Rationale of “Potency Test” as Performed on Alleged Accused of Sexual Offences in Age Old Forensic Practice- A Study

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Abstract

Background: Following the amendment in Sec 375 IPC as per Criminal Law Amendment Act 2013, potency is not at all essential to commit rape and so even an impotent man can rape a woman. Even after the change in definition of rape and laws related to it in 2013, still the same age old question of potency is repeating in every requisition seeking medical examination of alleged accused of sexual offence. Investigating police officers ask for potency test of the alleged accused persons irrespective of the type of sex offence committed by the persons. Moreover Medical examination report of the alleged accused is often labelled as the “POTENCY TEST REPORT” in the Court of Law disregarding all other findings. Method: Diagnosis of impotence is a multi-disciplinary approach. The aim of the study is to discuss the rationale of potency test in relation to sexual assault cases in light of CLAA (2013) and current practice followed in many Institutions. Alleged accused of various sexual offence cases are studied here concerning the history of sexual offence, self claim of potency and duration between alleged incident and medicolegal examination. Conclusion: There is absolutely no necessity of potency test if there is no history of peno-vaginal intercourse and if the accused is not claiming himself to be impotent. Integrated approach between doctors and law enforcing agencies is essential to channelize the investigation in a more scientific way.

Key words: Criminal Law Amendment Act, potency, rape, multi-disciplinary approach, fundamental rights

Introduction

Medical examination of alleged accused person of sexual offences is compulsory as per Indian legal system and it is guided by Sec 53 (1) CrPC which states ‘When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub- inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably for that purpose. Though it is not specific for sexual offence cases and also never suggesting anything related to potency of an accused person. While dealing with a case of alleged rape, the definition which existed in Sec 375 IPC, before the amendment of this section on Rape in India, it used to define Rape as, an unlawful sexual intercourse by a man with a woman. So it is to be observed that it clearly mentioned the term ‘sexual intercourse by the man’ which can be assumed that a man has to be potent to perform sexual intercourse or in other word an impotent man cannot perform sexual intercourse. Now the important question is what we mean by impotence. Impotence is defined in many ways like one view defined impotence as ‘consistent inability to sustain an erection sufficient for sexual intercourse or the inability to achieve ejaculation, or both. Impotence can vary. It can involve a total inability to achieve an erection or ejaculation, an inconsistent ability to do so, or a tendency to sustain only very brief erections’. Another view defines impotence as...
‘an abnormal physical or psychological state of a male characterized by inability to engage in sexual intercourse because of failure to have or maintain an erection’. Simply impotence means inability to perform sexual intercourse\(^{(4)}\). So if a person cannot perform sexual intercourse, it is very easy to say he cannot rape as per the previous definition under Sec 375 IPC. Following many fallacies and limitations the Definition of Rape was amended in 2013 in form of Criminal Law Amendment Act 2013 which defines rape as: A man is said to commit “rape” if he—\(^{(3)}\) \(^{(5)}\)

1. 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

2. 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

3. 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

4. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

So it is very clear now that following the amendment in the above definition, potency is not at all essential to commit the offence of rape and so even an impotent man can rape a woman because if a impotent man tries to pass the glans of a flaccid penis through the vulva of a woman it is rape as per the amended definition under sec 375 IPC. So following the changed definition of rape after Criminal Law (Amendment) Act, 2013, “potency test” loses its merit in rape cases because the changed law does not require peno-vaginal intercourse to call it as rape anymore. \(^{(3)}\)

Accused persons of alleged sexual offences is brought by the police for medical examination with queries including the question seeking opinion regarding potency of the subject which is a never changing phenomenon and the scenario remains same before and after the amendment of sec 375 IPC. Even after the change in definition of rape and laws related to it in 2013, still the same age old question of potency is repeating in every requisition seeking medical examination of alleged accused of sexual offence cases in 2018.

It is also surprising that the investigating police officers asking for potency test of the alleged accused persons irrespective of the type of sex offence committed by the persons. For example we observed in the requisitions where the I.O mentioned that the one accused person pressed the breast of a woman in public or committed the offence of frotteurism in public, still they ask for potency test.

It is further painful to say that the medical examination report of the alleged accused is often labelled as the “POTENCY TEST REPORT” in the Court of Law disregarding all other findings mentioned in the report.

Often it is also seen if the medical examiner consciously omitted the opinion regarding the potency of the subject in the report, mentioning other usual findings, investigating police officers seek second opinion in this regard from other Institution.

