Code of Criminal Procedure, 1973.

¹⁵ Explanation (a) to Sec. 53, Code of Criminal Procedure, 1973.

¹⁶ Fieldnotes from Delhi, at H1, H2, H3, PS1, PS2, Advocate; Fieldnotes from Patna, at H; Fieldnotes from Dehradun, at PS, H1, H2, H3

¹⁷ Fieldnotes from Dehradun, at H2 (Review of the 'Police MLC Register' maintained at H2 affirmed this. 'Police MLC Register' is a common record book of medico-legal certificates ("MLCs") pertaining to *all* medical examinations conducted at the request of the police. A typical requisition stated the name and age of the accused, section number of the offence ('Sec 376') and ended with a request for examination of the accused); Fieldnotes from Delhi, at H2 (Requisitions were printed in standard format, providing space for including the name and age of the accused, section number of the offence, and ended with a request for medical examination).

¹⁸ Fieldnotes from Pune, at H; Fieldnotes from Bengaluru, at H.

description of the allegation was provided. A copy of the FIR was made available during that time period in one.¹⁹

Either a general request for an internal and external examination²⁰ was included at the end of the police requisitions, specific samples were requested (including semen and blood samples)²¹, injuries were examined, or an opinion on 'potency' was sought.²² Evidence of "recent intercourse" and the accused's "capability to perform sexual intercourse" was requested in a translated requisition that also asked for blood and pubic hair samples.²³

Typically, this meant adhering closely to the hospital's 'medico-legal form' when reporting the results of the accused's medical examination.²⁴ In particular, in two hospitals, the accused was examined using the same *Proforma* for Victims that had been used to examine the victims.²⁵ A police officer confirmed that doctors performed all tests and sealed all samples for forensic examination, regardless of the crime's significance, as constables frequently failed to do so.²⁶ As a result, in one unusual case (discussed further on), samples of the accused man's sperm were taken.

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Another officer, however, stated that he did not record the receipt of a negative forensic report or the sealing of an irrelevant sample in the case diary because doing so would "serve no other purpose other than weakening the prosecution's case."²⁷

The medical staff could not think of any cases where the alleged act was anything other than penile-vaginal or penile-anal penetration.²⁸ A small number of people have the opinion that 'offense-specific' testing is only an issue when it comes to victim testing.²⁹ A change in

¹⁹ Fieldnotes from Lucknow. FIR stands for 'First Information Report' to the police under Sec. 154, Code of Criminal Procedure, 1973.

²⁰ Fieldnotes from Lucknow, at H1, H2, PS1 (Requisition recording the name of the accused, section number was accompanied with a copy of the FIR); Fieldnotes from Dehradun, at H2.

²¹ Fieldnotes from Delhi, at H2.

²² Fieldnotes from Delhi, at H2, Advocate (requesting opinion on whether the accused was "capable or not"; "capable of performing a sexual act"); Fieldnotes from Bengaluru, at H.

²³ Fieldnotes from Bangalore, at H;

²⁴ Fieldnotes from Lucknow, at H1, H2, H3, H4; Fieldnotes from Delhi, at H1 (No medico-legal form but the doctors had a standard format for reporting); Fieldnotes from Patna, at H.

²⁵ Ministry of Health and Family Welfare, *Guidelines and Protocols - Medico-Legal Care for Survivors / Victims of Sexual Violence* (2014) available at <https://mohfw.gov.in/sites/default/files/953522324.pdf> (Last visited on 21 May 2018)("2014 Guidelines").

²⁶ Fieldnotes from Lucknow, at PS3 (The police officer at the neighbouring police station recalled that in one case where the accused was arrested weeks after the incident, the doctors seized his 'fresh' clothes, not worn at the time of the incident, and sent it for forensic examination).

²⁷ Fieldnotes from Lucknow, at PS2.

²⁸ Though, in the cases of penile-anal penetration mentioned involved male victims, mostly minors.

²⁹ Fieldnotes from Dehradun, at H1; Fieldnotes from Delhi, at H2.

procedure for the victim's examination, rather than the accused's, was noted by one of them in cases not involving penile-vaginal penetration.³⁰

Grounding the 'Routine' in History

There must be "reasonable grounds" for a medical examination of the accused to be conducted under Section 53A of the Criminal Procedure Code.³¹ The police did not take into account the nature of the alleged act, the type of evidence that may be available on the body of the accused, or factors that may affect its availability (such as the amount of time that has passed since the offence and post-assault activities) before requesting the medical examination.³² From the perspective of the investigation, this could cause the discarding of necessary corroboration evidence or the accumulation of superfluous material.³³ Furthermore, the statutory requirement of reasonable grounds and the constitutional rights of the accused are both violated by the "reverence to routine" in either requesting or conducting a medical examination.³⁴

