

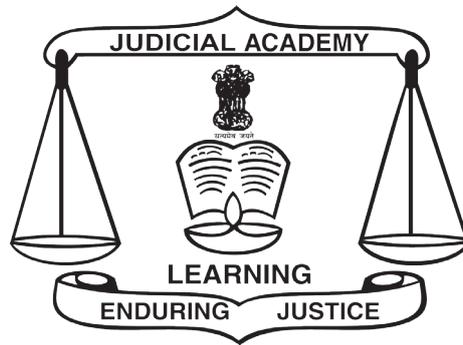


Judicial Academy Jharkhand

# READING MATERIAL

Special Courts And Procedures for trial under  
THE PROTECTION OF CHILDREN  
FROM SEXUAL OFFENCES ACT, 2012  
(POCSO ACT)





# **READING MATERIAL**

**on**

**SPECIAL COURTS AND PROCEDURES FOR TRIAL UNDER**

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**THE PROTECTION OF CHILDREN FROM  
SEXUAL OFFENCES ACT, 2012 (POCSO ACT)**

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Compiled by :

**Judicial Academy Jharkhand**



## Special Courts And Procedures for trial under THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (POCSO ACT)

### Need for POCSO Act, 2012

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) is a special enactment which provides punishment for *penetrative, touch, and non-touch* based sexual offences against children and also mandates the establishment of Special Courts and procedures for trial of offences involving children as the statute was enacted to protect children from offences arising out of sexual assault, sexual harassment and pornography and provides for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The Act is applicable to the whole of India. The POCSO Act 2012 defines a child as any **person below the age of 18 years** and provides protection to all children under the age of 18 years from sexual abuse. It also intends to protect the child through all stages of judicial process and gives paramount importance to the principle of "best interest of the child".

- The objective of enacting the POCSO Act, 2012 is to protect the children from various types of sexual offences and to establish Special Court for providing speedy disposal of cases.
- Before this Act, most of the sexual offences were covered under IPC, 1860. But IPC provisions were general in nature and it was felt that they were inadequate to deal with sexual offences against children .
- Sexual offence against a boy is also covered under POCSO Act. The Act is gender neutral as it does not distinguish between boy and girl.

### Jurisdiction of Special Courts

At the outset it will be relevant to note the circumstance in which the special courts shall have the jurisdiction in matters of sexual offences against a child. The Act emphatically lays down the provisions for age determination, cognizance of offences and the special procedure for trial in such cases. The Jurisdiction, as is stated above of Special Court constituted in terms of section 28 of the Act arises when the victim is a child, either boy or a girl of sexual offence fully defined under sections 3 to 22.

The Special Court designated under the POCSO Act will have the jurisdiction to try offences in addition to those under the POCSO Act with which the accused has been charged

under the I. P.C at the same trial as stated here in above. Where the accused has been charged under the Atrocities Act along with the POCSO Act, the matter will be tried by the Special Court under the POCSO Act and not the Special Court under the Atrocities Act.<sup>1</sup>

As per the provisions contained under section 28(3) of the POCSO Act the court will also have the jurisdiction to try offences relating to publication or transmission of sexually explicit material depicting children in any act or conduct or manner that facilitates abuse of children online under Section 67B, Information Technology Act, 2000.

The aim and object of the Act as set out in the preamble makes it a complete code with respect to all species of sexual offences with respect to a child. The incidental matter with regard to such offences has also been covered under this Act. *The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015)* is the core law relating to 'children in need of care and protection' and children in conflict with the law, providing for care, protection, development, treatment, social re-integration, and rehabilitation through a child-friendly approach. Every child who, is a victim under the POCSO Act 2015 is concerned, is undoubtedly a child in need of care and protection as defined under the JJ Act.

## **POCSO Act defines child as any person below 18 years of age. (Section 2)**

### **How to Assess Age of a Child Victim?**

Jurisdiction of Special Court turns on the age of victim child. It does not matter whether victim belongs to SC or ST category and the offence also comes under The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act,1989), if he or she is a child under 18 years of age. The power of age determination has therefore been vested in the Special Court under Section 34 of the Act.

A parent may walk in with a child to lodge a FIR alleging sexual abuse. A child victim of a brutal sexual assault may be found abandoned on the roadside by a patrolling police vehicle. After institution of FIR and receipt of the same in the court for the purpose of trial as well as for the purpose of disposal of other interlocutory applications including bail applications involving the issues relating to age of the victim the court may have to *prima facie* determine the age of the child, particularly to determine whether the victim is indeed a child under the POCSO Act, 2012, or other relevant laws. There is no doubt that when the age of the victim is to be assessed or ascertained the provisions of Section 94 of JJ Act are applicable. The provisions

