



The Complications and Drawbacks of Medical Evidence in Cases of Sexual Assault

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ABSTRACT

With the steady rise in rape cases in India but only a 27.2% conviction rate¹, there arises a need to look at shreds of evidence that may strengthen the case for prosecution. One such is the medical report of the rape victim. Section 164A of the CRPC² provides for a medical examination of the rape victim within 24 hours. The findings from the medical examination are used as corroborative evidence in the court of law u/s 45 of the Evidence Act³. However, the investigative authorities often fail to present medical reports⁴ and are seldom punished⁵. When such a report is not available, it is uncertain how and when can, its absence hinders the outcome of the case. Even though there are numerous medical jurisprudence textbooks, they remain out-dated and are based on a false sense of antiquated notions like women's chastity and ability to resist as well as the irrelevant need for two-finger tests which have been debunked by newer research and advancement in the field of toxicology⁶. However, despite such advancements, these textbooks are cited constantly by courts all across the nation leading to a higher rate of acquittal. Moreover, a report implying no injuries does not directly imply that the accused is innocent or vice versa. Furthermore, what happens when there is medical evidence, but the victim turns hostile owing to societal or financial pressure? The law remains ambiguous, and the precedents are constantly contradicting, which leads to the victim of a sexual assault paying the price as the

¹ National Crime Records Bureau, *Crime in India 2021 Statistics*, Vol. 1, National Crime Records Bureau (Ministry of Home Affairs) Government of India, xvi, 2022 <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/post/1679310394CII2021Volume1.pdf>

² The Code of Criminal Procedure, 1973, §164A, No. 2, Acts of Parliament, 1974

³ Indian Evidence Act, 1872, §114, No. 1, Acts of Parliament, 1872

⁴ What ails rape investigation in India? Human Rights Watch, (December 19, 2012 9:34 AM EST)

<https://www.hrw.org/news/2012/12/19/what-ails-rape-investigation-india>

⁵ *Ibid.*

⁶ McLean, Iain and Stephen A Roberts, *Female Genital Injuries Resulting from Consensual and Non-consensual Vaginal Intercourse*, *Forensic Science International*, 204 (2011)

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offender goes unpunished owing to the irregularity on the subject. Therefore, this article aims to follow the complications and drawbacks of medical evidence in cases of sexual assault.

INTRODUCTION

The focal point of medical examination following rape can be subdivided into two: to provide medical care and to gather evidence. Under Section 39 of the Bharatiya Sakshya Adhiniyam, 2023⁷ which has recently replaced Section 45 of the Indian Evidence Act⁸, the medical report is considered as evidence in the way of testimony of a medical expert⁹. The extent of this evidence is only corroborative, and it is used for cross checking.¹⁰

Doctors only examined the rape victims after getting a report from the police officer prior to the Supreme Court's decision in the case of *State of Karnataka v. Manjanna*.¹¹ The Supreme Court accepted the victim's entitlement to a medical examination as a medico legal emergency in its judgement in the aforementioned case in 2000. The need for a report to be made first has changed, and the victim can now seek medical attention or assistance from a doctor even without first filing a complaint with the police¹². Even without a requisition, the doctor is now required to examine her.¹³ Through the insertion of Section 164A in the Code of Criminal Procedure¹⁴, it became mandatory for the victim of a sexual assault to be examined by a medical practitioner within 24 hours. This provision is now embodied in Section 184 of the Bharatiya Nagarik Suraksha Sanhita, 2023, after an attempt was made to overhaul the laws governing the criminal justice system in India.¹⁵ However, where the non-compliance of such laws and precedents fails to attract stringent punishment, more often than not, they flat line. Without a medical report, the prosecution case frequently lacks corroboration.

In rape cases, the doctor's testimony is frequently regarded as being far more valuable than all other

evidence, including that of the victim. When evaluating medical evidence of a crime, doctors seem to mainly depend on the theories and techniques presented in medical jurisprudence texts. The courts frequently use medical jurisprudence textbooks, which are based on false notions of women's chastity and sexual history that are propagated in these publications. These texts often support the two finger tests and usually signify that injuries are needed to prove rape.¹⁶ Courts frequently depend on these in evaluating the evidence and rendering decisions in cases of sexual assault which leads to a higher rate of acquittal. Moreover, where the report shows no injuries, medical jurisprudence basing itself on false notions and out-dated scientific and medical knowledge makes a case that rape has not occurred.

Additionally, the horrendous and unscientific practice of two finger tests still finds its way in medical examinations¹⁷ even when it has been proved as baseless and it infringes the basic rights of the victim.

