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Review article

Potency test of a rape accused in India – Rationale, problems and suggestions in light of the Criminal Law (Amendment) Act, 2013

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ABSTRACT

Indian legal system makes it mandatory to medically examine any accused of rape as well as other forms of sexual assault. Accused is brought in the police custody for conducting medical examination which includes general physical examination, potency test and evidence collection. The medical examination report of the accused is labeled as the "POTENCY TEST REPORT". As per the changed definition of rape after Criminal Law (Amendment) Act, 2013, potency test stands irrelevant in rape cases because the changed law does not require peno-vaginal intercourse to call it as rape. However, even after the change in definition of rape and laws related to it, potency test is still a mandatory part of medical examination of accused. Displeasure about the same has also been raised by a fast track court of Delhi. In this paper, we have discussed the rationale of potency test of sexual assault in light of Criminal Law Amendment Act (2013), court judgment and other available literature.

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1. Introduction

In India, sexual violence in general and rape in particular, received extensive media coverage following a fatal infamous gang rape of a Physiotherapy student in Delhi on 16 December 2012;

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also popular as "Nirbhaya Case". The incident led country wide outrage and anguish condemning this heinous crime, finally compelling the Government of India to amend the laws regarding sexual assaults, especially rape, which led to passing of Criminal Law (Amendment) Act, 2013 a year later.^{1,2} The Criminal Law (Amendment) Act, 2013 came into force vide gazette notification on 2nd April 2013.³ After the new law came into force, the rate of reporting of rape cases increased throughout the country.⁴ The conviction rate in these cases is low due to many factors like lack of evidence, false allegations.⁵⁻¹⁰

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In a case of sexual assault, the apprehended accused is subjected to potency examination besides general medico legal examination and evidence collection. A fast track court in Delhi while acquitting a rape accused expressed serious displeasure about the manner of conducting potency tests.¹¹ In this paper, we have discussed the rationale of potency test of sexual assault in light of Criminal Law Amendment Act (2013), court judgment and other available literature. Further suggestions are also given to modify the current existing protocol regarding medical examination of accused for the better use of resources and available work force.

2. Potency

A male is said to be impotent when there is inability to develop or maintain a penile erection sufficient to conclude the act of intercourse to orgasm and ejaculation. In civil courts the question of potency arises in cases like adoption, disputed paternity, nullity of marriage and divorce. In criminal courts the potency is examined in cases of crime against women and children like rape, sexual assault, molestation, sodomy.^{12,15}

Potency depends on various anatomical, physiological, pathological and psychological factors. To correctly diagnose/rule out impotency or we can say '*Sexual Dysfunction*', other than general physical examination, following tests/investigations are needed to be performed^{14,15}:

1. Blood test:

- Serum testosterone and sex hormone binding globulin- to exclude endocrine causes.
- Fasting glucose and glycated hemoglobin (HbA1c)- to exclude latent diabetes mellitus.
- Lipid profile- for deranged lipid profile.
- Thyroid hormones- for hypogonadal patients.
- FSH- for patients with special clinical conditions.

2. Nocturnal penile tumescence.

3. Duplex ultrasonography.

4. Intracavernosal testing with vasoactive substance.

5. Cavernosometry – used to test for venous leaks.

6. Cavernosography – it is radiographic visualization of the cavernous penile tissues using contrast material in order to exclude structural abnormalities within the cavernous tissues. It helps in the differential diagnosis of organic impotence and is the only means of visualizing structural abnormalities of the corpora cavernosa.

7. Penile arteriography

8. Spongiosography.

3. Current legislation

3.1. Excerpts from section 375 IPC (Criminal Law (Amendment) ACT, 2013³

A man is said to commit "rape" if he—

- penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

- applies his mouth to the vagina, anus, and urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions.

The sharp rise in rape incidents could be due to change in law defining rape which enhanced the parameters of rape from peno-vaginal intercourse to insertion of penis, any body part or any object into the vagina or any other body orifice.^{1–3}

4. Potency test of the accused-current practice

Medical examination is a must for an accused of rape as well as other form of sexual assaults. Accused is brought in the custody of police along with the request from Investigating Officer to conduct medical examination including potency test. Section 53 of Cr. P. C lays down the guidelines for Investigating Officer and the examining doctor in such cases. Upon receiving a request from Investigating Officer, the Medical officer has to examine accused, preserve required evidences and hand over the report to Investigating Officer. The examination includes general physical examination, systemic examination, injury examination (if any) and local examination of genitalia. If the incident is recent, the trace evidences like blood, clothes of the accused, pubic hairs, nail clippings are preserved which may help in linking the accused to the crime.^{14,16}

The police in their application also request the Medical officer to conduct the "POTENCY TEST"^{12,14,15} After examination the doctor has to opine whether the person examined is capable of performing sexual intercourse or not. The opinion given is generally double negative and is generally written as "*There is nothing to suggest that the person examined is incapable of performing sexual intercourse under normal circumstances*". The medical examination report of the accused is labeled as the "*POTENCY TEST REPORT*".

