

## Understanding Forensic Examination in Child Sexual Abuse Cases through Case Analysis

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### Abstract

Child Sexual abuse is the scourge of today's society. It is essential to understand all the legal aspects in Child Sexual Abuse cases and also medical (forensic) examination for an effort to curtail this menace. Case scenarios depicting role of doctor for situations in dealing with prerequisites for medical examination of child sexual abuse; dealing with Informed consent issues with relation to age, mental status, medical termination of pregnancy; collecting and handling of medical evidence both for therapeutic care and forensic requirements; drafting medical opinion both provisional and final; therapeutic care of child sexual abuse cases including psychological care and rehabilitation are discussed. The practical solutions offered are ethically, legally, scientifically correct and are gender sensitive.

**Keywords:** Child Sexual abuse, Informed consent, mental status, rehabilitation, medical

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### Introduction

Child Sexual abuse is the scourge of today's society. The number of such cases are on the rise. About 53% of Indian children have suffered from atleast one form of sexual abuse in their lifetime is the reality<sup>1</sup>. And the fact that 71% of the abusers<sup>1</sup> were known persons of the victim challenges us to deal with the intricate social issues around child sexual abuse. Thus, the hurriedly brought out law<sup>2</sup>- POCSO (Protection of Children from Sexual Offences) Act, 2012 is not understood by all the stakeholders, particularly doctors. In spite of this law in force on 16<sup>th</sup> December 2012 we still had the occurrence of Nirbhaya case<sup>3</sup>, forcing the Indian government to bring the Criminal Law Amendment Act, 2013 bringing changes in the provisions of Indian

Penal Code (IPC), Criminal Procedure Code (CrPC) and Indian Evidence Act (IEA)<sup>4</sup>. This article attempts in understanding all these legal aspects in Child Sexual Abuse cases and also medical (forensic) examination in such cases through case scenarios.

### Case Analysis

#### Case Scenario 1

*Doctor refused to examine a victim of Sexual assault who was brought to the hospital directly for treatment, citing that it's a MLC case and required a Police requisition or Magistrate order to examine, Is the doctor correct?*

No, The Doctor is wrong. According to Section 27 POCSO Act there is no need for a police requisition to undertake medical examination of a Sexual Assault case by a doctor<sup>2</sup>. Similarly Rule 5 of POCSO clearly states that there is no need for a Magistrate order also to carry out medical examination. And Section 357C CrPC clearly mentions that the doctor should examine and to do the needful treatment in such cases and then

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Received on 02.12.2017

Accepted on 12.02.2018

inform the jurisdictional police<sup>4</sup>. Thus, voluntary reporting of such cases to hospital/doctor is a legal right of the victim of sexual offences. These legal changes reiterate the recognition of medical examination of Rape cases as a medico legal emergency by the Supreme Court of India in *State of Karnataka V Manjanna*<sup>5</sup>.

#### Case Scenario 2

*A 13 year old victim of Sexual assault was brought to the hospital for treatment, mother insists on you to conduct the medical examination but the victim does not want examination, what should you do, whose consent is valid?*

According to section 89 and 90 IPC, a 12 year old and above person could consent for a medical examination which is noninvasive in nature. And as per section 87 IPC, a 18 year old and above could consent for a medical examination which is invasive in nature (like undergoing surgical repair of injuries, Medical termination of pregnancy -MTP). The routine medical examination in Sexual assault cases is noninvasive in nature<sup>6</sup>. Thus this 13 year old victim could consent for her medical examination and if there is informed refusal then the doctor has to honour her/his wish and not carry out medical examination. Informed refusal means documenting refusal after giving all information that is after explaining all the pros and cons of getting such medical examination and not just directly documenting the refusal.

#### Case Scenario 3

*A 10 year old victim of Sexual assault was brought by parents to the hospital for treatment, father is suspicious of your procedures, victim is afraid whenever she sees her father. what should you do, whose consent is valid for examination?*

According to section 89 and 90 IPC victims should have been of minimum of 12 years to legally be valid to consent for medical examination. In this case as the victim is still 10 years old, then the parents have to consent for such medical examination. In this male dominated society, the doctor usually seeks consent in such cases from the father. But in

this case the child is afraid whenever she sees the father. It could be either the father himself could be the perpetrator or it could be just a case of over concerned father who might have scolded the child after learning about sexual abuse of his child. In either situations doctor has to see that during medical examination of the child, the child is at ease and the father is not around. The doctor could always make it clear if the child is a girl that it's their hospital policy whenever female patients are being examined then all male family members are to stay out. If the child is a male then the doctor could directly state as the child is uncomfortable so father could please stay out or use diplomacy and send the father out to get some registration card or bill payments done. In this case consent should be sought from the mother of the child.