Relevance of Medical Report

The relevance of the medical report of a victim in rape cases pertains to many factors, and thus a straight-jacket formula cannot be applied. Depending on the facts of each case, as each case tends to be unique, it is crucial to determine the significance of medical evidence including whether or not it may serve as the primary basis for a conviction or whether its apparent lack can lead to an accused person's acquittal.

False Allegation of Rape: It is to be noted that the Supreme Court has issued caution pertaining to false allegation by women stating, "Courts should bear in mind that false charges of rape are not uncommon"¹⁸. The Court stated in *Ratan Das v. State of West Bengal*¹⁹ that false accusations of rape are not uncommon and medical evidence may assist in determining the truth or otherwise of the claim. In subsequent rulings by high courts, this Supreme Court decision has frequently been cited in judgements such as that of *State of Himachal Pradesh vs Mano*.²⁰

⁷ Bharatiya Sakshya Adhiniyam, 2023, §39, No. 47, Acts of Parliament, 2023

⁸ Indian Evidence Act, 1872, §45, No. 1, Acts of Parliament, 1872

⁹ Sonali Priyadarsani, *Medical Evidence: Pivotal Role in Criminal Jurisdiction*, MANUPATRA, (Jan. 27, 2022), <https://articles.manupatra.com/article-details/Medical-Evidence-Pivotal-Role-in-Criminal-Jurisdiction>

¹⁰ M.R. Zafer, *Scientific Evidence: Expert Witness*, 21(2) JOURNAL OF THE INDIAN LAW INSTITUTE 53, 77 (1972).

¹¹ *State of Karnataka v. Manjanna*, AIR 2000 SC 2231

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Supra* note 2

¹⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, §184, No. 46, Acts of Parliament, 2023.

¹⁶ MODI, JAISINGH, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY, (Calcutta: Butterworth and Company, 16th edition, 1967)

¹⁷ Somreet Bhattacharya & Raj Shekhar, *Nirbhaya verdict: Justice JS Verma panel made a difference*, THE TIMES OF INDIA (May 6, 2017, 09:58 IST) <https://timesofindia.indiatimes.com/city/delhi/verma-panel-made-a-difference/articleshow/58541556.cms>

¹⁸ *Radhu vs State of Madhya Pradesh*, (2007), 12 S CC 57

¹⁹ *Ratan Das vs State of West Bengal*, 2005 Cri L J 1876 (Cal)

²⁰ *State of Himachal Pradesh vs Mano*, 2011 Cri L J 1218 (HP); See also, Pardeep @ Sonu vs State (Govt of NCT of Delhi), MANU/DE/2427/2011; Hari Om vs State (NCT), 2010 CriLJ 1281 (Del)

High Courts have a tendency to significantly rely on medical evidence when deciding whether the woman is fraudulently alleging rape, taking into account the Supreme Court's precautionary advice. However, it is important to understand that injuries cannot always be the sole basis for a conviction or acquittal.

On similar lines to the judgement of *Rameshwar vs The State of Rajasthan*²¹, it is important that in every incident of this nature, the judge must take the possibility of corroboration into account, in accordance with the real rule of prudence. In *State of Punjab vs. Gurmit Singh*²², it was held that sexual assault takes place in privacy and hence is surrounded by secrecy, and no other corroboration in terms of eyewitness, can be produced, thereby making medical evidence the only corroborative evidence. It is evident therefore that the court considers medical evidence significantly important in cases of sexual assault. However, if the lack of medical report is a mistake on part of the investigative authorities, it should not lead to injustice with the victim.

Absence of Medical Report

The court deconstructed in the aforementioned case²³ that if corroboration in the form of a medical report is unavailable or cannot be made available due to circumstances well beyond control, then the Court should not dismiss the case and the Court can instead rely only on the victim's or survivor's testimony. In such cases, it is the fault of the investigative authorities who failed to conduct a medical test and they are seldom punished, whereas the consequences fall onto the victim whose case is weakened. Unless provisions are made to strictly conduct these tests, the authorities will remain negligent. Moreover, despite overhaul of all the criminal laws, there is no provision for this.

Moreover, it remains important to determine if the court finds trust and confidence in the statement of the victim to convict the accused solely on the basis of her testimony. No conclusive precedent or law exists that clarifies when exactly the statement of the prosecutrix can be trusted.

Credibility of the Testimony of the Victim

The above section poses a question pertaining to how the courts decide the credibility of the testimony. Even when the prosecution provides a strong unhindered testimony of the victim throughout the proceedings, the lack of

medical evidence leads to the acquittal of the accused. Relying on the judgement of the Hon'ble Supreme Court in *Ram Chandra Rambux V. Champabai & Ors*,²⁴ the credibility of any testimony is to be judged by not only looking at the demeanour of the witness but also the surrounding circumstances as well as the probabilities.