Sec. 53 of Cr. P.C. which deals with medical examination in general offences, states that the doctor can conduct such examination as may be "*reasonably necessary*" to ascertain the facts relating to the commission of the offence.³⁵ Sec. 53A does not have a comparable phrase. A literal interpretation of this phrase, however, would violate the right to privacy and bodily integrity of the accused, as well as the right to a fair trial,³⁶ because the purpose of the examination is to obtain "*evidence as to the commission of [rape]*."³⁷

LAW ON MEDICAL EXAMINATION OF ACCUSED

Prior to the current Criminal Procedure Code (Cr.P.C.), the accused could not be subjected to a medical or physical examination without his permission (as was the case under the Code of Criminal Procedure, 1892).³⁸ In 1967, the Law Commission of India discussed the need for a

³⁰ Fieldnotes from Lucknow, at H1.

³¹ Sec. 53A, Code of Criminal Procedure, 1973.

³² Jagadeesh N., *supra* note 12.

³³ Fieldnotes from Dehradun, at P1 (A retired official of the Department of Medical Health and Family Welfare said that in case of 'fingering' by an accused, trace evidence ought to be taken by swabbing his hands in 'fresh' cases but the doctors were never made aware of the entire crime and clinical history).

³⁴ See Part I above on "Law on Accused's Examination". See also Maneka Gandhi, AIR 1978 SC 597, ¶ 21 ("the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary"); H. L. Packer, THE LIMITS OF CRIMINAL SANCTION, 156 (1968).

³⁵ Sec. 53, Code of Criminal Procedure, 1973.

³⁶ Sec. 53A, Code of Criminal Procedure, 1973.

³⁷ *Supra* note 33.

³⁸ Indian Law Institute, SELF-INCRIMINATION: PHYSICAL AND MEDICAL EXAMINATION OF THE ACCUSED, 1-3, 31 (1963); see Bhondar v. Emperor, AIR 1931 Cal 601 (Calcutta High Court) (The court held that in the absence of

provision authorising such an examination,³⁹ the preferred form of such an examination, and the protection against self-incrimination afforded by Art. 20 (3) of the Constitution.⁴⁰

Although the 84th Law Commission report, which came before the amendment, discussed the chronological stages and methods of conducting such examinations,⁴¹ the provisions introduced did not specify a methodical framework for interviewing either the victim or the rape suspect.⁴² The accused has no right under the provisions of Sections 53 and 53A of the Criminal Procedure Code to object to the medical examination. It does, however, call for the presence of "*reasonable grounds*" for thinking that such an examination would reveal proof of the offence's commission.⁴³

The right to be reviewed by a medical practitioner:

The two sections of the 1973 Code of Criminal Procedure, Sections 54 and 53, are opposites of one another. While the right granted to the accused to have himself examined medically is covered under section 54, which gives the arrested person the ability to defend and shield himself, section 53 primarily deals with the medical examination of the arrested person in order to facilitate the police officer's investigation.

The accused party is given the chance to have a staff doctor examine his body in order to ascertain whether the alleged crime was actually committed by someone else or whether he may have been physically hurt when he was imprisoned or brought before the judge. It is necessary to inform the accused of these rights.

In the case of *Sheela Barse v. State of Maharashtra*,⁴⁴ the Supreme Court ruled that magistrates have an obligation to question suspects about whether they have any complaints of maltreatment or torture while in police custody and to inform those who have been arrested of their right to a medical exam under section 54 of the code.

statutory authority, medical examination of the accused without his consent would amount to assault.); *Deoman v. State of Maharashtra*, AIR 1959 Bom 284 (Bombay High Court).

³⁹ Art. 20 (3), Constitution of India, 1950 ("No person accused of an offence shall be compelled to be a witness against himself").

⁴⁰ 37th Report of the Law Commission of India, *The Code of Criminal Procedure 1889*, 205 (1967).

⁴¹ David M. Paul, *The Medical Examination in Sexual Offences*, 15 (3) *MEDICINE, SCIENCE AND THE LAW* 154 (1975) as cited in 84th Report of the Law Commission of India.

⁴² Satish, *supra* note 4, at 45.

⁴³ Sec. 53 / 53A, Code of Criminal Procedure, 1973

⁴⁴ *Sheela Barse v. State of Maharashtra*, (1983) 2 SCC 96 (Supreme Court).