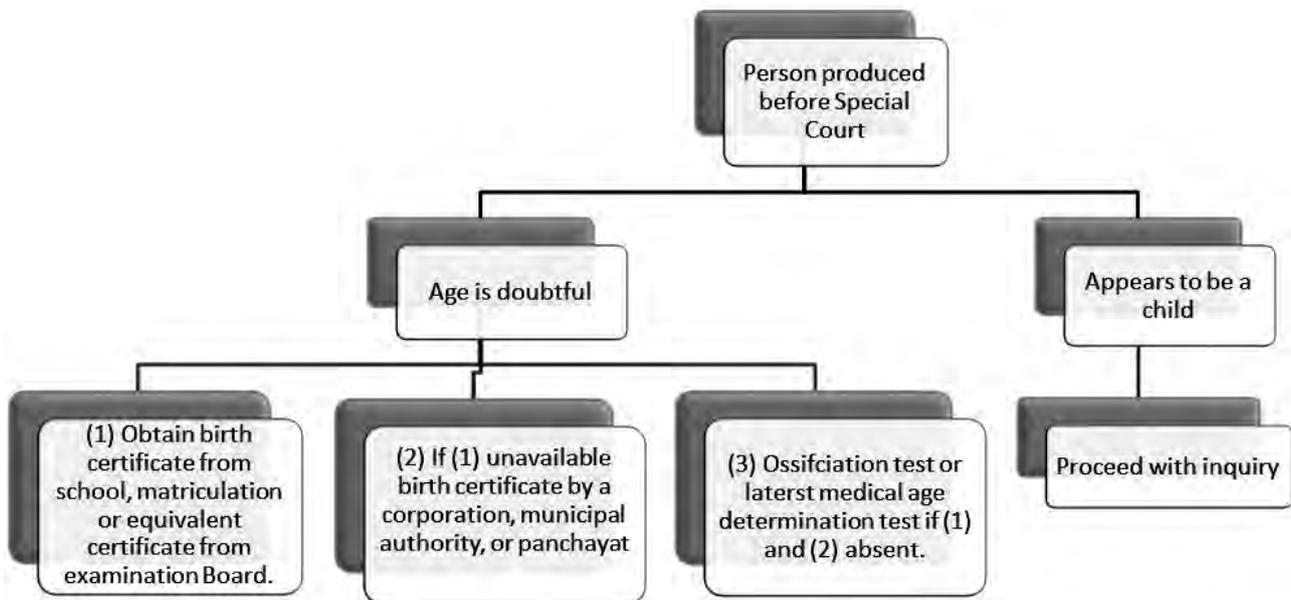
1 In Re: A Ref u/s 395(2) Cr.P.C by S.J. v. Unknown, S.B. Criminal Reference Petition No. 1/2013, Rajasthan High Court-Jodhpur Bench; Reference Case No.1 of 2017, In the matter of reference under Section 395 of Cr.P.C. made by the learned Sessions Judge, Mahilar Court, Tiruchirappalli, in his letter in D.No.238/2016 dated 17.03.2017 decided on 28.04.2017 by the Madras High Court.

of the Juvenile Justice Act become relevant and are to be read along with the provisions of the POCSO Act so far as the determination of the age of the victim too is concerned.

This is crucial because certain child-friendly procedures need to be followed and legal provisions applied if the victim is a child. For instance, if the child is a victim of penetrative sexual assault or sexual assault and is below 12 years, the offence will be aggravated under the POCSO Act and the relevant provisions will have to be mentioned in the FIR.

It may be difficult to assess the age when the child appears to be on the borderline. Erring on the side of caution, the police may treat such a person as a child and produce him/her before the CWC or the Special Court under the POCSO Act, as the case may be. This is because these bodies have the authority under the JJ Act, 2015 Section 94 and the POCSO Act Section 34(2), respectively, to determine age.

### Process for Age-Determination under Section 94, Juvenile Justice Act, 2015



The above process can be followed by any court before which the age of a person either the victim or the accused is in question. The moot question is what steps are to be followed in case age of a minor or child is to be ascertained.

- **If the person alleged to have committed a sexual offence looks clearly above 18, but the defence produces document to show he is under 18, what should be done?**

Under Section 94(1), JJ Act, 2015, appearance of a person can be relied upon only to conclude that the person is a child. It cannot be the basis to conclude that the person was an adult. According to Section 94(2), JJ Act, 2015, the birth certificate from school,

matriculation or evaluation certificates will be considered to determine if the person is a child. If these documents are not available, the birth certificate by a corporation, municipal authority, or a Local Body will be considered. If these are also unavailable, the JJB or CWC can order an ossification test or latest medical age determination test. The Special Court under the POCSO Act could also adhere to the procedure prescribed under the JJ Act, 2015 for age-determination as in *Jarnail Singh v. State of Haryana*, (2013) 7 SCC 263 the Supreme Court has held that the procedure to determine age of a child in conflict with the law can be used to determine age of a child victim.

### **Important Case Laws on Determination of Age.**

#### **1. Jarnail Singh v. State of Haryana, (AIR 2013 SC 3467)**

The Supreme Court held that Rule 12 of the erstwhile Juvenile Justice (Care and Protection of Children) Rules, 2007, which detailed the age determination process for children in conflict with the law should be applied to determine the age of a child victim. It was held that:

*“Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime.”*

#### **2. State of M.P. v. Anoop Singh (2015) 7 SCC 773 : 2015 SCC OnLine SC 603 at page 776**

*“12. We believe that the present case involves only one issue for this Court to be considered, which is regarding the determination of the age of the prosecutrix.*

*13. In the present case, the central question is whether the prosecutrix was below 16 years of age at the time of the incident? The prosecution in support of their case adduced two certificates, which were the birth certificate and the Middle School Certificate. The date of birth of the prosecutrix has been shown as 29-8-1987 in the birth certificate (Ext. P-5), while the date of birth is shown as 27-8-1987 in the Middle School Examination Certificate. There is a difference of just two days in the dates mentioned in the above mentioned exhibits. The trial court has rightly observed that the birth certificate, Ext. P-5 clearly shows that the registration regarding the birth was made on 30-10-1987 and keeping in view the fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as under aged in view of the possibility of*

the incident in question. We are of the view that the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in presuming that the documents could not be relied upon in determining the age of the prosecutrix.

14. This Court in *Mahadeo v. State of Maharashtra* [(2013) 14 SCC 637 : (2014) 4 SCC (Cri) 306] has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

“12.(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

- (a)(i) **the matriculation or equivalent certificates, if available; and in the absence whereof;**
- (ii) **the date of birth certificate from the school first attended (other than a play school); and in the absence whereof;**
- (iii) **the birth certificate given by a corporation or a municipal authority or a panchayat;**
- (b) **and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.**

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

15. This Court further held in para 12 of *Mahadeo* [(2013) 14 SCC 637 : (2014) 4 SCC (Cri) 306], as under: (SCC p. 641)

“12. ... Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for. **In**

**the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.** (emphasis supplied)

This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix. In para 13, this Court observed: (Mahadeo case [(2013) 14 SCC 637 : (2014) 4 SCC (Cri) 306], SCC p. 641)