Deconstructing from the judgement of the apex court in *Shaikh Zakir vs. State of Bihar*²⁵, it becomes vital to acknowledge that the victim's testimony is crucial in these situations, and the courts should have no trouble convicting an accused person based solely on the testimony of a sexual assault victim where it is believed that her testimony is trustworthy and credible, unless there exist compelling circumstances that require seeking out evidence to contradict it. The judgement left it open for interpretation by the judge as to what constitutes as circumstances that make corroboration compelling.

Moreover, the apex court in *Gangadhar Behera and ors. vs. State of Orissa*²⁶ has also given significant importance to the motive of the victim behind hiding the truth, and if such motive is established, the court shall look for corroboration.

It can be established that the burden falls onto defence to compel the court to look for corroboration by providing sufficient evidence and motive on part of the victim to make her testimony unreliable. It is important to consider that simply because the victim is sexually active with the accused or any other person, does not render her testimony untrustworthy. However, it has been reported numerously that the defence is quick to question the character of the victim to prove her testimony unreliable.²⁷ Only when the courts have reasoned with the defence, should it proceed to consider the fact that there exists a lack of medical evidence or injuries. The next question pertains as to why lack of injuries should not be a direct ground for disposal. The answer relies on laboratory studies and clinical reports and various medical jurisprudence textbooks.

Medical Jurisprudence - Stereotypes and Myths on Sexual Assault

Rape myths are "prejudiced, stereotypical, or erroneous beliefs about rape, rape victims, and abusers" (Burt 1980).²⁸

²⁴ Ramchandra Rambux vs Champabai And Others, 1965 AIR 354

²⁵ Sheikh Zakir vs State Of Bihar 1983 AIR 911

²⁶ Gangadhar Behera and ors. vs. State of Orissa (2003) 1 ACR 902

²⁷ Durba Mitra, Mrinal Satish, *Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India*, vol xlix no 41, EPW, 51, 52 (October 11, 2014)

²⁸ Burt, Martha R, Cultural Myths and Supports for Rape, Vol. 38,2 Journal of Personality and Social Psychology, 217, 218 (1980)

²¹ Rameshwar vs The State Of Rajasthan, 1952 AIR 54

²² The State Of Punjab vs Gurmit Singh & Ors, 1996 AIR 1393

²³ *Ibid.*

Some of these myths are descriptive; for instance, one can explain the normal response of a woman after rape. Yet, they frequently become prescriptive and dictate how a woman should respond to rape (Temkin and Krahe 2008).²⁹

Rape myths including women's claimed susceptibility for false accusations of rape and their supposed capability for resistance to rape are perpetuated by the use of medical jurisprudence texts in case laws. Medical jurisprudence texts go so far as to say that the ability to struggle is dependent on the age, class, and social status of the woman alleging rape. These characteristics were then integrated into case laws.

Medical textbooks' influence on Sexual Assault Adjudications

These Medical jurisprudence textbooks have a significant impact on the determination of rape cases since courts rely on such scientific and impartial evaluations of women's behaviour. For instance, High court judges in the case of *Sukru Gouda vs State of Orissa*³⁰ have specifically cited Jaisingh Modi's 'A Textbook of Medical Jurisprudence and Toxicology'³¹ statements regarding labouring women's capacity to resist rape.

Moreover, in 2009, the Supreme Court while hearing an appeal arising from the High court's judgement of *Sukru Gouda vs State of Orissa*,³² rejected categorically the claim that a single adult male cannot rape a healthy adult female. However, despite the fact that the judgement may have led to deletion of texts from Jaisingh Modi's book in its latest edition, the High Court of Himachal Pradesh in 2010 in *State Of Himachal Pradesh V. Kishan*³³ extensively quoted a line from an earlier version of Modi's textbook³⁴ that examines the relationship between the class of the rape victim and her capacity to fight rape in evaluating a victim from a "labouring" class. Due to the fact that the woman's body was uninjured, the defendant was found not guilty.

The aforementioned case is not a singled-out episode. Frequently, the employment of medical jurisprudence books by Courts directly contradicts the Supreme Court's rape jurisprudence. Because medical evidence is seen as "scientific" and "objective", Courts frequently adopt

the opinion of medical jurisprudence textbooks without taking into account Supreme Court rulings.

For instance, the medical test in *State of Uttar Pradesh v Sabir & Ors*³⁵ revealed that the rape victim's hymen was intact. The prosecution citing Supreme Court's decision argued that a torn hymen is not a prerequisite for proving rape. Despite this, the High Court of Allahabad made a ruling in favour of the accused based on medical jurisprudence textbooks that an intact hymen denotes that forceful penetration did not occur. The High Court cited the Supreme Court's decision but made a point that it was bound by medical jurisprudence. These jurisprudences, used by the courts, are often based on a false 'objective' and 'scientific' logic which has been invalidated through modern biology and laboratory research.