Right to Privacy

The *Puttaswamy* decision established the constitutionality of the right to privacy under Art. 21 and other freedoms guaranteed under Part III of the Constitution. Individuals' right to privacy—which includes the right to protect their physical safety, the confidentiality of their communications, and the freedom to make their own choices—has been viewed as fundamental to their sense of worth.⁴⁵ As a result of *Puttaswamy*, cases like *Selvi*, which established the 'right to privacy' as a fundamental facet of human dignity and freedom, are now enshrined in the constitution.⁴⁶ The right not only forbids the government from invading someone's privacy, but it also imposes a positive obligation on the government to do everything in its power to safeguard that privacy.⁴⁷

The Supreme Court distinguished between psychological and actual privacy in its *Selvi* decision. The Court found that intrusions into the mind violated Art. 20 (3) and *personal liberty* under Art. 21, but that physical privacy violations during forced medical examination or extraction of bodily substances were justified in the exercise of police powers.⁴⁸ Thus, unconstitutional are tests like narcoanalysis via intravenous injection of hypnotic drugs, which involve involuntary interference with the accused's mental processes.⁴⁹

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Puttaswamy's case admits that there must be some limits placed on the right to privacy. Any such restriction, however, must be consistent with the maximum extent to which the underlying freedom protected by Part III of the Constitution can be limited.⁵⁰ Additionally, the Chandrachud J.-authored minority opinion explains that any violation of the right must meet the criteria of:

- I. point of legality;
- II. point of necessity, as a means to achieve a lawful state goal; and

⁴⁵ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶ 318 (“Puttaswamy”).

⁴⁶ Puttaswamy, (2017) 10 SCC 1, ¶¶ 85, 99, 515 and 652; Gautam Bhatia, *The Supreme Court's Right to Privacy Judgment-III: Privacy, Surveillance, and the Body* (29 August 2017) available at <https://indconlawphil.wordpress.com/2017/08/29/the-supreme-courts-right-to-privacy-judgment-privacy-surveillance-and-the-body/> (Last visited on 21 May 2018).

⁴⁷ Puttaswamy, (2017) 10 SCC 1, ¶ 326.

⁴⁸ *Selvi*, (2010) 3 SCC (Cri) 1, ¶¶ 224-225.

⁴⁹ *Selvi*, (2010) 3 SCC (Cri) 1, ¶¶ 262-265.

⁵⁰ Puttaswamy, (2017) 10 SCC 1, ¶¶ 325 (Per Chandrachud J.), 379 (Per Chelameswar J.), 526 (Per Nariman J.), 427 (Per Bobde J.) (Thus, for claims of privacy under Art. 14, a reasonableness enquiry would follow. Likewise, express restrictions under Art. 19 would be examined if the right to privacy flows from freedoms under it).

III. point of proportionality interpreted as "the logical connection between the ends and the means used".⁵¹

While the Court in *Selvi* did rule that it was up to legislators to strike a fair balance between individual privacy and public safety, it was clear that "*invocations of compelling public interest*" could not be used to override fundamental constitutional protections like the privilege against self-incrimination.⁵² But after *Puttaswamy*, the state's compelling interest, subject to the principle of proportionality, would justify the limitation on privacy.

Right to Dignity

The Court in *Selvi* held that Art. 21 provided a sufficient basis for the right not to be subjected to cruel, inhuman, or degrading treatment while in a custodial setting, despite the Constitution's lack of express protection against such treatment.⁵³ Although there may not be an "overbearing police presence," any person arrested,⁵⁴ or detained is still entitled to the protections guaranteed by Articles 20(3) and 21.⁵⁵

These safeguards applied not only to physical but also to psychological forms of torture. As a result, "forced intrusions" into people's thoughts were seen as an affront to their inherent worth and freedom. The Supreme Court's *Puttaswamy* decision acknowledged privacy's central role in maintaining human dignity and affirmed that people's dignity and freedom are the cornerstones from which all other fundamental freedoms spring.⁵⁶

⁵¹ *Puttaswamy*, (2017) 10 SCC 1, ¶ 325 (Per Chandrachud J.). See *Bhatia*, *supra* note 17, *Puttaswamy*, (2017) 10 SCC 1, ¶ 638 (Per Kaul J.) (arguing that Kaul J. gives a wider import to proportionality than the rational nexus test, requiring the interference to be proportionate to the necessity claimed (minimal infringement for furthering the legitimate State aim). See also *Puttaswamy*, (2017) 10 SCC 1, ¶ 638 (Chelameswar J.) (observing that certain privacy violations would deserve 'strictest scrutiny' of compelling state interest and require narrowly tailored interference, while others would have to be tested against 'reasonable, just and fair' standard under Art. 21).

⁵² *Selvi*, (2010) 3 SCC (Cri) 1, ¶¶ 256-257.

