

Medical examination of child of sexual assault under the protection of children from sexual offences (POSCO), act 2012

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Abstract

The Government of India enacted the Prevention of Children from Sexual Assault Offences (POCSO) Act, 2012 w.e.f. 14/11/2012. The act deals with child sexual abuse cases and to provide the protection to children from the sexual offences and safeguarding the interests & their identity through child-friendly mechanisms for reporting, medical examination, evidence collection, investigation and speedy trial. The Act defines; child (any person below eighteen years), different forms of sexual abuse and prescribes punishment with a maximum term of rigorous imprisonment for life and fine. Whenever doctor suspects that child has been or is being sexually abused, he shall immediately report the matter to the concern police. The non-compliance shall be caused imprisonment up to six months, with or without fine. It's Police's responsibility to take the child to the nearest hospital (government or private). According to section-357C (Cr.PC1973) under section-23 of the criminal law amendment act, all hospitals are bound to give free of cost first-aid or medical treatment to the victim. The section-27 (POCSO Act) and section-164-A (Cr.PC) prescribe that medical examination and collection of forensic evidence shall be carried out within twenty-four hours of receiving the information regarding offence. The examination shall be conducted by a government doctor and if government doctor is not available than any other registered private medical practitioner, with the consent of child or any other person who is competent to give consent. The examination and collection of evidences shall be done in the presence of the parent or any other child's trustworthy person. A female doctor should examine, if the child is female. The section-173, sub-section (5) clause (a) of the POSCO Act bounds doctor to forward the report to the police officer and thereafter investigating officer shall forward the report to the concern magistrate.

Keywords: Child Sexual Abuse, Offence, POSCO Act, Punishment, Medical Examination.

Introduction

The Child sexual abuse define by WHO that the involvement of a child in sexual activity that he or she does not fully comprehend and is unable to give informed consent to or for which the child is not developmentally prepared or else that violate the laws or social taboos of society."⁽¹⁾ The child sexual abuse (CSA) includes different activities like "intercourse, attempted intercourse, oral-genital contact, fondling of genitals directly or indirectly through clothing, exhibitionism or showing children to adult sexual activity or pornography and child use for prostitution or pornography."⁽²⁾

According to a study of 2009, about 7.9% of males and 19.7% of females are globally faced sexual abuse anytime under eighteen years of age.⁽³⁾ The Africa shows 34.4% prevalence rate of CSA, highest in the world^(3,4) and Europe, America & Asia reported 9.2%, 10.1%, and 23.9% CSA respectively.⁽³⁾

The 19% of the world's children population lives in India and about 41% of total population of India were below 18 years according to 2011 census. About 40% children are susceptible to being homeless, trafficking, drug abuse, forced labor and crime.⁽⁸⁾ During the year 2011, India has reported world's largest number; 33,098 Child sexual abuse cases and 7,112 cases of child rape.^(5,6) A child less than 16 year is raped every 155th minute, child under 10 years for every 13th hour. At any point of time one child out of ten children are sexually

abused.⁽⁷⁾ Every second child is being exposed to one or the other form of sexual abuse and every fifth child faces critical forms sexual abuse.⁽⁶⁾ According to UNICEF report, during period from 2005 to 2013, 10% of Indian girls had experienced sexual violence in age group 10–14 years and 30% during 15–19 years of age. Overall, about 42% of Indian girls had gone through sexual violence before their teenage.⁽⁹⁾

In view of the alarming CSA cases, the Government of India promulgated a special comprehensive law; The Protection of Children from Sexual Offences (POCSO) act, 2012 w.e.f. 14th November, 2012 to deal with child sexual abuse cases and to provide the protection to children from the sexual assault offences, sexual harassment and pornography. The act prescribes the guidelines to safeguard the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through special courts. The POSCO act defines a child as any person below eighteen years. The act defines different forms of sexual abuse/assault including penetrative and non-penetrative, sexual harassment and pornography. The offences become more aggravated when the abused child is mentally ill or offence is committed by a person who is in position of trust or authority like a family member, police officer, teacher, or doctor. The act prescribes stringent punishment as per the gravity of the

offence, with a maximum term of rigorous imprisonment for life and fine. Further, the reporting of sexual offences is mandatory by a person who has knowledge that a child has been sexually abused. If he/she fails to compliance, he/she may be punished with six month imprisonment and/ or a fine.