Many such examples exist to show that repeatedly the Courts use experts from these textbooks and base their decisions on the same. However, the Courts fail to understand that such textbooks are mostly out-dated and new medical jurisprudence is constantly developing, such as the idea that even with forceful penetration, there can be instances of no injuries.

The Importance of Injuries in Biological Terms

In terms of biology, it has been clearly developed through Masters and Johnson's theory of 'Human Sexual Response'³⁶ that sexual stimulation in a female leads to the lubrication of the vaginal wall, Vasocongestion of the external genitalia, and the lengthening of the vaginal canal. Altogether, this creates a protective effect to protect against sustaining internal and external injuries. Therefore, along the same lines, it has been hypothesised that non-consensual sex³⁷, meaning no sexual stimulation of the female, will lead to genital injuries due to the lack of its protective effects.³⁸ The same has been included in various textbooks such as that of Modi's³⁹, Temkin and Krahe's⁴⁰ and Burt's⁴¹. However, it has been clinically suggested by newer laboratory studies

²⁹ Temkin, Jennifer and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* 32 (Oxford: Hart Publishing, 2008)

³⁰ *Sukru Gouda vs State of Orissa*, 2004 Cri L J 1566 (Ori); See also, *Revella Sivaiah vs State of Andhra Pradesh*, 2005 Cri L J 526 (AP)

³¹ *Supra* note 14

³² *Sukru Gouda vs State of Orissa*, 2009 Cri L J 831 (SC)

³³ *State Of Himachal Pradesh Vs. Kishan*, (2010) 07 SHI CK 0011

³⁴ *Supra* note 14

³⁵ *State of Uttar Pradesh v Sabir & Ors*, MANU/UP/0964/2011

³⁶ Masters W.H., Johnson V.E., *Human sexual response*, (Boston: Little Brown; 1966)

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Supra* note 14

⁴⁰ *Supra* note 29

⁴¹ *Supra* note 28

and clinical reports⁴² that sexual arousal may function at a subcortical level, meaning the female may be sexually stimulated without her will or consent. In other words, even non-consensual intercourse can be free of injuries due to the protective effects of the sexual stimulation. Despite medical jurisprudence textbooks' claim that non-consensual intercourse inevitably results in genital harm, recent clinical research demonstrates the opposite.⁴³ For instance, according to a 2011 medical study⁴⁴, the majority of rape victims do not incur any genital injuries as a consequence of non-consensual intercourse. The current sexual assault literature creates an unrealistic expectation that medical examination of the genitalia can alone prove rape.⁴⁵

Interpretation of Injuries- Legally

In determining rape, medical jurisprudence texts urge doctors to investigate for genital injuries. In accordance with those guidelines, medical examiners who examine rape victims often note the presence or absence of injuries in the genital area.⁴⁶ According to medical jurisprudence manuals, injuries are unavoidably inflicted by non-consensual intercourse. It is based on the belief that an erect penis induces lacerations in the vulva and labia, especially if the penetration is forceful.⁴⁷ The absence of harm is then used to prove that rape did not occur.⁴⁸ For instance, the "no harm no rape" argument became grounds for acquittals in cases like *Krishan Kumar Malik vs State of Haryana*⁴⁹ and *AnumulaRaji Reddy vs State of Andhra Pradesh*⁵⁰. In the case of *State of Orissa vs Kamakshya Prasad Meher*,⁵¹ the Courts have noted that the absence of injuries especially in light of an uncorroborated testimony denotes that rape has not occurred. However it is a flawed argument as the Supreme Court itself, as mentioned earlier had ruled that sexual assault takes place in the privacy and hence is surrounded by secrecy, and therefore corroboration in any other form rather than medical evidence may not be

available.⁵² But when the only corroboration available is based on false notions and antiquated practices in medicine which fails to up to date itself with modern research and findings, the victim falls helpless.

However, the Indian Penal Code does not require physical injury to the woman's genitalia to establish rape.⁵³ Section 375 of the IPC has been interpreted by the apex court to mean that to establish rape, there does not have to be complete insertion of the penis with fluid release and disruption of the hymen in numerous judgements.⁵⁴ Penetration, however slight, is adequate.⁵⁵

The Criminal Amendment Act 2013⁵⁶, defined 'consent' as "unequivocal agreement to engage in a particular sexual act", stressing further that only the lack of resistance would not establish consent.