Now coming back to the issue on cause and diagnosis of impotence. As we know that impotence depends on several factors like psychological, age of the individual, developmental or acquired abnormalities, diseases involving CNS, CVS, endocrinal disorders, medications the person use and on addiction. Diagnosis of impotence is not an easy task. It involves \(^{(6)}\)

a. taking detailed history

b. general examination

c. through systemic examination specially involving genitor-urinary, CVS, CNS and endocrinal functions.

d. Reflexes like bulbocavernous reflex

e. Laboratory examination involving complete hemogram, plasma sugar, lipid profiles, liver function test, thyroid function tests, urea, creatinine, serum testosterone, LH, serum prolactin, sex hormone binding
f. Other tests like- direct injection of PGE1 into the corpora, duplex ultrasonography, penile biothesiometry, nocturnal penile tumescence, cavernosography, cavernosometry, penile arteriography etc as deemed necessary in the particular case.

g. And most of the important is thorough psychological assessment

It is now very clear diagnosis of impotence is a multi-disciplinary approach involving doctors of surgery, neuromedicine, endocrinology, psychiatry and radiology. Forensic Medicine specialist may be part in this board of expert doctors but never can give an opinion on potency of a subject alone outside his speciality and degree of competence.

The question of impotence becomes significant in civil cases involving divorce, nullity of marriage, claim of damages involving sexual function following an assault or accident etc. The importance of impotence in relation to criminal cases surely has lost its merit following the Criminal Law Amendment Act 2013.

AIM OF THE STUDY:

The aim of the study is to discuss the rationale of potency test in relation to sexual assault cases in light of Criminal Law Amendment Act (2013) and current practice by Forensic Medicine Specialists followed in many Institutions.

Objectives

1. To find the different types of history of sex offences mentioned in requisition with request to perform potency test.

2. To find out whether the alleged accused persons were claiming themselves impotent

3. To find out a way to overcome the issue of so called potency test.

Methodology

- STUDY POPULATION: 76 Alleged accused of various sexual offence cases
- STUDY AREA: Dept. of Forensic Medicine and Toxicology, NRSMCH
- STUDY PERIOD: 01.01.2020 to 31.12.2020 (one year)
- STUDY MATERIAL: Requisition paper, measuring tape, swab & slides, test tubes, Torch, consent form
- STUDY TECHNIQUE: Procedural examination was carried out in every case as per norms guided by the existing proforma in the Dept. We are not going to the details of it here as it is not a matter of discussion in this context. For the potency test after checking any developmental or acquired abnormality involving external genitalia we asked the subjects to self manipulate the penis and watched whether it increased in length and circumference and if it was so the duration the state maintained for to opine whether the subject is capable of performing sexual intercourse.

Results & Analysis

Table No: 1- DISTRIBUTION OF STUDY POPULATION ACCORDING TO TIME INTERVAL BETWEEN ALLEGED INCIDENCE & EXAMINATION:

<table>
<thead>
<tr>
<th></th>
<th>Less than 12hrs</th>
<th>12hrs-24hrs</th>
<th>24-48</th>
<th>48-72</th>
<th>&lt;1week</th>
<th>1wk-1m</th>
<th>1m-6m</th>
<th>&gt;6m</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>0</td>
<td>3</td>
<td>6</td>
<td>12</td>
<td>14</td>
<td>15</td>
<td>20</td>
<td>6</td>
<td>76</td>
</tr>
</tbody>
</table>

It is seen that not a single case was brought by the police within 12 hrs, 20 cases was brought between 1m-6 m and 3 cases were brought between 12hrs-24 hrs of alleged incidence and medical examination.
Table No 2- DISTRIBUTION OF STUDY POPULATION ACCORDING TO TYPE OF SEX OFFENCE COMMITTED BY THE ALLEGED ACCUSED, AS MENTIONED IN REQUISITION:

<table>
<thead>
<tr>
<th>Type of Sexual Assault</th>
<th>Penetrating sexual assault</th>
<th>Non-penetrating sexual assault</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>31 (41%)</td>
<td>45 (59%)</td>
<td>76</td>
</tr>
</tbody>
</table>

Surprisingly it is seen over one year duration the cases which came for medical examination in Dept of FMT, NRSMCH, history of non penetrating sexual assault was mentioned in 59% cases by the I.O which included offences like pressing the breasts of a woman in public, frotteurism in public, openly masturbating in public, offences falls under sec 354 A, 369, 366 IPC etc.