Medical examination of child according to section 27 of the POSCO act 2012

Medical examination of a child is to be conducted as per the provisions of section 27 of the POSCO act, 2012 and section 164-A of the CrPC, 1973. A medical examination of a child shall be conducted;

1. Even before a FIR or a complaint is registered.
2. By a government doctor in a government hospital or a hospital run by a local authority. If government doctor is not available, the examination can be conducted by any other registered medical practitioner.
3. With the consent of the child or of a person competent to give consent on behalf of child.
4. In the presence of the parent of the child or any other person in whom the child reposes trust or confidence.
5. Within 24 hours from the time of receiving information about the offence.
6. In case the victim is a girl child, the medical examination shall be conducted by a female doctor.
7. For any reason, the parent of the child or other person referred to in sub-section (3) could not be present, the head of the medical institution will nominate a woman and the medical examination shall be conducted in the presence of that woman.
8. The doctor shall forward the report to the investigation officer without any delay, who shall forward it to the Magistrate.

Contents of medical examination

The doctor is the person who confirms that a child is a victim of sexual abuse because doctor have knowledge and understanding of sexual victimization and they can detect that a child has been or is being abused. Following are the contents of examination;

Consent: Firstly, doctors must take the comprehensive, informative and voluntary written consent of the child after explaining the information about the process medical examination. Secondly, they should give enough time to understand the information and to clarify their doubts. Lastly, the child and/or his or her parent/guardian should agree voluntarily and without feeling any pressure for the examination. In case when child is young below 12 years of age or incapable to give consent, then consent should be taken from the parents/guardian of child or any other person whom child repose trust and confidence.

Medical history & examination: During examination of child, record a medical history and carried out a detailed examination and prepare a medical report with

photographic/video documentation of all findings as result of offence. Thereafter, make diagnosis of sexual abuse and prescribe treatment. The doctor's role becomes more crucial to make the diagnosis of sexual abuse, when no direct allegation of sexual abuse is found but on other hand child is complaining about (i) vaginal discharge (ii) abdominal pain (iii) has no complaint but an incidental finding of enlarged hymeneal ring. These are the findings could be directly/indirectly related to the possibility of sexual abuse. Doctor should record the nature of the assault including anal, vaginal and/or oral penetration. Physician should look any injuries like bruises, burns, scars or rashes on the skin and breasts and describe the size, location, pattern and colour of the injuries. Child should also be checked for vaginal or anal pain and bleeding and/or any discharge and any pain/difficulty in defecation or urination etc. Further, look for any signs of force and/or restraints, particularly around the neck and extremities and genitals. If the child is menstruating at the time of examination then a second examination is to be done to record the injuries more visibly and clearly. In the majority of children, the findings are found normal but normal or non-specific findings does not rule out sexual abuse. During examination child should be asked questions in the his/her own language without leading questions, like what, when, where, and how. Questions. These are the important questions in medical evaluation in suspected case of child sexual abuse. Medical history should also include for allergies, immunization status and other medications. Sometime. Children report the incidence after weeks or months, in that case the physical findings/injuries to the genital or anal regions are minimal/healed or absent. These case are to be carefully examined.

Evidence collection: Carefully collect and preserve forensic evidence including clothing's specially underwear for evidentiary DNA.

Privacy: The examination should be least disturbing and without pain to the child. The examination does not conduct in place that may cause additional trauma to the child. The privacy must be insured and be sensitive to the child's feelings of embarrassment. The examination should stop if the child feels discomfort or withdraws permission to continue. If the child is mature enough to understand then doctor can ask to child that whom they want to be present during the examination.

Mandatory reporting: When doctor suspects that a child has been or is being sexually abused even in the absence of consent of child or parents, have mandatory legal obligations to report CSA cases to the appropriate authorities (the police or the relevant person within his organization). If he fails to do so, he may be liable for punishment of imprisonment of up to six months, with or without fine.

Referral & counselling: Wherever it is felt the need for counselling, for testing of HIV and other Sexually

transmitted diseases, then child may be referred to the concerned centre.

