

PROVISIONS OF MEDICAL EXAMINATION OF CHILD VICTIM OF SEXUAL OFFENCES IN INDIA – HUMAN RIGHTS PERSPECTIVE.

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Abstract

Man is a social animal. Since the development of human beings, there are persons with good as well as bad habits. Society has been governed by some set of rules. Initially there were dictator's or the ruler's rules. In India peoples are beliefs regarding god and they are having faith in sins and virtue. In the society there are law abider's as well as the law breakers. By the passage of the change in the form or kind of offences has been noticed. In the long past there were offences against property, later on offences against person has also started taking place. From few centuries back, we have seen increase in the sexual offences against the major persons. Now a days, we are coming across increasing the sexual offences against children. In this era of technological advancement, even the child may also get easy access to sexual explicit material due to which, child may become vulnerable to it as a victim or as an culprit of the same.

There are various types of sexual offences. In earlier times, there was only rape or molestation but now a days, the range of these kinds of offences has tremendously widened. Earlier these offences were gender sensitized, means mostly took place against the girls or women. But presently the study shows that sexual offences may be committed against girls/boys. All these offences were initially covered under Indian Penal Code. But due to the increase in the number of offences against the children, legislature has felt need to enact new legislation and finally "The Protection of children from sexual offences Act,2012" came into force. Whenever any such offences takes place, the victim or his/her family either rushes to the police station or to the hospital. Medical evidence is most important in such kind of offences and it plays a vital role. Similarly, the victim of sexual offenses not only suffers physically but also psychologically and emotionally too. Therefore, some specific provisions are inserted in the Criminal procedure Code, Indian Penal Code as well as in The Protection of Children from Sexual Offences Act,2012 regarding medical examination of the victims of rape. Though care has been taken to provide immediate and proper medical aid to victim, but still these provisions are not enough to take care of all the human rights of such victims of tender age. Since the scope and definition of sexual violence such as rape has been expanded, accordingly the aspect of medical opinion has also been changed. Similarly, importance of immediate medical examination has been understood so as to prevent loss or damage of forensic evidence which is important one.

Key words - Registered medical practitioner, sexual violence, victim, child & Human rights.

INTRODUCTION

"When wealth is lost Nothing is lost.
When health is lost ... something is lost.
When character is lost .. all is lost."

In Indian culture much more importance has been given to the character of an individual. Offender may commit offence against property, reputation, body or the character of the victim. Hence, the offence against character i.e. sexual offences are considered as most heinous offenses. The offender not only ravishes the body of the victim but also disrupts his mental & psychological wellbeing. Prior to 2012 only outraging modesty & rape were two broadly classified sexual offences. But increasing incidents of these kinds of offences is demanding stringent punishment. Since recent past the womens are started stepping out of their houses either they are working or for handling the family affairs. It is widely noticed that such womens are also facing problems at the workplace. Therefore, in **Vishakha Vs State of Rajasthan**⁶² Hon'ble Apex Court gave some directions in order to provide healthy and secured environment to the working women and accordingly "Sexual Harassment of Woman at workplace (Prevention, Prohibition ad Redressal) Act,2013" came into force. However, the movement really got boosted after the Nirbhaya's case⁶³ it is also known as Delhi Gang Rape Case, 2012. Thereafter, legislature has brought vast changes in criminal laws dealing with sexual offences. The scope of definition of rape has been widened so also many other activities like stalking, voyeurism sexually coloured remarks etc. have been brought under the ambit of offences, so also the punishments also made stringent. Legislature has accordingly amended Indian Penal Code, Indian Evidence Act & Code of Criminal Procedure to

⁶²Vishakha Vs State of Rajasthan [AIR 1997 SC 3011]

⁶³Mukesh and ors Vs State (NCT Delhi) Criminal Appeal No.609 of 2017 Decided on 5th May 2017

protecting the children from sexual offences namely “The Protection of children from sexual offenses Act, 2012”. The victims of sexual offences needs special care & protection from the authorities as well as from the society. The scope of sexual offence has also been widened and it now includes sexual harassment, penetrative sexual assault & aggravated penetrative sexual assault. Victims of such offenses requires immediate medical aid & psychological counseling. Immediate medical examination is also important for getting the accurate expert opinion from those medical samples, which may get destroyed as the time passes. Therefore, legislature as well as Ministry of development and family welfare have framed certain rules. Not only this number of times Hon’ble Apex Court & Hon’ble High Courts also issued some guidelines regarding the prevention & adoptive measures to be taken at the time of medical examination of the victim. Though efforts are being made to tackle this delicate issue more sensitively, but still it is lacking in protecting the basic human rights of the victims under this Act.