- “13. In light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the school under Ext. 54, the date of birth of the prosecutrix has been clearly noted as 20-5-1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20-5-1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any grounds to interfere with the same.”
16. In the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3) (b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P-5 and P-6 cannot be discarded. Therefore, the trial court was correct in relying on the documents.
17. The High Court also relied on the statement of PW 11 Dr A.K. Saraf who took the x-ray of the prosecutrix and on the basis of the ossification test, came to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3) (b) and only in the absence, the medical opinion should have been sought. We find that the trial court has also dealt with this aspect of the ossification test. The trial court noted that the respondent had cited *Lakhanlal v. State of M.P.* [2004 SCC OnLine MP 16 : 2004 Cri LJ 3962], wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18½ years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the trial court rightly held that in the present case the ossification test

*is not the sole criterion for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed.*

18. *Thus, keeping in view the medical examination reports, the statements of the prosecution witnesses which inspire confidence and the certificates proving the age of the prosecutrix to be below 16 years of age on the date of the incident, we set aside the impugned judgment [Anoop Singh v. State of M.P., Criminal Appeal No. 924 of 2006, order dated 10-7-2008 (MP)] passed by the High Court and uphold the judgment and order dated 24-4-2006 passed by the Third Additional Sessions Judge, Satna in Special Case No. 123 of 2003.”*

**3. Ashwani Kumar Saxena v. State of Madhya Pradesh, AIR 2013 SC 553**

The Supreme Court held:

*“Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, JJ Board or a Committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the JJ Board or the Committee need to go for medical report for age determination.”*

**4. Shah Nawaz v. State of Uttar Pradesh, (2011) 13 SCC 751**

The Supreme Court observed that in accordance with the erstwhile JJ Model Rules, 2007 “...the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available.”

**5. Birad Mal Singhvi v. AnandPurohit, AIR 1988 SC 1796**

In this case, the Supreme Court held that the basis on which the entry pertaining to date of birth in a school register was recorded needs to be established for it to have evidentiary value. It held:

*“To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public*

*servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”*

**6. Eera through Manjula Krippendorf v. State (Govt. of NCT of Delhi) and Ors (2017)15 SCC 133**

The issue before the apex court in this case was whether Section 2(d) of the POCSO Act which defines the term “child” should be interpreted to include **the mental age of a person so that a mentally retarded person or extremely intellectually challenged person above the biological age of 18 years would come within its ambit.** A two-judge bench of the Supreme Court held that such an interpretation would not be tenable because of the purpose of the legislation and the intention of Parliament. The court held **“we would be doing violence both to the intent and the language of Parliament if we were to read the word “mental” into Section 2(1)(d) of the 2012 Act. Given the fact that it is a beneficial/ penal legislation, we as Judges can extend it only as far as Parliament intended and no further.”**

**7. Mahadeo v. State of Maharashtra, (2013) 14 SCC 637 : (2014) 4 SCC (Cri) 306 : 2013 SCC OnLine SC 662 at page 640**

11. *Though the learned counsel for the appellant attempted to find fault with the said conclusion by making reference to the evidence of PW 8, the doctor, who examined the prosecutrix and who in her evidence stated that on her examination she could state that the age of the prosecutrix could have been between 17 to 25 years, it will have to be held that the rejection of the said submission even by the trial court was perfectly in order and justified. The trial court has found that to rely upon the said version of PW 8, the doctor, scientific examination of the prosecutrix such as ossification test to ascertain the exact age should have been conducted which was not done in the present case and, therefore, merely based on the opinion of PW 8, the age of the prosecutrix could not be acted upon.*

12. *We can also in this connection make reference to a statutory provision contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12(3) of the said Rules, it is stated that:*

“12. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining—

- (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;”

Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.

13. In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20-5-1990, and this document was also proved by PW 11. Apart from that the transfer certificate as well as the admission form maintained by the Primary School, Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20-5-1990. The reliance placed upon the said evidence by the courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same.

#### **8. Jabbar v. State 2018 Scc Online Delhi 9327**

The court relied on ADHAR card for determining the age of the prosecutrix “We have perused the Aadhar Card (Ex.PW-11/H) and find that, in the said Card, the age of ‘S’ is, indeed, reflected as six years. We may also note that the veracity of the said Aadhar Card has not been questioned by the defence, at any stage of proceedings.”

#### **The sexual offences which are recognized under the POCSO Act and Punishments for those offences**

Penetrative and aggravated penetrative sexual assault, sexual and aggravated sexual assault, sexual harassment, and child harassment including using of child for

pornographic purposes are the five offences against children that are covered by this act. This act envisages punishing even for abetment or for an attempt to commit the offences defined in the act. It recognizes that the intent to commit an offence, even when unsuccessful needs to be penalized. The punishment for the attempt to commit is up to half the punishment prescribed for the commission of the offence and the various penal provisions in the act may be summarised in a tabular form for easy reference as below:-

<b>Description of offences</b>	<b>Relevant sections Under POCSO</b>	<b>Minimum sentence</b>	<b>Maximum sentence</b>
Penetrative sexual assault	Sec-4	Seven years	Imprisonment for life
Aggravated Penetrative sexual assault	Sec-6	Ten years (R/I)	Imprisonment for life
Sexual assault	Sec-8	Three years	Five years
Aggravated sexual assault	Sec-10	Five years	Seven years
Sexual harassment	Sec-12		Three years
Using Child for pornographic purposes	Sec -14(1)		5 years & up to 7 years for subsequent offence
	Sec -14(2)	Ten years	Imprisonment for life
	Sec -14(3)	Regorous Imprisonment for life	
	Sec -14(4)	Six years	Eight years
	Sec -14(5)	Eight years	Ten years
Storage of pornographic material involving child	Sec -15		Three years &/or Fine
Abatement of offence	Sec- 17	Provided for the offence	
Attempt to commit offence	Sec -18	Half of the longest term	
Failure to Report or Record Complaint	Sec-21		6 Months to 1 year &/or Fine
False Complaint or False Information	Sec - 22		6 Months to 1 year &/or Fine