⁵³ See generally *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675 (Supreme Court) (against solitary confinement); *Sunil Batra v. Delhi Administration*, AIR 1989 SC 1579 (Supreme Court); *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535 (Supreme Court) (against handcuffing of prisoners); *Hussainara Khatoon v. Home Secretary, Bihar* (1980) 1 SCC 81 (Supreme Court); *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610 (Supreme Court). P. N. Bhagwati, *Human Rights in the Criminal Justice System*, 27 (1) JOURNAL OF INDIAN LAW INSTITUTE 1, 15 (1985).

⁵⁴ *Selvi*, (2010) 3 SCC (Cri) 1, ¶ 195.

⁵⁵ *Selvi*, (2010) 3 SCC (Cri) 1, ¶ 230.

⁵⁶ *Puttaswamy*, (2017) 10 SCC 1, ¶ 318.

Scientific of tests and Fair Trial

The scientific validity of the tests was lauded by the *Selvi* Court, which connected it to the accused's right to a fair trial (a component of the freedom to pursue one's own interests guaranteed by Art. 21).⁵⁷ Both the accused, whose guilt must be proven beyond a reasonable doubt and the victim, whose credibility may be called into question if the court relies on hearsay instead of the results of a thorough medical examination, have a vested interest in this aspect of the investigation.

Legal Obligations of the health worker in Sexual Offence:

Since we developed our strategy and techniques of medico-legal care for the Accused, scientific and forensic vigour has been helpful to the investigation in order to maintain transparency in evidence collection on the path to achieving just from unjust. Following the Blackstone Ratio, which states that "ten guilty persons escaping is preferable to the suffering of one innocent," we hold that an accused person is innocent until proven guilty and that it is better for ten guilty people to go free than for one innocent person to go to jail.⁵⁸

Health care providers, both public and private, have a duty to provide treatment under Section 357C Cr.PC, which was added by the Criminal Law Amendment Act of 2013.⁵⁹ Denial of treatment, on the other hand, carries a penalty of up to a year in prison, a fine of up to 10,000, or both under Section 166 B of the Indian Penal Code. But healthcare providers must address the needs of both victims and offenders.

This overarching principle of court rules and procedure was articulated by the English jurist William Blackstone. Because trust in the justice system is bolstered by openness in the handling of evidence, this principle ensures that both the victim and the accused receive fair trials.⁶⁰

The cornerstone of forensics is Lockard's Exchange Principle, which states that any suspect will bring something to the crime scene and take something out of it; both of these items can

⁵⁷ *Selvi*, (2010) 3 SCC (Cri) 1, ¶ 246-254.

⁵⁸ 'Forensic Medical Examination (FME): A Legal Perspective with Proper Management and Justice in Rape Incidents' (*Legalserviceindia.com*, 2022) <<https://www.legalserviceindia.com/legal/article-2337-forensic-medical-examination-fme-a-legal-perspective-with-proper-management-and-justice-in-rape-incidents.html>> accessed 14 April 2022.

⁵⁹ Section 357C, The Criminal Law Amendment Act, 2013

⁶⁰ 'Forensic Medical Examination (FME): A Legal Perspective with Proper Management and Justice in Rape Incidents' (*Legalserviceindia.com*, 2022) <<https://www.legalserviceindia.com/legal/article-2337-forensic-medical-examination-fme-a-legal-perspective-with-proper-management-and-justice-in-rape-incidents.html>> accessed 14 April 2022.

be used as evidence. The use of forensic science and technology in police investigations ensures that the collection of evidence will be simple, as required by the oft-repeated adage "the evidence will speak for itself." In addition to actually being carried out, the administration of justice must also be publicly observed.⁶¹

ELEMENTS OF MEDICAL EXAMINATION

An Accused's Consent for Medical Examination

It is not necessary to obtain consent before bringing a suspect in police custody for a sexual assault case to a doctor. It's possible to take samples and turn them over to the authorities for forensic analysis. When an accused person gives permission for a medical examination that opens the door for the prosecution to collect additional evidence. If, however, the accused refuses to give consent after being informed of the potential repercussions of not undergoing a medical examination and the possible adverse inferences that the Courts may draw against the accused as a result, then the accused's informed refusal must be recorded.

Medical Evidence (in Rape cases) –

1. Sexually-related injuries it's usually not there.
2. Damage to the victim (cuts, bites, etc.) Caused by the victim's resistance. Location? Number? Extent? It's common to find them if the female is fit and lively.
3. SMEGMA? Its presence is indicative of importance. It can be used to disprove a bogus rape claim. It is not necessary for proving rape if it is missing.
4. Is it possible? Does the offender engage in sexual activity?
5. Venereal disease? Does the offender have a history of genital herpes?