Before dealing with the subject in detail, author is like to highlight some key words for the better understanding

The expression “Sexual violence” though not specifically defined under The Protection of Children from Sexual Offences Act, 2012, means and includes sexual assault⁶⁴, penetrative sexual assault⁶⁵, aggravated penetrative sexual assault⁶⁶, aggravated sexual assault⁶⁷, sexual harassment of the child⁶⁸ and use of child for pornographic purposes⁶⁹.

Medical officer – Explanation to section 53 of the Code of Criminal Procedure “registered medical practitioner” means a medical practitioner who possesses any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 and whose name been entered in a State Medical Register⁷⁰.

Section 2(wa) of the Code of Criminal Procedure Code, Victim means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression victim also includes his or her guardian or legal heir⁷¹.

Section 2(1) (d) of The Protection of Children from Sexual offences Act, 2012 defines Child as any person below eighteen years of age⁷².

Section 2 of the Protection of Human Rights Act, 1993 defines Human Rights means rights relating to life, liberty, equality & dignity of the individuals guaranteed by the constitution or embodied in the International covenants & enforceable by Courts in India⁷³

OBJECTIVE

In case **Bodhisattwa Gautam Vs. Subhra Chakraborty**, Hon’ble Supreme Court said that rape is a crime against basic human rights and violation of the victim’s most important fundamental right, namely, the right to life in Article 21. Article 21 not only protects the life and limb of the individual, it also means right to live with human dignity. An act of sexual violence not just violate the one’s right of physical body, the person’s body but also his dignity, mental stability, psychological, emotional and social status. In case of victims under The Protection of Children from Sexual Offences Act, 2012, there are of too tender age, that many a times they don’t even understand that they were ravished or become prey for the lust of other persons. Thus, it is a crime against basic human rights of an individual⁷⁴.

It is very difficult to survive the victim who has suffered physical violence. Therefore, provisions regarding medical examination of such kind of victims is also important point to be considered. There are two major enactments such as The Protection of Children from Sexual Act, 2012 and Criminal Procedure (Amendment) Act, 2013⁷⁵ dealing with provisions in respect of medical aid and examination of the victims of the sexual offences along with the Guidelines & Protocols – issued by Ministry of Health and Family Welfare, Government of India⁷⁶.

Description :-

1. Criminal Procedure (Amendment) Act, 2013⁷⁷
2. Guidelines & Protocols – issued by Ministry of Health and Family Welfare, Government of India⁷⁸

⁶⁴Section 7 of the Protection of Children from Sexual Offences Act, 2012 defines “sexual assault” Sec.2(i)

⁶⁵Section 3 of the The Protection of children from Sexual offences Act, 2012 defines “Penetrative sexual assault” sec.2(f).

⁶⁶Section 2(a) and sec.5 of The Protection of Children from sexual offences Act, 2012, defines “Aggravated penetrative sexual assault”.

⁶⁷Section 9 and sec. 10 of The Protection of Children from Sexual offences Act, 2012 defines “aggravated sexual assault”

⁶⁸Section 11 and 12 of The Protection of Children from Sexual offences Act, 2012 defines “sexual harassment of the child”

⁶⁹Section 13 and 14 of The Protection of Children from Sexual offences Act, 2012 defines “use of child for pornographic purposes”

⁷⁰Section 53 of the Code of Criminal Procedure, 1973.

⁷¹Section 2(wa) of the Code of Criminal Procedure, 1973

⁷²Section 2(1)(d) of The Protection of Children from Sexual offences Act, 2012 defines “Child”

⁷³Section 2 of The Protection of Human Rights Act, 1993 defines “Human Rights”

⁷⁴Bodhisattwa Gautam Vs Subhra Chakraborty [1996 AIR 922]

⁷⁵Criminal Procedure Code (Amendment) Act, 2013

⁷⁶Guidelines and Protocols – Medico legal care for survivors / victims of sexual violence, issued by Ministry of Health and Family Welfare, Government of India, 2014

⁷⁷Ibid

⁷⁸Ibid

3. Protection of Children from sexual offences Act, 2012⁷⁹.

Prior to 2009, doctors used to examine & treat any victims only on the request of Police, therefore, victims were forced to lodge report and then only they were able to receive medical treatment. Hon'ble Supreme Court of India found this procedure as unjust and hostile. Therefore, in case of **Tuka Ram and Others Vs State of Maharashtra**⁸⁰ and **State of Karnataka Vs. Manajanna**⁸¹ directions are given to the medical Practitioners to treat the victim of rape as "Medico Legal Emergency". It has further directed that the victim may approach hospitals directly or through police or through Court and under any such circumstances doctor should not insist for medical memo and it is their duty to provide immediate medical aid to the victim⁸²

During said period new section 164A has been inserted in the Code of Criminal Procedure in the year 2005. As per the new inserted section now it is mandatory on the Medical Practitioner of the Govt. or local hospital, or if not available then by any other doctor the victims or his or her guardian's consent within 24 hours of information to examine and treat the victim and to prepare report with reasoned opinion⁸³.