**Note**

- ✓ **All the above offences shall be punished with imprisonment for either description but aggravated penetrative sexual assault shall be punished with rigorous imprisonment.**
- ✓ **Imprisonment for life is always rigorous imprisonment.**
- ✓ **All the above offences shall also be liable to fine if not otherwise provided. Section 42 and 42 A provides that if the same act is an offence under IPC the stringent punishment of the two shall be awarded as the act is though overriding but not in derogation.**
- There are five types of sexual offences against children defined under Chapter II of POCSO Act. These are:
  - Penetrative sexual assault; (Sections 3)
  - Aggravated penetrative sexual assault; (Sections 5)
  - Sexual assault; (Sections 7)
  - Aggravated sexual assault; (Sections 9), and
  - Sexual harassment (Sections 11)
- Abetment of an offence or an attempt to commit an offence is also punishable under the Act. (Section 16)
- Using a child for pornographic purposes such as representation of the sexual organ of a child, usage of a child engaged in real or stimulated sexual acts, the indecent or obscene representation of a child is an offence under POCSO Act and is punishable (Section 13).
- A Special Court is a court to be set up under section 28 of the POCSO Act for providing ***speedy trial*** and to **try the case in a child friendly atmosphere.**

JJ Act, 2015, Section 2(15) defines the term “child-friendly” to mean “any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child.” This Act provides for setting up of institutional mechanisms to adjudicate and provide services to children in a comprehensive and holistic manner. It also specifies certain offences against children.

The Preamble of JJ Act, 2015 highlights the **objectives of a ‘child-friendly’ approach and ‘best interest of the child’** principle in their care, protection, development, treatment,

and social re-integration. The Principles underlined in Section 3, JJ Act, 2015, for guiding the juvenile justice system are as follows –

- Principle of presumption of innocence – Any child, who is a ‘child in conflict with law’ shall be presumed to be innocent of any mala fide or criminal intent up to the age of eighteen years.
- Principle of dignity and worth – All children, whether a child victim or a child in conflict with law shall be treated with equal dignity by the police, without showing any bias or prejudice, towards the situation that the child is facing. For example, a child seen begging on the road junction cannot be treated as a ‘beggar’ at par with an adult. The child shall be treated as a person who was made to beg by somebody.
- Principle of participation – The police shall hear the child and pay due respect to the wishes of the child – such as, when the child wants the police interview to discontinue, or the child expresses a desire to go home instead of to a Child Care Institution. Having heard the child’s views, the police should take them consideration in the totality of the situation and take decisions accordingly, with due regard to the age and maturity of the child. For example, a trafficked child or a child subjected to sexual abuse may change his statement a few times, depending on its capacity to recall the events. This is natural and cannot be construed as concoction or ‘padding’ as one would attribute to an adult victim.
- Principle of best interest – “All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.” The child, and the child alone should be the focal point of all decision making, vis-à-vis the other adults who might be affected by those decisions. For example, the police cannot insist on the institutionalization of a child victim of a sexual offence only because her family members may pressurize her to turn hostile. This is because separating her from her family when she has undergone abuse and needs their support may not be in her best interest. Separation, may however, be considered by the Child Welfare Committee (CWC) where the perpetrator is a family member.
- Principle of family responsibility – The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be. For instance, if a child begging on the street is living with the parents/relatives who also work on the street, it may probably not be prudent to separate and immediately produce the child before the CWC. Action in this case could also involve

an NGO who could counsel the family and take the child off the street from begging and into a school, whilst continuing to live with the family.

- Principle of safety – “All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.” Children are sometimes re-victimised in the child care institutions by the staff, or by other senior children. The police should ensure the child’s safety, within this care and protection system. It would also entail ensuring their safety and protection from the accused during an on-going investigation or trial.
- Positive measures – “All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.” Through community policing, by mapping the vulnerable populations and communities within cities, towns and villages, the police can prevent the occurrences of crimes against children and also of children committing offences.
- Principle of non-stigmatizing semantics – “Adversarial or accusatory words are not to be used in the processes pertaining to a child.” During interviewing a child victim, especially in cases of sexual offences, the police should not use language that attributes blame to the child for the crime. Similarly, when a child is alleged to have committed an offence, the police should not use language which, labels the child as a criminal. For example, a child rescued from a brothel can never be called a “child prostitute” as she was never one, whereas the fact is that she has been prostituted and victimized.
- Principle of non-waiver of rights – The child should get the benefit of all provisions of the JJ Act, and other fundamental rights as laid down in the Constitution. No authority, which is statutorily bound to take a decision for the child, can claim that these procedures need not be undertaken or be deemed to have been waived either by the child/ or the family/ guardians.
- Principle of equality and non-discrimination – There shall be no discrimination by the police against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child. For instance, the police should not automatically assume that a child from a rich family would be more intelligent and can participate in the justice process, but a child who lives with the parents on the street, need not be asked for his/ her opinion with respect to decisions affecting the child.

- Principle of right to privacy and confidentiality – The police should for instance, ensure that the child’s identity is never disclosed to the media, by the media or by anyone so as to identify the child – either as a victim or as a child in conflict with the law. The police should also maintain the confidentiality of their records with respect to processes under the JJ Act, for every child.
- Principle of institutionalization as a measure of last resort – Although it is for the CWC or the Juvenile Justice Board (JJB) to order for institutionalization of the child brought before them, the police may also remember that taking the child away from the family and placing it in an institution may not always be the best course of action.
- Principle of repatriation and restoration – Again, this is a point to be decided by the CWC or the JJB respectively, and is the ultimate responsibility of the Child Care Institution where the child is staying, but the police should be aware of this principle that the child has a right to be re-united with his/ her family at the earliest, if it is in the best interest of the child.
- Principle of fresh start – All past records of any child under the Juvenile Justice system should be erased except in special circumstances, as is provided for under the law. The police should not disclose records of children for character certificates in cases that are closed or disposed of.
- Principle of diversion – Measures for dealing with children in conflict with law without resorting to judicial proceedings are to be promoted by the JJB, unless it is in the best interest of the child or the society as a whole.
- Principles of natural justice – Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act. The Juvenile Justice Model Rules of 2016 provides that non-compliance with the Act and the Rules by any officer/ institution, statutory body, etc., can invite action by the State Government against such officer/institution, statutory body etc., after due inquiry and simultaneously make alternative arrangements for discharge of functions for effective implementation of the Act (Rule 93).