#### Case Scenario 4

*A 15 year old girl had eloped with her boy friend and became pregnant with 16 weeks of gestation age. Father refused to consent for MTP, what should doctor do? Whose consent to take?*

This is an invasive procedure and according to section 87 IPC the consenting person should be more than 18 years. The victim is 15 years old and the father is refusing to consent. In such cases consent can be sought from the panel of senior doctors (like Medical Superintendent, Resident Medical Officer, Casualty Medical Officer, Head of the department etc.) who will act in the best interest of the child. In case the hospital panel is not constituted or is not consenting then consent can be sought from the jurisdictional Child welfare Committee. CWC is the legal authority established under the Juvenile Justice Act, 2015 to act in the best interests of children whoever needs care and protection. *CWC were informed through police. At that situation father consented for MTP. MTP done but now father wants products of conception to be sent for further investigations but the girl says she does not want to implicate boy friend with DNA analysis of products of conception, what should doctor do? Father threatens to use*

*Sec 41 POCSO? If gestational age is more than 20 weeks then who consents for MTP?*

The argument of father is that the surgical procedure of MTP was done with his consent and thus he has to decide what should be done to the products of conception recovered by doing MTP. The 15 year old girl's argument is that the products of conception were recovered from her body and she has the right to decide the future of her body products recovered. Yes as 15 year old girl, she could decide about the nature of medical examinations carried out on her, and thus the products of conception. Only she could not consent for invasive procedures till she attained 18 years.

Yes, the threat of misusing section 41 POCSO by parents is there. Section 41 POCSO states that such medical examinations and/or treatments carried out with the consent of parent or guardian will not be considered as an offence under POCSO<sup>2</sup>. This is because even with medical examinations and treatments also there are possibilities of introduction of fingers or objects into orifices, and this is exempted from being considered as an offence under POCSO provided parents or guardians have consented for the medical examination of the child.

In cases of conducting MTP in gestational periods beyond 20 weeks due permissions have to be obtained from the honourable Courts.

#### Case Scenario 5

*Sexual assault victim approached a doctor for getting an MTP done post assault. Doctor had mandatorily informed police and then proceeded in conducting MTP. Police have issued a notice to doctor alleging that the doctor should have waited till the police arrived before conducting MTP. Are the doctor/ Police wrong?*

Both the sections of 357C CrPC and 19 of POCSO clarify that mere information has to be given to the jurisdictional police<sup>2,4</sup>. It does not stipulate to wait till the arrival of police. Contrary doctor also has a legal duty to care. And thus, cannot go on waiting for the arrival

of police without caring and treating the victim. If there are health complications like threatened abortion or imminent death, then doctor would become solely responsible. Thus, in this case police is wrong in issuing a notice to the doctor.

However, to balance the practicalities involved at ground level the doctor could communicate (in addition to mandatory reporting) in writing to the police the exact date/day of carrying out of MTP, so that police could collect the products of conception for possible future DNA analysis to connect the accused to crime. Then even on the day of conducting MTP again one more communication (clarifying the infrastructure available at hospital to store products of conception for few hours/days/weeks depending on type of hospital) could be given in writing to police so that they could make efforts to collect DNA evidentiary materials. After that if police have not arrived one more communication to police in writing to be done before disposing off the DNA evidentiary materials. In spite of so many communications from the doctor to police in writing, if the police have not arrived then the application of section 201 IPC would be against the police and not doctor. Section 201 IPC stipulates punishment for those who deliberately or ignorantly destroy any evidentiary material required for investigation of a crime with imprisonment.

#### Case Scenario 6

*15 year old sexual assault victim along with her mother approached a public hospital for MTP. Doctor asked them to come to his private clinic in the evening so that he could avoid mandatory reporting, but would do it free of cost. Is it correct procedure?*

No, mandatory reporting applies to all doctors and hospitals both private and government / public. So this doctor is wrong. *After doing MTP the doctor handed over the foetus to the mother and asked them to dispose of the foetus in a nala (drainage) on their way back home citing strict Biomedical waste disposal rules, Is it correct procedure?*

Again, the doctor is violating the Biomedical waste disposal Rules, which is wrong as well as punishable under law.

*When mother went to dispose the foetus into a nala; it's then a patrolling police vehicle caught them and enquired. To their surprise police found the foetus was female. Mother and daughter traced all this to the doctor. So, the police charged the doctor. Can you enumerate what all charges could be against the doctor?*

This doctor could be charged by police for Violating Mandatory reporting; conducting Female feticide under PCPNDT; and for Violating Biomedical waste disposal rules.

#### Case Scenario 7

*A 18 years & 4 months old lady presented to nursing home for delivery of her full term child, doctor wanted to mandatorily report to police citing that she became pregnant when she was a minor. Is the doctor correct in action?*

Yes, the doctor is correct in mandatorily reporting to police all sexual activities less than 18 years. POCSO Act<sup>2</sup> does not give any exemption for sexual activity, even within marriage if it's a child involved. Recently Supreme Court clarified that all forced sexual activities involving children less than 18 years, even under marriage are criminal in nature and stuck down the exemption provided in section 375 IPC which had earlier exempted sexual activities with the wife above 15 years from qualifying as an offence of Rape.