Section 19 of Protection of Children from Sexual Offences Act, 2012⁸⁴ and Section 357 C of the Criminal Procedure (Amendment) Act⁸⁵ lays down mandatory duty on the doctors or hospitals treating a victim of sexual offence to inform about it to the police. Further, Section 21 of the said Act and Section 166B prescribes punishment for not following the aforementioned direction.

It is also important to note here that Section 27 of The Protection of Children from Sexual Offences Act, 2012 and rule 5 of POCSO Rules specify that doctor should not insist for police requisition or Magistrate's order before conducting medical examination. Section 375 C of Criminal Procedure (Amendment) Act 2013 directs that doctor should give priority to Medical examination of the victim.

So far as Section 164 A of Criminal Procedure (Amendment) Act, 2005 postulates the examination of female victim by a lady doctor. We all are well aware about the factual position in our Country where there are very few lady doctors attached with the rural hospitals. If such doctor is not present then the victim is required to travel a distance to get examine by lady doctor

as per the direction. Due to the traveling and lapse of time some important piece of medical evidence may get lost. In spite of this, again Section 27 of The Protection of Children from Sexual Offences Act, 2012 insist a female doctor to examine a victim girl child who is below 18 years of age.

In case of "Sameera Kohli Vs. Dr. Prabha Manachanda", Hon'ble Apex Court has held that a person giving consent must be competent to give consent and it must be voluntary and based upon adequate information provided by the doctor like nature of treatment and risk involved etc⁸⁶.

On the basis of Section 164A of Criminal Procedure (Amendment) Act, 2005 the Ministry of Health and Family Welfare for Medico Legal Care of Victims of Sexual violence in India issued some important guidelines as follows :

(1) Basic details and consent-Medical Examiner shall record the name, age, address, sex, name and relationship of the person who brought the victim or survivor and consent of victim or guardian.

(2) Before according consent, the nature of medical examination should be explained. But as per Section 92 of Indian Penal Code in like threatening cases the doctor may proceed without the consent.

(3) Identification Marks.

(4) Menstruation and vaccination history.

(5) History of incident – in the own words of survivor or victim. This has evidentiary value in the Court of Law. If any other person narrates the history then mention his name.

(6) Details of clothing, previous medical and surgical history.

(7) General physical examination – general observation alongwith presence of semen or stain marks on body or clothes.

(8) Examination of injuries – like nail abrasion, teeth bite marks, cuts, boils, lesions with details.

(9) Examination of Genital parts – observation with samples of pubic hairs and matted pubic hair taken and preserved.

(10) Examination of vagina with the help of sterile speculum to check internal bleeding, bruises or injuries. It is not necessary when there is no penetration or visible injuries. If required it should be done under the Anesthesia.

(11) Two finger test – i.e. for per vaginum examination – it should not be done. Previously it was done to check whether the hymen is intact or not.

(12) Any injury near anus, anal opening or oral cavity.

⁷⁹Ibid

⁸⁰Tuka Ram Vs State of Maharashtra [1979 AIR 185]

⁸¹State of Karnataka Vs Manajanna [2000(6) SCC 188]

⁸²Ibid

⁸³Section 164A of Criminal Procedure (Amendment) Act, 2005

⁸⁴Ibid

⁸⁵Ibid

⁸⁶Sameera Kohli Vs Dr. Prabha Manchanda [2008 CPJ 56 SC]

- (13) Sampling – bone test i.e. ossification test for determining age of the victim, only on the request of police.
- (14) Urine sample – to determine pregnancy.
- (15) Blood Test – for HIV, VDRL i.e. sexually transmitted diseases.
- (16) Post examination – after examination, Medical practitioner should document the report, formulate his opinion and sign it. A copy of report must be given to the survivor, as it is his right to know about the information.
- (17) All the evidences collected during the examination, like clothes of the women, vaginal swab, anal opening etc., pubic hair sample, foreign material, nails scraping, swap sticks along with the report must be placed in an envelope and handed over to the police or Magistrate.⁸⁷