When the child resists the examination

The physical examination should be done in utmost comfort & care and should not cause any trauma to the child, so if a child at any stage refuses the genital-anal examination, then it is better to postponed the examination. The examination should not be done forcefully, this forceful examination may cause for another trauma to the child. Doctor should understand fear and anxieties of child and recognise the potential sources of unease and try to alleviate the problem. Sedation or anaesthesia is rarely used but can be given when the child refuses and unable to cooperate for examination and evidence collection and other conditions where urgent medical attention is required like bleeding or a foreign body. In case of pre-pubertal girl, speculum examination should be done under anaesthesia.

Emergency medical care of the child: Whenever an officer of the Special Juvenile Police Unit (SJPU), or the local police receives information about the offence and the police officer is satisfied that the child needs urgent medical care and protection, as early as possible, but not later than 24 hours of receiving information, he shall, take child to the nearest hospital (government or private) for emergency medical care. The section 23 of the criminal law amendment act, which inserts section 357C into the CrPC, 1973; states that all hospitals are bound to provide first-aid or medical treatment free of cost. During emergency medical care child shall provide privacy at the most. The examination shall be done in the presence of the parent or guardian or any other person in whom the child repose trust and confidence. The medical practitioner or hospital rendering emergency medical care shall not demand any documentation, legal or magisterial requisition for the treatment. The child shall be treated for injuries including genital injuries. Also child shall be treated for exposure of STDs, HIV. Wherever, requires the prophylaxis may be given. The treating doctor may also consult with the expert of infectious diseases. In case of possible pregnancy Emergency contraceptives should be given after discussion with the pubertal child and her parent. If it is needed, a referral or consultation for mental or psychological health counselling should be taken. Forensic evidences should be collected as per the section 27 of the POSCO act.

Compensation for medical expenses: According to section 33(8) of the act, special courts in addition to the punishment, are entrusted with power to grant compensation to the child for treatment or for immediate rehabilitation of any physical or mental trauma. The section 7(1) of the act mentioned that the compensation may be paid on an interim basis, to meet the immediate needs of the child at any time after the First Information Report. The section 7(3) prescribed

the criteria which are to be taken into consideration for fixing the compensation amount. These criteria include the severity of the injuries or physical harm and/or mental trauma which are suffered by the child. Further, the inclusion of the expenditure incurred or likely to be incurred on medical treatment for physical and/or mental illness and any other disability occurred due to sexual offence.

Role of medical professionals as expert witnesses

Child sexual abuse cases are often very difficult to decide and prove because most of the time CSA cases occurs in secret, usually leaves no physical evidence and often occurs for a prolonged period of time and often no other person remains as an eyewitness other than the child himself/herself. Many-times children's testimony is ineffective as many children are un-able to give conclusive testimony. Therefore, in such situations under section 45 to 51 of IEA, expert medical witness's testimony can be useful. Medical practitioner on based upon the history, statements of child and thereafter medical examination can give conclusive opinions regarding sexual abuse. The physician cannot make definitive conclusions, whether the victim was consented for any sexual activity and what degree of force was used by the abuser. Because medical experts treated or examined the child, can appropriately conclude that whether there is evidence of recent sexual contact, any recent injury and the history and medical examination are consistent with sexual abuse. The medical professionals should always prepare their report in simple/laymen's language, so that the court, advocate and parties can understand the report easily. While experts framing report, they should also incorporate their clinical experience along with written research/literature. The expert's opinion must be a reasonable degree of certainty and admissible as per the guidelines. The expert's opinions are not final and court is not bound by an expert's opinion. Expert opinion is a corroborative evidence, the court will determine that what weight should be given to other evidence which are presented before the court.

Conclusion

The POSCO act 2012 is certainly a law which was need of time and it is now very much helpful to prevent sexual assault against a child. The provisions of law provide full privacy to victim for medical examination and collection forensic evidence samples. The time frame prescribed for the medical examination and reporting is pivotal along with mandatory to reporting by a doctor wherever they encounter the cases of child sexual abuse. The effective implementation of the POSCO act would be great tool in delivering of justice to the victim and punishment to culprits.

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