#### Case Scenario 8

*Child line activist who came along with the sexual assault victim wanted to witness the medical examination being conducted. But the doctor denied permission and asked her to stay out. Is the doctor correct? What aspects should doctor consider before arriving at the decision?*

No, the doctor is wrong. As per section 27 of POCSO<sup>2</sup> the doctor has to allow the parent or guardian on whomever the child expresses trust during medical examination. If such trusted persons are not accompanying the child then it's the responsibility of the

doctor/hospital to provide one (like a nurse or paramedic).

#### Case Scenario 9

*Police forwards a request to the doctor to conduct a complete medical examination on a case of 6 year old victim who was molested. The police also want samples to be collected from genitals and victim's pubic hair. What should the doctor do?*

Medical examination may get modified based on the type of sexual violence. In case of nonpenetrative sexual offences (like in this case of molestation), it is not required to do a head to toe examination and collect all the swabs. The police may request anything based on their police manual, but the doctor has to answer back in writing based on medical science and reasoning. In this case of 6 year old victim, the police asking for victim's pubic hair has to be answered as – at the age of 6 years there is no pubic hair growth in a child and thus no sample can be collected.

#### Case Scenario 10

*Police forwards a request to the doctor to do a medical examination on a case of 6 year old male victim who was sodomised. Which doctor should do this examination? Pediatric surgeon / General Surgeon / Pediatrician / Obstetrician / Forensic / Any doctor*

This shifting of responsibility from one doctor to another is largely due to the lack of training of doctors in such examination of male victims and inexperience of doctors in sensitive handling of male victims. In such cases all doctors should have been equipped to carry out the medical examination.

#### Case Scenario 11

*Doctor after examining a victim of sexual violence opined that Rape has occurred. Comment*

Rape, Sexual Assault and Sexual Harassment are all legal terms. Hence doctors cannot conclude opinions using these terminologies. For writing medical opinions in sexual violence cases the doctors could always refer to the manual from Ministry of Health and Family Welfare, Government of India,

Guidelines & Protocols, Medicolegal care for survivors/victims of Sexual Violence<sup>6</sup>.

#### Case Scenario 12

*Doctor after examining a victim of sexual violence - who did not have any injuries on the body and did not show any signs of semen on /in the genitals opined that sexual violence did not occur. Comment*

It's not necessary that in every case of sexual violence there should be injuries. Medical research evidence says that only in one third cases of sexual violence you may get injuries. Presence of semen is also not a necessity in every case of sexual violence. It could be a case of penetration by use of objects or body parts; or it could be a case of non-penetrative sexual violence wherein there is no question of presence of semen. Even if it is a case of penetration by use of penis – it is not necessary that there should be an ejaculation. If there is an ejaculation – then also semen need not be present in the orifices – it could be due to use of condom which is now not recovered; or could be due to ejaculation outside the body; or it could be a delayed examination with semen being washed or bathed or douched or washed away with urination and defecation.

#### Case Scenario 13

*Minor boy was found molesting another minor girl in a school. The parents of minor boy approach you as a doctor. What should you do?*

There is mandatory reporting to police of any sexual violence of a child, as per section 19 of POCSO<sup>2</sup>. But with accused also being a child there is always a dilemma in deciding whether this child is in conflict with law or is a child in need of care and protection. The other role required by the doctor to do to this minor boy is to do therapeutic counseling.

#### Case Scenario 14

*17 year old boy approaches you the doctor for treatment of Sexually transmitted disease and also asks you for contraceptive advice for himself and his partner. On probing about his partner you find out that he is in love with his lady teacher (19 years old) at college for*

*last two years and they have sexual relations often. What is your approach towards the boy & teacher?*

There is mandatory reporting to police of any sexual violence of a child, as per section 19 of POCSO<sup>2</sup>. But in this case accused is a woman and thus there is always a dilemma in deciding whether this woman is an accused or victim in this male dominated society.

The law has criminalized all sexual relations with children, even amongst children when they are less than 18 years. The role of consensual activity is not permitted by law. But in reality, the doctor faces dilemma to decide between mandatory reporting at one end and the another being to carry out therapeutic care. (Like in this case the boy approached for care of sexually transmitted infections and also to prevent the same through contraceptive advice). The other role required by the doctor to do to this minor boy and also lady teacher is to do therapeutic counseling and treatment.

#### Conclusion

Case based approach helps the doctors in understanding better the forensic examination of Child sexual abuse cases. It also provides practical solutions to the doctor to apply whenever there is a case of Child sexual abuse before them to examine and care.

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