### **Norms of a Child-friendly Trial**

A parent or guardian should accompany the child at all times. In case they are accused of the offence against the child, another suitable person chosen by the child, or a representative

of a fit institution as defined in the JJ Act, 2015, or a Support Person appointed by a CWC or a court should accompany the child.

Where the parents or guardians or someone living in the same shared house is the perpetrator or are involved in the commission of an offence or the child is living at a place where there is a risk of further trauma, the child should be produced before the CWC and the CWC may direct the child to be taken out of their custody or care, or out of such situation. In the context of a sexual offence against a child, the decision to take the child out of the custody of a parent, guardian, or childcare institution can be taken only by the Child Welfare Committee as per the provisions of Rule 4(3) and 4(4) of POCSO Rules. Courts before whom such children are produced should direct the police to present the child before the jurisdictional CWC.

Age determination must be conducted as per the procedures laid out in Section 94, JJ Act, 2015.

- The language used in the court must be familiar to the child and where needed translators, interpreters, and special educators must be made available.
- The court must ensure beforehand that the child is capable of giving a voluntary statement.
- No statement of the child should be disregarded as evidence in the trial solely on the basis of the age of the child.
- Images or statements admissible in the interview of the child should not be detrimental to the mental or physical well-being of the child.
- Length and questions admissible at the interview should not be taxing and must be suitable to the attention span of the child.
- In case of young children, or otherwise incapacitated child, alternative methods of interaction and evidence collection that is less intimidating to be adopted.
- The Court should ensure that at no stage during trial, the child comes face to face with the accused.
- Special permission from school and arrangement for remedial classes for days lost to be ensured by the school authorities.
- Identity of the child should be protected from the media.

## Roles of Special Court under POCSO Act during the trial

### Child-friendly atmosphere

- Special Courts should create a child-friendly atmosphere by allowing a family member, guardian, friend, or relative whom the child trusts or has confidence in to be present. (Section 33(4), POCSO Act).
- They should ensure that the child is not repeatedly called to testify in court. (Section 33(5), POCSO Act)
- They should ensure that identity of the child is not disclosed at any time during investigation or trial unless the disclosure is in the interest of the child. Reasons should be recorded in writing if disclosure is allowed. (Section 33(7), POCSO Act)
- Special Courts should determine the age of the child when the question arises before the court and adhere to the provisions of the JJ Act, 2015 on age-determination. (Section 34(2), POCSO Act)
- They should ensure that the child is not exposed to the accused at the time of recording the evidence and that the accused is able to hear the statement of the child and communicate with his advocate. Video conferencing, single visibility mirrors, curtains, or any other device should be used to facilitate this. (Section 36, POCSO Act)
- They should conduct the trial in camera and in the presence of parents of the child or any other person in whom the child has trust or confidence. (Section 37, POCSO Act)
- Special Courts should examine the child in a place other than the courtroom if the situation requires it. (Section 37, POCSO Act)
- **The Special Court shall complete the trial within a period of one year from the date of taking cognizance of the offence (Section 35).**

The apex court has issued guidelines in the case of **Alakh Alok Srivastava Vs Union of India and Others** reported in **2018 SCC Online SC 478** in following wordings:-

*“24. It is submitted by Mr. Srivastava that in both the States, the cases are pending at the evidence stage beyond one year. We are absolutely conscious that Section 35(2) of the Act says “as far as possible”. Be that as it may, regard being had to the spirit of the Act, we think it appropriate to issue the following directions:—*

- (i) *The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts and the presiding officers of the said courts are sensitized in the matters of child protection and psychological response.*
- (ii) *The Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the POCSO Act.*
- (iii) *The instructions should be issued to the Special Courts to fast track the cases by not granting unnecessary adjournments and following the procedure laid down in the POCSO Act and thus complete the trial in a time-bound manner or within a specific time frame under the Act.*
- (iv) *The Chief Justices of the High Courts are requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three Judges are not available the Chief Justices of the said courts shall constitute one Judge Committee.*
- (v) *The Director General of Police or the officer of equivalent rank of the States shall constitute a Special Task Force which shall ensure that the investigation is properly conducted and witnesses are produced on the dates fixed before the trial courts.*
- (vi) *Adequate steps shall be taken by the High Courts to provide child friendly atmosphere in the Special Courts keeping in view the provisions of the POCSO Act so that the spirit of the Act is observed.”*

### **Procedures of the Special Court**

Under the POCSO Act Section 28(1), the State Government in consultation with the Chief Justice of the High Court, should designate a Sessions Court to be a Special Court in every district to try offences under the Act. As per the provisions contained in POCSO Act, Section 28(2) the Special Court can try offences under the POCSO Act and offences with which the accused is charged under the I.P.C. at the same trial.

### **Cognizance and Disposal**

Special Courts can take cognizance directly without committal.(Section 33(1), POCSO Act). The police should thus submit the charge-sheet to the Special Court under the POCSO Act.

They **must record the evidence of the child within 30 days of taking cognizance** and record reasons for the delay.(Section 35(1), POCSO Act)

They **must complete the trial within one year of taking cognizance**, as far as possible. (Section 35(2), POCSO Act)

### **How to Ascertain if a Child Witness Understands the Difference between Truth and Lie**

In **State v. Sujeet Kumar**<sup>2</sup>, the Delhi High Court was critical of the inappropriate questions posed by a Magistrate to assess the competence of a two-and-a-half year old child victim of a brutal rape before recording her statement under Section 164, Cr. P.C. It found the questions to the child about the school she went to and the class she studied in highly inappropriate as the child lived in a slum and did not attend any school. The Magistrate then asked her if she understood the term “truth” and the difference between truth and lie. The High Court observed: “How could a two and half year old child explain the meaning of word “truth” and state difference between truth and lie. It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between truth and lie. What to talk of a two and half year old child.”