TWO FINGERS TEST

Two fingers Test is also called as per vaginum examination. This is a way to determine whether the hymen of a women is intact or not. It was assumed that if a women undergoes sexual intercourse then only her hymen gets ruptured. But there is no scientific basis for it. It is clear from the studies that there are number of reasons due to which the hymen get ruptured and sexual intercourse is one of it. This test violates the basic human right of a victim as provided by Article 21 of Indian Constitution. This view has been taken by Hon'ble Supreme Court in **Lillu @ Rajesh Vs. State of Haryana** and in this ratio Hon'ble Apex Court has referred the international covenants on economic, social and cultural rights, UN Declaration of basic principles of justice for victims of crime and abuse of powers 1985, rape survivors are entitle to legal recourses that does not re-traumatize them or violate their physical or mental integrity and dignity⁸⁸

Ministry of Health and Family Welfare has issued guidelines in 2014 in which this test is criticized and appealed that it should not be performed. In spite of these guidelines and the verdicts of Hon'ble Apex Court, the practice of performing this test has not been completely stopped. Hon'ble Punjab and Harayana High Court in case of **Kamaljeet Singh Thind Vs. Kanwaljeet Kaur** has held that allowing medical examination of a women for her virginity would certainly violate her right of privacy and personal liberty enshrined under Article 21 of the Constitution. Such an order would amount to roving enquiry against a female who are vulnerable even otherwise.⁸⁹ Despite of this, even today we may find the medical report as “victim is habitual to sexual intercourse as her vagina easily admits two fingers”. Apart from this test, there are other test available for the doctors for arriving at a conclusion of sexual violence.

IMPORTANCE OF MEDICAL REPORT

In cases of sexual violences the medical opinion carries a lot of importance. As per new definition of rape which includes penetrative and non- penetrative acts. In case of non-penetrative acts there cannot be any medical evidence. This has to be clearly understood by all the stakeholders of the Criminal Procedure as doctors, police, lawyers and courts for providing justice to the victims of sexual violences.

HUMAN RIGHTS PERSPECTIVE

It is clear from the provisions of The Protection of Children from Sexual Offences Act,2012 that it applies to the victims who are of any sex and who are below 18 years of their age. As per sub-section 3 of Section 27 of the The Protection of Children from Sexual Offences Act,2012, it is mandatory to conduct the medical examination in the presence of parents or any person in whom the child reposes trust or confidence. If such person is not available then it should be conducted in the presence of any women nominated by the Head of the Medical Institution⁹⁰. While considering this fact the legislature has not considered that the said Act is gender neutral and it covers the adolescent too. As already due to the acts of the offender, the child victim may be emotionally and psychologically disturbed further he or she may be required to face his parents, family members, neighbors, friends etc before whom the incident will be directly or indirectly discussed in presence of child. This will ultimately lead in violating the human rights like right of secrecy and confidentiality and life with dignity. It also violates the human right of non discrimination. Further it may get worsen when the victim has again required to narrate the incident before police in presence of his family member or social worker or expert person. When the victim is further referred or brought before the medical officer he or she may once again have to undergo same trauma. At this time it is coupled with the medical examination of private parts that too in presence of third person. When the victim is asked to undergo the medical examination in presence of such other person certainly he or she may feel shy. It may further lead to increase in their mental trauma. Though the victim has confidence on such person, but his or her's mental state has not been considered. Such as the victims human right of dignity and confidentiality has been violated. So also these provisions may be

⁸⁷Article on 'Medical examination of rape victims by Akshita Gopal published on <https://blog.ipleaders.in>

⁸⁸Lillu @ Rajesh Vs State of Haryana [AIR 2013 SC 1784]

⁸⁹Kamaljeet Singh Thind Vs Kanwaljeet Kaur [AIR 2003 PH 353]

⁹⁰Section 27(3) of The Protection of Children from Sexual Offences Act,2012

beneficial for the victims who are below 7 years of age because when any criminal sexual act has been done against them they sustain more trauma and while undergoing medical treatment, they require their near ones presence. Similarly, the Legislature has not considered that victim is required to narrate the incident in his or her own words before the Medical Practitioner which will again traumatize him. As such, basic human rights of the victims like right of privacy, right of liberty and right to live with dignity with equality are endangered. Thus, from the above discussion, it is clear that while making provisions regarding medical treatment of the victims of sexual offences under The Protection of Children from Sexual Offences Act,2012, the victim's human rights are not fully taken into account.

CONCLUSION

In this digital era though we are technologically achieved advance, but still we are struck up with orthodox norms too. The offences of sexual assault committed against the child is a serious menace to the society. Though there are specific guidelines in respect of medical examination, the stake holders are failing to comply it scrupulously. Therefore, this is the demand of time and of our future generation that we must get sensitized otherwise, we will lose faith and confidence of our younger ones.