Absence of Injuries- Legally

Cases where medical evidence is available but contradicts the testimony on the basis that there were no injuries sustained, internal or external, cannot be interpreted in a way to imply the innocence of the accused and the same has been established medically. The apex court in *State of U.P vs Chhoteylal*⁵⁷ has also ruled that even if medical evidence rules out rape due to the absence of injuries, the courts are not to rely solely on the medical evidence and award acquittal.⁵⁸ The Supreme Court acknowledged Medical Jurisprudence and Toxicology in the case of *Wahid Khan v. State of M.P.*⁵⁹, asserting that sexual intercourse is the mild penetration of the vulva by the penis, with or without semen discharge.⁶⁰ Therefore, it can be hypothesised that rape can occur without any physical injury being caused to the victim.

The provisions of the clause in Section 375 of the Indian Penal Code⁶¹ clearly define that a woman cannot be considered to have consented to sexual activity merely because she does not physically protest the act of penetration. Section 375 of the Indian Penal Code has been reproduced verbatim in Section 63 of the Bharatiya

⁴² Levin, Roy J, and Willy van Berlo. *Sexual arousal and orgasm in subjects who experience forced or non-consensual sexual stimulation -- a review*, Vol. 11,2. Journal of clinical forensic medicine, 82, 8 (2004).

⁴³ White, Catherine and Iain McLean, *Adolescent Complainants of Sexual Assault; Injury Patterns in Virgin and Non-virgin Groups*, Journal of Clinical Forensic Medicine (2006)

⁴⁴ *Supra* note 6

⁴⁵ *Ibid.*

⁴⁶ *Supra* Note 14, 38, 39

⁴⁷ Pappu vs State of Delhi, 2009 Cri L J 334 (Del)

⁴⁸ Jagadish Prasad Sharma vs State, 1995 Cri LJ 2501 (Del).

⁴⁹ Krishan Kumar Malik vs State of Haryana, (2011) 7 SCC 130

⁵⁰ AnumulaRaji Reddy vs State of Andhra Pradesh, 2005 CriLJ 220

⁵¹ State of Orissa vs Kamakshya Prasad Meher, 2001 CriLJ 3620

⁵² *Supra* Note 20

⁵³ Rafiq vs State Of U.P, 1981 SCR (1) 402 ; Balwant Singh And Ors. vs State Of Punjab, AIR 1987 SC 1080

⁵⁴ *Ibid.*

⁵⁵ Ranjit Hazarika vs State Of Assam, (1998) 8 SCC 635, IPC 1860, §375, No. 45, Acts of Parliament, 1860

⁵⁶ The Criminal Law (Amendment) Act, 2013 Act No. 10, Acts of Parliament, 2013

⁵⁷ State of U.P vs Chhoteylal, AIR 2011 SC 697

⁵⁸ *Ibid.*

⁵⁹ Wahid Khan v. State of M.P.(2010) 1 ACR 16

⁶⁰ *Ibid.*

⁶¹ IPC 1860, §375, No. 45, Acts of Parliament, 1860

Nyaya Sanhita, 2023,⁶² which is the new act that replaces the Indian Penal Code. On similar grounds, the rationale for the ruling in *Rajinder @ Raju v. State of H.P.*⁶³ was that an accused can be found guilty of rape since the lack of injuries cannot be interpreted as a sign of consent. Moreover, the Criminal Amendment of 1983,⁶⁴ following the judgement of the *Mathura rape case*,⁶⁵ amended the Indian Penal Code to clarify that even mild contact of the penis to the vagina is sufficient to establish rape. Henceforth, it can be inferred that in such cases, there is a possibility that the victim might not sustain injuries. This makes it abundantly clear that even if medical evidence shows no injuries due to no resistance, consent cannot be presumed and therefore such evidence cannot be made the sole basis of acquittal. However, the evidence cannot be wholly discarded on these grounds and can be used to strengthen the case of defence.

Relying on the 'no resistance means consent' argument also disregards the fact that consent and will are different since consent can be obtained through force or inducement, as is clearly prescribed even in the provisions of the IPC.

However, the apex court also held in *Rajoo v. State of Madhya Pradesh*⁶⁶ that the prosecutrix's sole testimony lacks credibility when it is not corroborated by medical proof, and in certain instances, the accused is even entitled to the benefit of the doubt because there is no other evidence to support the prosecutrix's narrative. In *Pratap Misra vs. State of Orissa*,⁶⁷ the prosecutrix claimed rape by numerous people, but there existed no evidence of injuries, and the SC ruled that if the victim's version is true, the presence of injuries is unquestionably relevant. Therefore, it can be inferred that in horrendous cases of sexual assault, such as gang rape, an absence of injuries will substantially weaken the case of the prosecution. Such ambiguous precedents and medical jurisprudence leaves the analysis of medical reports at the judge's discretion. However, complete discretion, even when some facts are scientifically approved can lead to miscarriage of justice.