The Delhi High Court cited an article “Child Witness Competency: When Should the Issue be Raised” and highlighted the key points as follows–

- Asking, "What does it mean to tell the truth?" and "What does it mean to tell a lie?" are more developmentally appropriate for young children than asking, "What is the difference between the truth and a lie?"
- Very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. Situationally relevant multiple-choice questions can be posed to assess the child’s competency.
- Examples of such questions are:
  - \* If I told your mom that you just yelled at me, would that be the truth or a lie?
  - \* If you told your mom that I hit you, would that be the truth or a lie?
  - \* If you told your teacher that something bad happened to you, but it really didn't happen-you were making it up-would you be telling the truth or a lie?
- Competent children should be able to consistently provide correct answers to these multiple-choice questions.

### **Presumptions under the POCSO Act**

The POCSO Act provides for two presumptions – **presumption as to certain offences**

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<sup>2</sup> CRL.A. 1190/2014 decided on 13.10.2015 by the Delhi High Court. 2014 SCC Online Del 1952

**(Section 29) and presumption of culpable mental state (Section 30).** A person prosecuted for committing, abetting or attempting to commit penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, or aggravated sexual assault will be presumed to have committed the offence unless the contrary is proved. If an offence requires presence of a culpable mental state, the Special Court should presume its existence and the burden is on the defence to establish that the accused did not have the mental state. The phrase “culpable mental state” includes “intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact” as per the Explanation to Section 30, POCSO Act. The offences of sexual assault, aggravated sexual assault, and sexual harassment require the presence of sexual intent. The presumption of culpable mental state can be applied to these offences.

### **Questioning Children**

- Special Courts should ensure that the Special Public Prosecutor and defence lawyer do not question the child directly. The questions to be put to the child have to be communicated to the Special Court, who should put the questions to the child. (Section 33(2), POCSO Act)
- They should permit frequent breaks to the child during trial, if necessary. (Section 33(3), POCSO Act)
- They should not allow aggressive questioning or character assassination of the child and ensure that dignity is maintained (Section 33(6), POCSO Act)
- Special Courts should take the assistance, if necessary, of a qualified and experienced translator or interpreter on payment of prescribed fees when recording the statement of a child. (Section 38(1), POCSO Act).
- They should take the assistance, if necessary, of a qualified and experienced special educator or person familiar with the manner of communication of the child or an expert, when recording the statement of a child with mental or physical disability. (Section 38(2), POCSO Act)

### **Sexual offences which may relate to children under the IPC along with the offence under the POCSO Act are:**

- **Outraging the modesty of a woman**, which entails the assault or use of criminal force with the intention to outrage or knowing it to be likely that her modesty will be outraged. (Section 354)

- **Sexual harassment**, which includes unwelcome physical contact and advances and explicit sexual overtures, demand or request for sexual favours, showing pornography against will of a woman, or making sexually coloured remarks by a man. (Section 354-A)
- **Using criminal force with intent to disrobe** a woman or compel her to be naked and the abetment of such an act. (Section 354-B)
- **Voyeurism** which criminalizes the following acts by a man – watching, capturing, or disseminating the image of a woman engaging in a private act where her genitals, posterior or breasts are exposed or covered only in underwear or where the victim is using a lavatory or doing a sexual act that is not ordinarily done in public, and where she would usually expect not being observed. (Section 354-C)
- **Stalking** which entails following, contacting, or attempting to contact a woman by a man to foster personal interaction repeatedly despite a clear indication of disinterest by the woman or monitoring the use of internet, email or any other form of electronic communication. (Section 354-D)
- **Kidnapping, abducting or inducing woman to compel her marriage** against her will, or so that she may be forced or seduced to illicit intercourse, or knowing it is likely that she will be forced or seduced to illicit intercourse. (Section 366)
- **Procuration of a minor girl** which entails inducing a girl below 18 years to go from any place or do any act with the intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. (Section 366-A)
- **Importation of a girl below 21 years from a foreign country or from Jammu & Kashmir** with the intent that she may be or knowing it to be likely that she will be forced or seduced to illicit intercourse with another person. (Section 366-B)
- **Trafficking** which entails recruitment, transportation, harbouring, transferring, or receiving a person for the purpose of exploitation by using threats, force or any form of coercion, abduction, practicing fraud or deception, abuse of power, or inducement including the giving or receiving of payments or benefits to achieve consent of the person having control over the person trafficked. (Section 370) This provision is gender neutral vis-à-vis the offender and the victim. For details, please refer to Chapter 2.
- **Rape** by a man of woman below 18 years, with or without her consent. (Section 375) The Criminal Law (Amendment) Act, 2013 has expanded the concept of penetration and rape now includes penetration of the penis, to any extent, into the vagina, mouth, urethra or anus of woman; inserting, to any extent, any object or body part other than

the penis, into the vagina, urethra or anus of a woman; manipulating any body part of woman so as to cause penetration into the vagina, urethra, anus, or any part of the body of a woman; application of the mouth to the vagina, anus or urethra of the woman. Making the woman do any of the above acts with the man or any other person will fall under the ambit of rape if any of the seven descriptions under Section 375, IPC are met. In the context of the girl child, the sixth description which states “With or without her consent, when she is under eighteen years of age” will apply.

- **Causing death or resulting in persistent vegetative state** of a woman during rape or aggravated rape. (Section 376-A)
- **Sexual intercourse by husband upon his wife during separation** without her consent. (Section 376-B)
- **Sexual intercourse by a person in authority or fiduciary relationship**, public servant, or superintendent of a custodial institution, or management or staff of a hospital who abuses the authority to induce or seduce any woman under his custody or charge or present in the premises to have sexual intercourse with him. (Section 376-C)
- **Gang rape** i.e., rape by one or more persons constituting a group or acting in furtherance of a common intention. (Section 376-D).