Physical evidence:-

1. Stains from vaginal fluid, blood, and semen on the penis, pubic hair, the region around the male organ, the thighs, and clothing. Smears from the pubic hair, the surrounding skin, and the male organ should always be collected.

⁶¹ as established in *R v Sussex Justices, ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep 233) is a leading English case on the unbiasedness and recusation of judges.

2. Foreign hairs mixed in with pubic hairs, especially in private areas. They should be gathered by the doctor for additional research.
3. Clothing fibers from the victim. Most of them are on his clothes.
4. Cosmetic stains on the wearer's clothing and skin.
5. The victim's vaginal fluid, skin, fibres, cosmetics, etc. may be found in the fingernail scrapings.
6. The scene's debris, especially in cases involving nature.
7. Clothing that is torn. They should be taken into possession of an expert.

The accused may be subjected to a medical examination under Section 53A of the Criminal Procedure Code,⁶² However, the term "reasonable force" is not defined in the IPC or any other legal document. The aforementioned section also allows for the use of reasonable force during a rape suspect's medical examination. Before conducting such examinations, which may involve the collection of body fluids such as semen, blood, hair, saliva, and body fluids (trace evidence/evidentiary materials like tooth marks), all doctors must, however, obtain informed consent.

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A general examination of the accused person's health, including a physical examination, a systemic examination, an examination of any injuries, a local examination of the genitalia, and a potency test are typically included.⁶³

Potency Examination

It is recommended to stop using practises like potency examination in light of the change in the definition of rape/sexual assault brought about by the Criminal Law Amendment of 2013, which now includes both penetrative and non-penetrative assault.⁶⁴ Potency testing is not mentioned in Section 53A of the CrPC, which deals with the medical examination of rape

⁶² Section 53A, Code of Criminal Procedure, 1973.

⁶³ Md. Shadaab Raheel *et al*, *Potency Test of a Rape Accused in India – Rationale, Problems and Suggestions in the light of Criminal Law (Amendment) Act, 2013*, 6 (4) EGYPTIAN JOURNAL OF FORENSIC SCIENCES 333 (2016).

⁶⁴ Dr. Jagadeesh Narayanareddy, 'Medical Examination of Survivors / Victims of Sexual Violence: A Handbook for Medical Officers' (*India.unfpa.org*, 2022) <<https://india.unfpa.org/sites/default/files/pub-pdf/Violence%20Kit-1.pdf>> accessed 14 April 2022.

suspects specifically. If there is an obvious anatomical abnormality, genetic disorders that run in the family, or a known illness that could impair potency, a basic examination will reveal his incapacity. As a result, conducting a potency examination of the accused is unnecessary and largely irrelevant today. Regarding semen sample collection, there is no scientific basis for a doctor to compel the accused to masturbate while the accused is being examined. It is also highly unethical and inhumane to make the accused masturbate by exposing him to pornography or other similar materials. Even if the investigating officer requests that the accused's semen samples be compared to those found at the crime scene, the doctor's response should be that "for DNA profiling anyone material can be used and material such as blood is easier to obtain for DNA comparison."

In cases of erectile dysfunction, the patient benefits from the use of a **Colour Doppler examination** of the penis or a papaverine injection to certify potency for therapeutic purposes. However, carrying out such tests without the accused's consent would be against the law in a medico-legal case. Additionally, in these situations, the evidence gleaned from these tests might work against the accused. The Indian Constitution's Article 20 Subsection 3 states that an accused person is not required to present evidence that would incriminate them.⁶⁵

Age Verification of Accused

When it comes to age verification, the Hon'ble Supreme Court ruled in the case of Ashwani Kumar Saxena vs. State of M.P.⁶⁶ 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.....". Therefore, medical age verification tests should only be performed in situations where documentary proof of age is unavailable, suspiciously fabricated, or otherwise manipulated.

Corroborative evidence

⁶⁵ Ministry of Law and Justice, Government of India. The Constitution of India. Nov 9, 2015. Available from; <http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf>

⁶⁶ Ashwani Kumar Saxena vs State Of M.P, (2012) 9 SCC 750 (Supreme Court).

In every rape case, corroboration of evidences is not always necessary to give the judge credibility. Although it is not a legal requirement, the prosecutrix's testimony should be supported by other witnesses in order for the court to be able to rely on it.⁶⁷

In accordance with Section 114-A of the Evidence Act,⁶⁸ the Court assumes that the rape victim did not give her consent and that the offence was carried out against her will. When sexual intercourse is proven in rape cases under Sections 376(2)(a) through (g) of the IPC, and the woman who is accused of being raped claims she did not consent in her testimony before the court, the court will presume that she did not give consent.⁶⁹ In these situations, the victim's testimony is crucial, and unless there are compelling reasons that require seeking out evidence to support it, the courts shouldn't have any trouble convicting an accused person based solely upon that testimony of a victim of sexual abuse where her testimony is believed to be reliable and inspires confidence. In these situations, it is generally worse to rely on her statement without first seeking confirmation, which would be adding insult to injury. The Karnataka High Court upheld that a rape accuser can still be found guilty in the case of *State of Karnataka v. S. Raju*,⁷⁰ despite the lack of medical evidence. Because of this, it is not always necessary to provide medical reports as evidence.