⁶² Bhartiya Nyaya Sanhita, 2023, §63, No. 45, Acts of Parliament, 2023

⁶³ *Rajinder @ Raju v. State of Himachal Pradesh*, (2009) 16 SCC 69 : JT 2009 (9) SC 9.

⁶⁴ The Criminal Law (Second Amendment) Act, 1983, No. 46, Acts of Parliament, 1983

⁶⁵ *Tuka Ram And Anr vs State Of Maharashtra*, 1979 SCR (1) 810

⁶⁶ *Rajoo v. State of Madhya Pradesh*, AIR 2009 SC 858

⁶⁷ *Pratap Misra vs. State of Orissa*, AIR 1977 SC 1307

Judge's Discretion in Analysing Medical Evidence

When seen as whole, medical evidence cannot be considered as solely convicting evidence in every type of case such as that of dacoity or homicide. But as far as occurrence of internal injuries and DNA matching through forensics are concerned, medical and forensic sciences are accepted worldwide in case of sexual assault. In the same way that through the *Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik*,⁶⁸ the Court recognised in reference to medical evidence specifically that of DNA, that some sections were made way before the advancement of science. The court acknowledged that when something has been scientifically proven as well as accepted worldwide and it's against conclusive proof envisaged under law, the scientifically acclaimed has to win over the latter. Therefore, when the need for injuries has also been debunked and scientifically acclaimed, it should win over the precedents set by case laws and antiquated medical jurisprudence textbooks. The need for injuries to prove rape has to be done away with. Judge's discretion should not be allowed to an extent where the case is dismissed based on the fact that there were no injuries. For instance, in *Union Territory, Chandigarh v. Amit Kumar @Rachu & Others*,⁶⁹ a leave for appeal was declined against acquittal of the accused based on the fact that the medical report, supported by the medical examiner in the testimony stated that there were no injuries sustained by the victim. The medical examiner also pointed out that the victim had recent consensual sexual relations. The High court concluded based on the testimony of the medical examiner that the victim was a consenting party. Thus, it could be noted that judges often base their decisions on past sexual history of the victim as well even when the same has been revoked.

Past Sexual History

Despite repealing Section 155(4) via the Indian Evidence (Amendment) Act of 2002⁷⁰, wherein the general immorality of a female victim of rape could be brought onto as evidence to tarnish the witness, new ways have been developed by the defence to bring the past sexual history of a victim in question. It is common for a medical examiner to point out habituation to sexual intercourse of the victim in

⁶⁸ *Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik*, (2014) 2 ACR 1340

⁶⁹ *Union Territory, Chandigarh v. Amit Kumar @Rachu & Others*, 2019 SCC OnLine P&H 3659: (2020) 1 RCR (Cri) 51

⁷⁰ Indian Evidence (Amendment) Act of 2002, No. 4, Acts of Parliament, 2003

the medical report.⁷¹ The judgments have often included how medical reports explicitly point out habituation in cases like *Raj Kumar @ Raju vs State of Himachal Pradesh*.⁷²

In addition to the medical report, defence counsels often use a woman's demeanour, class, clothing, etc. to destroy her character to falsify her claims. Medical tests are conducted to gather medical evidence of sexual assault, the habituation of the victim may be taken into account to gather evidence, but an attempt to dismantle the claims of a victim based on habituation is erroneous. Significantly, it should be directed to the trial courts to not accept any view of the medical examiner regarding the fact that whether the victim is habituated to intercourse or not. However, in India, it used to and still crosses all limits whereby the victim has to undergo 'the two-finger test'⁷³ in an attempt to prove her chastity owing to a lack of implementation and awareness.⁷⁴

The Two-Finger Test

The two-finger test is a medical procedure that involves a doctor inserting two fingers into a rape survivor's vagina.⁷⁵ The test is used to determine if the hymen is broken, assess the laxity of the vaginal muscle and check if the victim has had recent sexual intercourse.⁷⁶ The test is often used to declare rape survivors as 'habituated to sex'.