The following grounds constitute aggravated rape under the IPC:

- Rape on a woman below the age of 16 years;IPC, Section 376(2)(i) .
- Rape on a woman suffering from mental or physical disability;IPC, Section 376(2)(l).
- Rape by a relative, guardian, teacher, or person in a position of trust or authority;IPC, Section 376(2)(f).
- Rape by a person on the management or staff of a jail, remand home, place of custody, women’s or children’s institution on any inmate within that institution; IPC, Section 376(2)(d).
- Rape by a person on the management or staff of hospital on a woman in the hospital; IPC, Section 376(2)(e).
- Rape by a person in a position of control or dominance over the woman; IPC, Section 376(2)(k).
- Rape by a police officer within the limits of the police station, premises of any station house, or on a woman in his or his subordinate officer’s custody; IPC, Section 376(2)(a)

by a public servant on a woman in his or his subordinate officer's custody IPC, Section 376(2)(b); by a member of the armed forces in the area in which he is deployed IPC, Section 376(2)(c);

- Rape committed during communal or sectarian violence IPC, Section 376(2)(g);
- Rape committed on a woman knowing her to be pregnant IPC, Section 376(2)(h);
- Causing grievous bodily harm, maiming, disfiguring or endangering the life of a woman IPC, Section 376(2)(m);
- Repeatedly raping the same woman IPC, Section 376(2)(n);

### **Facilitation of Recording of Statement under Section 164, Cr.P.C., by the Magistrate**

The POCSO Act does not mandate that a statement under Section 164, Cr.P.C. be recorded in every case. However, pursuant to the Criminal Law (Amendment) Act, 2013, Section 164(5-A)(a), the statement of victim against whom offences has been committed under Sections 354, 354-A, 354-B, 354-C, 354-D, 376(1), 376(2), 376-A, 376-B, 376-C, 376-D, 376-E or 509 of the IPC **shall** be recorded by a Judicial Magistrate. As per the provisions of Section 164(5-A)(a) Cr.P.C., The statement should be recorded as soon as the commission is brought to the notice of the police. In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/preferably Judicial Magistrate for recording the 164 statement and preferably to a Lady Magistrate (*State of Karnataka v. Shivanna, (2014) 8 SCC 913.*)

- **Child victim to be brought immediately:** In case of sexual offences under the IPC, the IO should bring the child victim to the Magistrate immediately. [Section 164(5-A)(a)] In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/preferably Judicial Magistrate for recording the 164 statement.
- **Reasons for delay:** The reasons for delay in bringing the victim of rape within 24 hours should be recorded in the case diary and the copy of the same should be handed to the Magistrate. For instance, if the child is traumatized or in no state to be physically taken for the 164 statement, this reason should be cited to the Magistrate to explain the delay.
- **Medical examination report:** The IO should also hand over to the Magistrate a copy of the medical examination report.
- **Unavailability of lady Magistrate:** The POCSO Act does not mandate that the child should be taken to a lady Magistrate. The Supreme Court has also indicated that this is a preference and not a mandatory requirement. The priority should be on ensuring that the statement is recorded at the earliest. If a lady Magistrate is unavailable, the IO

should not delay matters and take the child to any Metropolitan or preferably Judicial Magistrate.

## **SOME IMPORTANT TERMINOLOGIES**

Some important terminologies that will help us understand Sexual Offences against children are:-

### **Incest:**

The term incest means a forbidden sexual relationship between close relatives in a family, e.g. between brother and sister or parent and child. As per Section 5 (n) of the POCSO Act, whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child, is punishable for aggravated penetrative sexual assault with rigorous imprisonment, which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine (Section 6)

“**Shared household**” means a household where the person charged with the offence lives or has lived at any time in a domestic relationship with the child [Section 2 (k)]. However, cases involving sexual offences against children by close family members are difficult and tricky to handle. The following are as some of the factors that need considering when dealing with cases of incest:-

The accused may be the sole breadwinner of the household. In such cases, incarcerating the person may put the family in financial stress and leave them vulnerable. Families are therefore, reluctant to report such matters to the police. Other family members tend to disbelieve the child and refuse to co-operate with the case. They may side with the accused and put pressure on the child to retract his/ her story or become uncooperative in the case. The child has extremely conflicting feelings about the abuser. This results in delayed reporting of cases. It has also been observed that the child’s home is no longer a secure space for them.

### **Commercial Sexual Exploitation of Children (CSEC):**

Commercial sexual exploitation of children is defined as the “sexual abuse by the adult along with remuneration in cash or kind to the child or a third person or persons”. It is a process through which the child is treated as a sexual object and as a commercial object. The main forms of CSEC are child prostitution (including child sex tourism), child sexual abuse images and trafficking of children for sexual purposes.

**Child Sex Tourism:**

Child sex tourism is the sexual exploitation of children by a person or persons who travel from their home district or home country in order to have sexual contact with children. Child sex tourists would be domestic travellers or they can be international tourists. It often involves the use of accommodation, transportation and other tourism-related services that facilitate contact with children and enable the perpetrator to remain fairly inconspicuous in the surrounding population and environment. Child sex tourism involves the exchange of cash, clothes, food or some other form of consideration to a child or to a third party for sexual contact. Child Sex Tourists may be married or single, male or female (though the majority are male), foreign or local, wealthy or budget tourists or from a high socio-economic or even disadvantaged background. Although they have no distinguishing physical features, patterns of social behaviour or particular mannerisms, it is possible to separate them into three distinct categories:

**Situational Child Sex Tourist:** The situational child sex offender abuses children by way of experimentation or through the anonymity and impunity afforded by virtue of being a tourist.

**Preferential Child Sex Tourist:** The preferential child sex tourist displays an active sexual preference for children, mostly pubescent and adolescent.