Table No 3- DISTRIBUTION OF STUDY POPULATION REGARDING SELF CLAIM OF IMPOTENCE BY THE ALLEGED ACCUSED:

<table>
<thead>
<tr>
<th>Status</th>
<th>Potent</th>
<th>Impotent</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>69</td>
<td>7</td>
<td>76</td>
</tr>
</tbody>
</table>

Here first the examiner explained the subject what does impotence mean thoroughly in the language the subject understood and then asked whether they considered themselves as impotent and 69 persons out of 76 persons in this study claimed themselves to be potent.

Table No 4: DISTRIBUTION OF STUDY POPULATION ACCORDING TO AGE:

<table>
<thead>
<tr>
<th>Age</th>
<th>&lt;10yrs</th>
<th>11-20yrs</th>
<th>21-30yrs</th>
<th>31-40yrs</th>
<th>41-50yrs</th>
<th>51-60yrs</th>
<th>61-70yrs</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>0</td>
<td>11</td>
<td>38</td>
<td>19</td>
<td>6</td>
<td>2</td>
<td>1</td>
<td>76</td>
</tr>
</tbody>
</table>

From the table above it is seen most of the study population belonged to 21-30 years of age.

Table No 5- DISTRIBUTION OF STUDY POPULATION AS PER MARITAL STATUS:

- 65% of study population was unmarried, 22% was married with child and 13% married without any child
Table No 6- DISTRIBUTION OF STUDY POPULATION ACCORDING TO INTAKE OF ANY MEDICATION:

<table>
<thead>
<tr>
<th>No history</th>
<th>Anti-Diabetic</th>
<th>Anti-Hypertensive</th>
<th>Anti-depressant</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>63</td>
<td>6</td>
<td>4</td>
<td>3</td>
<td>76</td>
</tr>
</tbody>
</table>

63 Persons did not provide any history of intake of medication, where 6 persons were on anti diabetic, 4 persons on anti hypertensive and 3 persons were on anti depressant drugs.

Now as in table 3 we have mentioned that 7 persons claimed themselves to be impotent, among which 2 persons had no history of medication, 2 persons on anti diabetic, 1 persons on anti hypertensive and 3 persons were on anti depressant medication and it was seen those who were on different types of medications with self claim history of impotence, all of them were on the medication for more than 6 months.

Discussion

A. Our practice to determine potency of the subjects:

Ø As already mentioned above after checking any developmental or acquired abnormality involving external genitalia we ask the subjects to self manipulate the penis and watch whether it increases in length and circumference and if it was so, the duration the state maintained for to opine whether the subject is capable of performing sexual intercourse. It is also observed by one of the researcher that few medical examiners touché the penis of the subject with cotton to stimulate it. And if the penis increases even less than half inches or its girth increases a little than the previous flaccid state, we opine the question in double negative way like ‘there is nothing to suggest that the subject who is identified as Mr X, identified by Mr. Y, SI of Z PS, is incapable of performing sexual intercourse in ordinary course of nature during the date and time of examination’.

Ø It is also observed if there was no increase in length and girth of penis following stimulation, the accused is asked to come another day for repeat examination and even on that day the result remain same the I.O is asked to bring the subject before medical board after getting necessary court order.

B. Does the above mentioned method of detection of potency has any value in true sense?

Ø As it is clearly discussed above that diagnosis of impotence is a multi-disciplinary approach involving different specialists ruling out different causes of impotence related with their speciality, so single opinion from a Forensic Specialist in this regard is purely of questionable reliability even if the opinion is given in double negative way after a single initial examination as mentioned above.

Ø Also a subject who is already either in police custody or arrested by police, is anxious, tensed, depressed or agitated and if such person fails to manipulate his penis by self before the medical examiner or fails to show any sign of sexual stimulation following methods induced by the medical examiner, can it be scientific to opine the subject impotent rather non-stimulation of penis is quite a expected result and if such person is called on another day for the same purpose, whether it is not violating the human rights of the alleged accused person.

Ø There is also a high chance this type of opinion can be challenged in the court of law by the defence lawyer that whether other tests were carried out to opine the potency of the alleged accused person or whether the accused person being examined by other specialist in this regard or whether the Forensic Specialist referred the subject to the Medical Board for further assessment.

Ø Are we the Forensic Specialist are clear to our conscience that what do we perform as a Potency test is really a Potency test in true sense?
C. Issues related with potency:(11)

Potency is not permanent as it depends on several factors like:

i) A person who is potent to a particular person, may not be potent to another person (impotence quodem)

ii) A person may be potent towards a particular sex, not to other sex

iii) A person though not impotent may temporarily fail to get erection due to performance related anxiety.

iv) A person may not be comfortable in particular situation or environment.