Similarly to this, the Supreme Court ruled in *State of MP v. Dayal Sahu*,⁷¹ that an appellate court cannot base its decision on irrelevant circumstances when making findings of guilt. The accused shall not be given the benefit of the doubt for failing to cross-examine the prosecution's doctor in cases where the victim's and other witnesses' testimony was deemed reliable. Some participants noted that there is little room for focused examination or cross-validation of findings due to the doctors who examined the victim and the accused not working together. The police provide any necessary confirmation.

In medical jurisprudence textbooks, it is typically advised that the victim be examined by a doctor first, and then the accused should be examined by the same physician.⁷² In one instance, a hospital had designated two teams specifically for the victim's and the accused's medical

⁶⁷ *Ram Pal v. State Of U.P.*, Criminal Appeal No. 1105 of 2000, Allahabad High Court, Lucknow Bench, (MANU/UP/3000/2017)

⁶⁸ Section 114-A, the Indian Evidence Act, 1872.

⁶⁹ Section 376(2) (a)-(g), Indian Penal Code, 1860.

⁷⁰ *State of Karnataka v. S. Raju*, (2007) 11 SCC 490 (Karnataka High court).

⁷¹ *State of MP v. Dayal Sahu*, (2005) 8 SCC 122 (Supreme Court).

⁷² *See for instance* Gautam Biswas, *REVIEW OF FORENSIC MEDICINE AND TOXICOLOGY*, 384 (3rd edn.,2015); Anil Aggarwal, *ESSENTIALS OF FORENSIC MEDICINE AND TOXICOLOGY* 356 (2016).

examinations; however, in a given case, both were examined by the same team. The victim and the accused, on the other hand, were sometimes taken to different hospitals for their examinations or, even when they were examined at the same hospital, were directed to different departments.⁷³

Expert Opinion of evidence corroboration.

Section 45 of the Evidence Act⁷⁴, states that finger impressions and the opinions of people with special expertise in certain fields of science, art, or foreign law are all relevant. It must be established that an expert is qualified and knowledgeable enough to present his testimony.⁷⁵ Since it is a third-party opinion, an expert's opinion cannot serve as substantive evidence but may be used for corroborating purposes.⁷⁶ It cannot be said to be conclusive.⁷⁷ The court is not required to give weight to every expert opinion that is presented.⁷⁸ An expert witness's responsibility was to give the judge the necessary scientific standards for testing. Therefore, forensic and medical evidence cannot be the only evidence on the basis of which a conviction can be made. It is possible that the victim has been raped, which is proven by the forensic and medical evidence, but at the same time, the victim has been raped by the accused only needs to be proven with the aid of other corroborating evidences.

CHARACTERISTIC ELEMENTS OF MEDICAL EXAMINATION

A general examination of the accused's body parts, a systemic examination of their health, a local examination of their genitalia, and a potency test are typically included in their medical evaluation.⁷⁹

A Case of (Un)Due Diligence

Anatomical evaluations of genital development—both normal and abnormal—would be performed even in cases of general medical *examinations upon the arrest of a person* who may

⁷³ Victim's examination is usually in the Gynaecology Department.

⁷⁴ Section 45, the Indian Evidence Act, 1872.

⁷⁵ State of Himachal Pradesh v. Jai Lal, AIR 1999 SC 3318

⁷⁶ Khyall v. State, 1980 ALJ 230.

⁷⁷ Chandreshwar Singh v. Ram Chandra Singh, AIR 1973 Pat. 215

⁷⁸ Las Society of India v. Fertilisers and Chemicals Travancore Ltd. AIR 1994 Ker. 308.

⁷⁹ Md. Shadaab Raheel *et al*, *Potency Test of a Rape Accused in India – Rationale, Problems and Suggestions in the light of Criminal Law (Amendment) Act, 2013*, 6 (4) EGYPTIAN JOURNAL OF FORENSIC SCIENCES 333 (2016).

be charged with any crime, according to a participant doctor who claimed that this was standard procedure.⁸⁰

It should be noted that, unlike Sections 53 and 53A, Section 54 of the Criminal Procedure Code makes the "examination" of arrested persons mandatory⁸¹ and does not require "reasonable grounds" as a prerequisite. It is debatable whether such an "examination," based on the justification provided in Section 53 of the Criminal Procedure Code,⁸² would permit a variety of tests, including those specific to sexual offences. According to Section 54 (2) of the Criminal Procedure Code, the goal of this examination is to document "any marks or injuries of violence" that have been inflicted on the arrested person, along with the approximate time that they occurred.