5. Issues related to current practice

In criminal cases, the potency of an accused in current practice is determined by the fact that after general physical examination, systemic examination (CNS, CVS, Respiratory system, & abdominal findings), absence of any major illness and anatomically normal external genitalia, no condition could be found which can interfere in an individual's capability of performing sexual intercourse under normal circumstances. However, various other factors like pathological or psychological conditions also play part in determination of potency. These factors are not considered in most of the cases and hence, put the whole potency test report in doubt.

An honorable Fast track court (dealing specifically with cases of sexual assault) in Delhi has raised objections to the manner in which potency examination of an accused is conducted on above lines and the double negative opinion given after examination.¹¹ The court also ordered the Ministry of health and Family Welfare, Government of India, to frame the guidelines for potency test of the accused, if necessary.

The real issue is the manner in which this opinion is reached at, and this is aggressively questioned and contested in the courts by the defense counsels. In the cross examination the defense counsels argue that when the tests like hormonal test, Doppler flow study have not been done, how can one opine about the potency of a person? There is no doubt that the questions raised by the defense counsels and the queries by the honorable court¹¹ have merits and are serious. The above mentioned comments by the courts of law have put a question mark on the way potency test is generally conducted in India.

6. Discussion

Unlike sterility, potency is not permanent and it depends on various factors. Besides organic causes, diseases, and psychological causes are also responsible for impotence. Following are the various factors which may affect the potency and are needed to be considered at the time of examination¹⁵:

- A man may have been potent at the time of alleged rape but may have become impotent at the time of medical examination or vice versa. This is particularly relevant when the accusation is brought up after considerable time gap.
- A person who is impotent towards one person who may be his wife need not be impotent for others.
- A person may have impotency for one gender but not for another gender.
- A person may not get erection in unfamiliar and uncomfortable atmosphere.
- Performance related anxiety.

So, even after having a normal result for the extensive list of investigations mentioned above under the heading 'potency', which exclude the organic causes of sexual dysfunction, an accused man can still be impotent at any particular situation. Casper states that the possession of virility and power neither requires to be, nor can be, proved to exist by any physician but is supposed to exist just like any other normal function.¹² If the genitals are normal, an opinion of impotence cannot be given.^{13,17} The new section 375 implies that a man will be accused of committing rape even if he inserts any object, his fingers, and victim fingers inside the natural orifices mentioned. In the back drop of this section it can be concluded that peno-vaginal intercourse is not necessary to call it as rape. A person, who is unable to get a penile erection can also perform and be accused of rape. One can sexually assault a female even without the involvement of the penis.

The cost of investigations and manpower involved will have to be taken into consideration. Many of the tests needs to be done by radiologist or urologist who will not only do the examination but will also attend the court summons in future. In a developing country like India where the health sector is already struggling due to the lack of funds and manpower, there is no justification of diverting so many resources to one such issue which ultimately does not have any substantial impact over the fate of the case in the court of law. Medical evidence in sexual assault cases although important, is not the only evidence, which the court looks at in deciding such cases. The court decides the matter on the basis of complainant statement, circumstantial and corroborative evidences.

The Potency examination of every accused can be compared to a discarded medical examination test called "THE TWO FINGER TEST" that was used to be done on the victims of rape. In this test it was considered that if two fingers are easily passing through the orifice of the hymen, it indicates previous sexual intercourse.^{18–20} This test was found to be outrageous towards the character of the female and was ultimately discarded. In author's views, any person who is accused of sexual assault has all the fundamental rights granted by the constitution of India. He should also have the right to dignity. Moreover, looking at the large number of acquittals and also filing of rape cases due to ulterior motives^{5–10,21}, the justification of subjecting an accused to this undue process of so called POTENCY TESTING becomes questionable.

7. Conclusion

The law assumes a person to be innocent unless proved otherwise. Thus, a person accused of rape should also be treated with

dignity. Just like the "two finger test" done on rape victim, potency test also disrobes the accused of his privacy and dignity. This trend of subjecting each and every accused to potency test without any rationale needs to be stopped. This also unnecessarily strains the manpower and resources of hospitals, which can be utilized for other better purposes.

8. Suggestions

In view of the above discussions, we suggest some steps to be followed during the medical examination of sexual assault accused:

1. Whenever an accused is apprehended on the charges of sexual assaults, he should be subjected to necessary medicolegal examination for collection of trace evidences without any reference to potency testing.
2. If the accused is apprehended for committing rape under clause b, c and d of section 375 IPC, he should be exempted from undergoing potency test.
3. When a person has been apprehended for committing rape under clause a, of section 375 IPC and he does not claim impotency, then there should be no reason to believe that the man is impotent and should be exempted from undergoing potency test. If the accused claims to be impotent, only then he should be subjected to potency test by a court order when the honorable magistrate has assessed the necessity of the potency test.
4. Potency test examination should be conducted by a board of doctors in a medical college or a district hospital only, as it is not possible to rule out impotency just by performing the physical examination of the accused. The board should be composed of the doctors of required specialties like urologist, general surgeon, radiologist, psychiatrist, physician and forensic medicine expert.

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