The finger test is unscientific as well as regressive and the same was held by the Supreme Court very recently.⁷⁷ Although, the Justice Verma Committee had ordered that the Two-Finger Test, which is used to determine whether the hymen is distensible, be discontinued since it interferes with the victim's right to privacy, it was never strictly implemented.⁷⁸ A strict implementation requires penal charges for violation which was at last recognised by the Supreme Court in its recent judgement of *State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai*.⁷⁹

⁷¹ *Sr.Septhy vs CBI & Ors.* (2023) 02 DEL CK 0046

⁷² *Raj Kumar @ Raju vs State of Himachal Pradesh* 2007 CriLJ 1916 (HP); See also, *Virender Singh vs State of Haryana*, 2007 CriLJ 2459 (P&H), *Ram Lal vs State of Rajasthan* 2006 Cri L J 2530 (Raj)

⁷³ Tushar Jain, *Do you know about the Two Finger Test?* SAYFTY (August 4, 2013) <https://sayfty.com/do-you-know-about-the-two-finger-test/>

⁷⁴ *Krishnakant vs State Of U.P. And Another* (2022) 09 AHC CK 0060 ; *Babu vs State Of Kerala* (2022) 07 KL CK 0131; *Rajiv Gandhi vs State* (2022) 04 MAD CK 0025

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai* (2022) 10 SC CK 0069

⁷⁸ *Supra* note 15

⁷⁹ *Supra* note 77

The Supreme Court had already, in 2013 ruled the test unconstitutional in the case of *Lillu @ Rajesh and Anr v. State of Haryana*.⁸⁰ In November 2022, the Supreme Court held that the test has no scientific basis and finally banned the test and declared any medical officer guilty of misconduct if he is found to have performed such tests. Justice DY Chandrachud added that the two-finger test should be removed from the medical curriculum as well.

Guidelines for the care of survivors/victims of sexual violence⁸¹ were released by India's Ministry of Health in March 2014. According to the Guidelines, "Per-Vaginum examination, popularly known by laypeople as the "two-finger test," must not be performed to prove rape or sexual violence, and the magnitude of the vaginal introitus has no influence on a case of sexual violence." Unfortunately, neither the Guidelines nor their enforcement have been applied equally throughout India, and any violations are not supported by a legal response. This will finally begin to change with the recent judgement as the doctor would serve punitive charges for violation. This makes a start at addressing the impunity with which medical professionals engage in this behaviour.

The decision was significant in that it highlighted the fact that the two-finger test is founded on the false notion that a sexually active woman cannot be raped. A woman's sexual history is completely unimportant while adjudicating whether the accused raped her. It starts to send a message that character assassinations of survivors during trials, particularly those based on their sexual or romantic past, will no longer be accepted.

Is the Medical Report Enough If the Victim Turns Hostile?

It has been observed that a number of rape cases lack conviction owing to the victim turning hostile due to family and societal pressure. This issue has finally started to come to light and the judiciary is taking notice of the same. High court guidelines released recently in July 2022, such as Calcutta High court guidelines on vulnerable witness includes victims of sexual assault.⁸² In older versions of guidelines for vulnerable witnesses, for instance,

⁸⁰ *Lillu @ Rajesh and Anr v. State of Haryana* AIR 2013 SC 1784

⁸¹ Ministry of Health and Family Welfare, Government of India, GUIDELINES & PROTOCOLS Medico-legal care for survivors/victims of Sexual Violence Ministry of Health and Family Welfare, (Mar. 19, 2014) <https://main.mohfw.gov.in/sites/default/files/953522324.pdf>

⁸² Calcutta High Court, *Guidelines for Recording Evidence of Vulnerable Witnesses*, Calcutta High Court (Jul. 29, 2022), <https://www.calcuttahighcourt.gov.in/Notice-Files/general-notice/6717>

the Gauhati High Court guidelines, released in 2018 only includes child witnesses.⁸³ As recent as November 2022, the Supreme Court finally addressed this issue by broadening the scope of vulnerable witnesses to include sexual assault victims under section 3 of the Delhi High Court Guidelines for recording of evidence of vulnerable witnesses in criminal matters.⁸⁴ Therefore, the victim's turning hostile cannot be made sole ground for acquittal. The same was finally supported by the supreme court in 2018 in the recent & landmark judgement of *Hemudan Nanbha Gadhvi*,⁸⁵ where the apex court ruled that even if the victim turned hostile during the trial, other shreds of evidence, especially including medical evidence, can be considered enough to prove guilt. The court in this case observed the reasons for the victim's turning hostile and found that, as she is now married, she went back on her previous statement, so her married life is not distorted further by this case. Therefore, since there was clear medical evidence of rape, the court convicted the accused.

The courts should therefore never hasten to dispose of a case on the basis of the victim turning hostile. In a country like India, where sexual assault is still a taboo held against the victim, the courts have a duty to examine the socio-economic conditions of the victim and understand the reasons for her hostility. The courts have remained incautious towards these issues which further deteriorates the conviction rate. Slowly the issue has started to rise, and a speedy rise is the need of the hour.

ANALYSIS & CONCLUSION

It can be evidently concluded that victims of sexual assault have been denied justice in numerous cases only because medical jurisprudence has failed to evolve.