So even though there were no developmental or local abnormality, no abnormality detected in complete system wise examination and all the tests results were within normal limit, it is still difficult to comment regarding the potency of a person giving due consideration of psychological factors.

D. Rationale of potency test in police requisition:

Ø Even though there was no history of penetrating sexual assault as per the complaints of the survivor woman and this type is found to be more common in this study. Potency of the subject was requested by the I.O in every requisition irrespective of history of sex offence.

Ø Alleged accused person himself is not claiming himself to be impotent and it is also predominant in this study.

E. Rationale of potency test in the eyes of law after Criminal Law Amendment Act 2013:

Ø As potency is not at all a criterion to rape a woman, after the amendment in the definition of rape, so even an impotent person can rape. Passing the glans of a flaccid penis through the vulva of a woman under any seven descriptions of Rape as per sec 375 IPC, also constitutes a rape.

Ø Is there any difference in the existing law to define a case of rape between the act of full penetration by a potent person or mere touching the genitalia of a woman by a flaccid penis by an impotent person fulfilling any of the seven descriptions of Rape as per sec 375 IPC.

F. Human rights of alleged accused person of sex offence:

We know that ‘Two finger test’ is prohibited now a days as it is considered disgraceful for a woman when such tests were done to determine whether a woman, victim or survivor of sex offence was habituated in sexual intercourse or had previous history of sexual intercourse(8,9,10). Similarly for a man who is not till found guilty by the court of law as his offence has not yet been proved, has every human right to disallow the doctor asking him to stimulate his genitalia or doctor himself attempting to stimulate his genitalia by any means for the sake of so called ‘potency test’.

Conclusions and Recommendations

After the Criminal Law Amendment Act, potency test surely has lost its merit in a case of alleged rape. Potency has mostly its importance in relation to civil cases involving divorce or nullity of marriage. The unhealthy trend among the investigating officer to request the doctor to perform potency test in every cases of sex offence irrespective of the history of the case, shall be restricted because potency is not a simple issue to deal with as they think. Diagnosis of potency is purely a multi-disciplinary approach involving specialists of different speciality and opinion solely from a Forensic Expert in a double negative form, is not at all a scientific way to deal with. Even to establish a subject ‘potent’ is hard task for the members of medical board considering the psychological factors. Casper(8,12) states that the possession of virility and power cannot be proved by physician as it is considered to exist just like other normal body functions. Medical science considers every person is to be potent until proved otherwise. In the developing country like India where there is already shortage of manpower and also lack of fund in health sector, involving many doctors at a single time as members of medical board to opine the issue of potency of a subject and spending money for doing the necessary investigations, is not a healthy practice because the outcome of the case not at all solely depends
on the issue of potency of the alleged accused person, it also depends on other part of medical examination report like presence of any injury, evidence of sexually transmitted infection, collected evidences from the subject and also giving due importance on the statement of the survivor and circumstantial evidences involving the case. We strongly feel the so called ‘potency test’ is depriving a alleged person who is not proved guilty yet, of his fundamental rights of privacy, dignity just like two finger test in a survivor of sex offence.

Under the above mentioned circumstances discussed above we like to recommend the followings in relation to medical examination of alleged accused male person of sex offence:

1. There is absolutely no necessity of potency test if there is no history of peno-vaginal intercourse as defined under Sec 375 b, c, and d(5)

2. If the case has the history of peno-vaginal intercourse and subject is not claiming himself to be impotent, there is no valid indication for potency test.

3. Potency test can be performed if there is history of peno-vaginal intercourse and subject is claiming himself to be impotent and counter charging the woman with false allegation.

4. If potency test is at all required it should be performed under the guidance of medical board constituting specialists of different medical speciality.

5. Though we always complain that police men are giving requisition for the potency test still in 2021, when the law on rape has changed in 2013, we cannot escape our responsibility to make systematic, proper communication with the investigating officers dealing with such cases. We can invite them to have interactive sessions with us where we can make them understood the fallacies and difficulties related with the issue of potency which they think to be a very easy task for a doctor to opine. We can utilize our organizing bodies for arrangement of such events with police and law personals to share our views before a large audience at a single time rather than trying to educate them one by one during each visit in our dept.

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Ø Source of Funding: Self

Ø Conflict of Interest: Nil

References