The Code of Criminal Procedure (Amendment) Act, 2008, which replaced the provision, introduced amendments regarding the grounds for arrest, the procedure for arrest, the rights of the arrested person, and a provision requiring "reasonable care of the health and safety of the accused" in accordance with the guidelines in *D.K. Basu v. State of West Bengal*.⁸³ Given this context, the claim that an examination under Section 54 of the Criminal Procedure Code is intended to "record all findings" that may "exonerate or convict" the accused, despite the fact that the examining physician is blind to the offence being investigated at the time of the examination,⁸⁴ is in conflict with the legislative intent aimed at stopping arbitrary arrests and torture in detention facilities.

The assessment of the accused's ability to engage in sexual activity is a distinctive aspect of the medical examination.⁸⁵ Commonly known as a "potency test," it is typically connected to

⁸⁰ Fieldnotes from Delhi, at H1; Sec. 54, Code of Criminal Procedure, 1973.

⁸¹ Prior to its amendment in 2009, an arrested person could make a request for medical examination to a Magistrate stating that such examination would disprove the commission of offence by him or prove commission of offence on his body by another person. If the request did not appear to be vexatious, for causing delay or defeating the ends of justice, the Magistrate could order such examination.

⁸² Explanation (a) to Sec. 53, Code of Criminal Procedure, 1973.

⁸³ Code of Criminal Procedure (Amendment) Act, 2008; See Secs, 41, 41-A, 41-B, 41-C, 41-D, 55A, Code of Criminal Procedure, 1973; *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416 (Supreme Court) (One of guidelines insisted on medical examination of an arrested person detained in custody at every 48 hours).

⁸⁴ Fieldnotes from Delhi, at H1 (The doctor remarked that recording of genital development would be important even in case of a person arrested for an offence, other than sexual offences, such as "theft").

⁸⁵ MODI: A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY 672 (K.Kannan J. and K. Mathiwaran eds., 24th edn., 2011) ("physical built of the accused as compared with those of victim"); See for instance, PARIKH'S TEXTBOOK OF MEDICAL JURISPRUDENCE, FORENSIC MEDICINE AND TOXICOLOGY, 401 (B.V. Subrahmanyam, 7th edn., 2016) (2016 edition of the book carries a sub-section on 'false accusations', which reiterates the Hale warning. It lists ways in which false evidence of rape may be produced by lying victims such as bruises made using nut juice, blood stains using frog's and fowl's blood, and semen stains using egg albumin or starch "size and physique of the alleged assailant to determine the ability of the victim to offer

"erectile dysfunction," or the inability to achieve a penile erection strong enough for sexual activity (primarily vaginal penetration).⁸⁶ A "double negative" statement expresses an opinion about potency.⁸⁷

(In)Capability Approach to Formulating Medical

In accordance with Section 53A (3) of the Criminal Procedure Code, the report of the examining physician must give precise justification for each conclusion. While some of the participant doctors limited their judgement to the wounds they observed and the samples they took,⁸⁸ the majority also expressed an opinion on the accused's "*ability to engage in sexual activity*."⁸⁹

The medico-legal certificates issued by a hospital were all, with the exception of one, titled "Medical Examination and Potency Test Report," according to the review of the case files in Delhi. The police requisitions required an opinion on potency, a participant doctor from this hospital clarified, which is why this was the case. Similar language and findings regarding the development of external genitalia were included in the medico-legal certificates. There is nothing discovered to suggest that "*the person whose name was previously mentioned is unable to engage in sexual activity under normal circumstances*", they conclude (emphasis added).

The doctor explained that "[*this*] is a convention that has existed since the era of Modi's legal system." She continued by stating that the document is written in a "double negative" with an

resistance and to assess genital injuries sustained by her"); S.K. Lahiri, ELEMENTS OF MEDICAL JURISPRUDENCE: FOR LAWYERS, MAGISTRATES, MEDICAL MEN AND POLICE OFFICERS, at 120 (On recording the physique of the accused to ascertain if he could have committed the act single handedly); *see generally on built* Neeraj v. State of NCT of Delhi, 2017 SCCOnLine Del 12359 (Delhi High Court); Santosh v. NCT of Delhi, 2017 SCCOnLine Del 9546; State v. Jai Bhagwan Pandla, SC 64 /14 (2014) (Delhi District Court, Dwarka), at ¶ 26 ("Jai Bhagwan") ("Accused is a 73 years old person with fragile and infirm body...difficult to believe that [he]...would succeed in committing *forcible* sexual intercourse upon a lady like the prosecutrix and that too repeatedly"); *See* Aparna Chandra and Mrinal Satish, *Criminal Law and the Constitution* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 794 (Sujit Choudhary *et al* eds., 2016); K.S.N. Reddy and O P Murty, THE ESSENTIALS OF FORENSIC MEDICINE & TOXICOLOGY, at 397-398 (34th edn., 2017).