Even when there is compelling evidence in the form of injuries, the prosecution still has to present other evidence since medical evidence is only corroborative in nature. The Indian Evidence Act, under Section 114,⁸⁶ lays down certain presumption of facts. This provision has been replaced by Section 119 of the Bharatiya Sakshya Adhinyam, 2023,

⁸³ Gauhati High Court, *Guidelines for recording of evidence of vulnerable witnesses in criminal matters*, The Gauhati High Court (Jul. 26, 2018), <https://ghconline.gov.in/General/Notification-26-07-2018.pdf>

⁸⁴ *Smruti Tukaram Badade v. State of Maharashtra*, (2022) 01 SC CK 0098

⁸⁵ *Hemudan Nanbha Gadhvi vs The State Of Gujarat*, AIR 2018 SC 4760

⁸⁶ *Supra* note 3

and still retains its original text.⁸⁷ An amendment to the same regarding the presumption of rape when there is evidence of genital and external injuries clearly, could pave the way for better conviction rates.

The statutes can be amended in a way to recognise that the absence of injuries does not signify consensual sex. Therefore, in such circumstances, the onus would not shift onto the prosecution to prove rape. As has been stated by Justice DY Chandrachud, there is a need for reformation in the medical curriculum to better deal with medical evidence and medical care that the victim deserves.

In order to improve the present condition of medical evidence in India, a stricter approach is essential. Moreover, if medical evidence is given the evidentiary value it deserves that is of convicting evidence rather than corroborative, it will become more convenient for the magistrate to issue stringent punishment to the investigative authorities for their incompetence in providing medical evidence.

In addition to this, because the absence of medical evidence is a fault on part of the investigative authorities, its lack thereof should not entitle any benefit of the doubt to the accused.

Furthermore, stringent punishment should also be issued to any medical examiner who conducts the unconstitutional 'two-finger test'. Trial courts have to be directed to reject any medical opinion regarding the habituation to intercourse of the victim. A medical report is essential only to see if penetration occurred and whether there are physical and genital injuries to show forceful penetration. Anything beyond this should not be accepted. This is needed to uphold the right to privacy of a victim and will restrain the defence from relying on irrelevant aspects of sexual habituation and the immoral character of the victim to dismantle the prosecution's case.

It has been noticed that the word "character" has been used in numerous rape adjudications. In compliance with recent judgements and medical advancement, medical jurisprudence textbooks must be significantly rewritten to exclude examinations like the finger test and assessments of the condition of the hymen that yield prejudiced and misleading evidence. Just those medical observations and tests that are logically coherent and legally substantial should be used. It is important to remove unfounded and unscientific claims from these medical textbooks, such as the claim that women frequently make false rape allegations. Doctors will continue to apply these tests and use prejudiced understandings of the prevalence of false accu-

⁸⁷ *Bharatiya Sakshya Adhinyam, 2023*, §119, No. 47, Acts of Parliament, 2023.

sations and the status of women's chastity in determining the occurrence of rape without these adjustments to textbooks and accompanying curricula in medical school courses. Prejudicial evidence will thus continue to be used in criminal trials and impact the result of cases of sexual assault.

Moreover, Judge's discretion should be limited to cases where circumstances make the analysis of medical evidence complex. Discretion on the judge's part where science is clear and unambiguous should be discouraged.

It is evident that many rape victims are denied justice even when there is overwhelming proof in the form of medical evidence only because they turned hostile due to family pressure. Despite there being a complete overhaul of the laws governing the criminal justice system in India in an attempt to modernise and update the laws, the actual text and provisions of the law have largely remained the same as before. There have been negligent to no changes in the new laws in provisions surrounding sexual offences or medical examination for the same. To tackle such a serious issue and increase the conviction rate in rape cases, it is important to understand the socio-economic reasons behind a victim turning hostile, and thus a conviction

based solely on medical evidence can surely pave the way to tackle such crimes in more underprivileged regions.

The conviction rate will remain low if medical evidence is only used as corroborative evidence and if the investigative authorities remain unpunished and antiquated & prejudiced medical jurisprudence is still used by the courts to base their decision instead of relying on newer findings and laboratory studies.

Going through a medical examination following a sexual assault can be extremely excruciating for a person who is already traumatized and thus due care and caution should be taken when examining a victim of sexual assault. Subjecting them to two-finger tests is inhumane and the test has no scientific base or logic to support it. Moreover, the medical report produced through medical examination is used against the victim to victim-shame her for her past sexual history and base a claim that the allegations of rape are false only because she is habitual to intercourse. The position of medical evidence in cases of sexual assault could be altered only through continuous reforms and if both medical jurisprudence textbooks and courts remain up to date with modern scientific and medical analyses.