⁸⁶ *See generally*, Lavlesh Kumar, *An Approach to Examination of a Case of Erectile Dysfunction* in RECENT ADVANCES IN FORENSIC MEDICINE AND TOXICOLOGY, Vol. 2, 177, 183 (Gautam Biswas ed., 2018).

⁸⁷ Parikh, *supra* note 85, at 404 ("There is nothing to suggest that the said accused is incapable of performing sexual intercourse")

⁸⁸ Fieldnotes from Lucknow, at H2 and H3 (The MLCs contained in the case files and court records only recorded injuries on the body of the accused); Fieldnotes from Dehradun, H2 and H3 (However, MLCs of H2 contained findings on genital abnormalities).

⁸⁹ Fieldnotes from Delhi, at H1, H3; Fieldnotes from Dehradun, at H1; Fieldnotes from Patna, at H; Fieldnotes from Bengaluru, at H (In Patna and Bengaluru, the opinion included a comment on evidence of recent sexual act and potency. One out of the three participant doctors in Dehradun recorded his opinion on capability of the accused to enter into sexual intercourse).

emphasis on “ordinary circumstances”⁹⁰ because it is impossible to render a definitive opinion on the accused's guilt. If a direct opinion is given, the accused may claim that he is powerless because of a “certain person or particular situation.”⁹¹

CONCLUSION

The purpose of this study was to evaluate two competing public goals while better understanding the processes of accused people's medical examinations.⁹² in: rape investigation efficiency and safeguarding of accused's rights Despite the fact that the constitutional and legislative framework under review shares a commitment to 'reasonability,' its practises are founded on unjustified 'routine' that are unaffected by changes to the law. Fear of the law motivates people to strictly adhere to the routine, which puts at risk (to varying degrees) both the investigation and the rights of the accused, and thus renders premature any attempt to determine the 'balance.'

The results emphasise the significance of standardising medical examination, evidence collection, and medical opinion formulation. In addition, it is crucial to ensure that the police effectively convey the criminal history and other information for medical examination to the examining doctor via appropriate channels, thereby preventing any unnecessary examinations or sample collections. To avoid the loss of useful corroboration evidence and to protect the accused's constitutional rights in the context of involuntary medical examination, the same is required as was done in the case of the victim's examination when the 2014 Guidelines were revised to refocus on the nature of the alleged crime, criminal history, and scientific evidence collection methods.

According to Selvi, Puttaswamy, and Oghad, in order for an invasion of a person's physical privacy to be justified, it must meet the criteria of "need" and "proportionality," while an invasion of a person's mental privacy requires the consent of the subject. The accused has the right to a humane and respectful medical examination free from any cruel, inhuman, or

⁹⁰ Fieldnotes from Delhi, at H1, Advocate. *See also* Fieldnotes from Pune, at H (Responses to the query on potency were phrased in “double negative”).

⁹¹ *Id.*

⁹² Jack Tsen-Ta Lee, *Medical Investigations of Suspects by the Police*, 17 SINGAPORE LAW REVIEW 51, 54 (1996) (Arguing that the two interests in efficient investigation and rights of accused should be both regarded as public interests rather than treating the latter as a matter of ‘individual right’ which ought to be balanced with societal needs).

degrading treatment.⁹³ What's more, the credibility of the evidence produced scientifically impacts the accused as well as the victim's right to a fair trial.

In conclusion, medical jurisprudence textbooks need to be revised so that a defendant's medical evaluation can be reduced to a determination of his "capacity to perform sexual intercourse." Because the accused has not made any such claim, it is evident that the "convention," which is treated as the "law," is based on concerns about fabricated allegations of rape.⁹⁴



⁹³ Accidental observations of medical examination of the accused at two instances during the study revealed lack of privacy, and in one instance degrading and humiliating treatment to the accused. *See K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1

⁹⁴ Fieldnotes from Delhi, Fieldnotes from Delhi, at PS1, PS2. *See generally State v. Deepak*, SC 53642/16 (Delhi District Courts, Rohini) (Potency test was conducted when the victim held from the beginning that she had married that accused at will, accused had not alleged impotence and victim was pregnant with their child).