**Paedophile:** The paedophile manifests an exclusive sexual inclination for pre-pubescent children.

Child Sexual Abuse Imagery is any visual depiction of sexually explicit conduct involving a minor (child under 18 years of age). Visual depictions include photographs, videos, digital or computer generated image, production, distribution, possession and even seeking Child Sexual Images are illegal. (Section 67 (B)((b) of the Information Technology Act, 2000 and Sections 13/14 of the POCSIO Act, 2012)

**Child Sexual Abuse Imagery and Online Sexual Abuse:**

Online abuse is any type of abuse that happens on the web, whether through social networks, playing online games or using mobile phones. Children and young people may experience cyber bullying, grooming, sexual abuse, sexual exploitation or emotional abuse. Children can be at risk of online abuse from people they know, as well as from strangers. Online abuse may be part of abuse that is taking place in the real world (for example bullying or grooming) or, it may be that the abuse only happens online (for example persuading children to take part in sexual activity online). Children may feel like there is no escape from online abuse – abusers can contact them at any time of the day or night, the abuse can come into safe

places like their bedrooms, and images and videos can be stored and shared with other people.

### **Compensation**

Special Courts should direct payment of compensation (interim and final) for physical or mental trauma caused to the child or for the child's immediate rehabilitation. They should determine quantum and direct the State Government to pay the compensation within 30 days. (Section 33(8), POCSO Act read with Rule 7, POCSO Rules)

In order for the Special Court to order for interim or final compensation, it is not pre-requisite for the child to file an application. The Special Court may order on his/her own accord where it is found to be appropriate.

A record of conviction is not mandatory for the provision of compensation. Where the Special Court is satisfied that a child has been a victim of sexual abuse, the judge may direct compensation to be paid in cases where the accused has been acquitted or even in cases where the accused has not identified or traced POCSO Rules, Rule 7(2) Interim compensation can be paid at any stage and is not linked to the child's testimony.

The compensation ordered must be disbursed by the State Government within 30 days from the order POCSO Rules, Rule 7(4) and 7(5) The State Government may pay the sum from the *Victims Compensation Fund* or any other scheme or fund which has been established under section 357A of the Code of Criminal Procedure.

The quantum of compensation is not specified in the POCSO Act and it is based on the discretion of the judge deciding the matter. The POCSO Rules provides that while deciding the quantum of compensation, the judge must take into consideration the type, nature and severity of abuse, the extent of physical and mental harm caused to the child, expenditure incurred for medical treatment for physical and/or mental health, financial condition of the child, etc. POCSO Rules, Rule 7(3)

### **Support Persons**

They should recognize the support persons appointed by the CWC or the family directly and allow them to be present during the child's evidence. They should also allow them to also convey the child's questions and fears about the evidence recording process. (Rule 4(8), POCSO Rules)

### **Legal Counsel on Behalf of Victim**

Special Courts should recognize the right of the child to take assistance of a legal practitioner. (Section 40, POCSO Act)

## Significant Court Rulings

### 1. On institution of F.I.R

#### **Lalita Kumari v. Govt. of U.P. and Ors., AIR 2014 SC 187**

The following directions were laid down by a Constitutional Bench of the Supreme Court:

- (i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
- (ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
- (iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
- (iv) The police officer cannot avoid its duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
- (v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
- (vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:
  - (a) Matrimonial disputes/family disputes
  - (b) Commercial offences
  - (c) Medical negligence cases
  - (d) Corruption cases

- (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

- (vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.
- (viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

## 2. **Role of the Police in investigation and facilitating statement under Section 164, Cr.P.C**

***State of Karnataka v. Shivanna @ Tarkari Shivanna (2014) 8 SCC 913 and (2014) 8 SCC 916*** : Fast track procedures and **Trial By Fast Track Courts Scheme** - In cases of rape, IO should take the victim immediately, as far as possible, to the nearest lady Metropolitan/preferably lady Judicial Magistrate for recording the statement under Section 164, Cr.P.C. The IO should record the date and time at which he learn about the commission of rape and the date and time at which the victim was taken to the Magistrate. Reasons for delay exceeding 24 hours should be recorded in the case diary and a copy should be handed to the Magistrate along with a copy of the medical examination report. The directions of the Apex may be reproduced as follows :-

10. On considering the same, we have accepted the suggestion offered by the learned counsel who appeared before us and hence exercising powers under Article 142 of the Constitution, we are pleased to issue interim directions in the form of mandamus to all the Police Stations-in-Charge in the entire country to follow the directions of this Court which are as follows:

“10.1. Upon receipt of information relating to the commission of offence of rape, the investigating officer shall make immediate steps to take the victim to

any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 CrPC. A copy of the statement under Section 164 CrPC should be handed over to the investigating officer immediately with a specific direction that the contents of such statement under Section 164 CrPC should not be disclosed to any person till charge-sheet/report under Section 173 CrPC is filed.

- 10.2. The investigating officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.
- 10.3. The investigating officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.
- 10.4. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the investigating officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.
- 10.5. Medical examination of the victim: Section 164-A CrPC inserted by Act 25 of 2005 in CrPC imposes an obligation on the part of investigating officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 CrPC.”

### 3. Jurisdiction of Special Courts

**Kum.ShraddhaMeghshyamVelhal v. State of Maharashtra, (Criminal Application No. 354 Of 2013 in The High Court Of Judicature At Bombay criminal Appellate Jurisdiction dated;3 July, 2013 coram: Mrs. RoshanDalvi, J.):** *In cases under the POCSO Act, police officers should produce the accused for remand before the Children’s Court and not before the Magistrates Court.*

**Prasad v. State of Kerala, (2013) SCC Online Ker 10374 :** *The POCSO Act does not prevent Magistrates from ordering first remand of an accused under the Act, since Section 167, Cr.P.C. allows it. However, subsequent remand orders or bail applications should be made only before the Special Court under the POCSO Act.*

**4. Nature of Offences under the POCSO Act**

**Santosh Kumar Mandal v. State, Bail Appln No. 1763/2016, Delhi High Court (28 September 2016) (2016) SCC Onliner Del 5378 :** *“Considering the gravity of the offences and the special mechanism provided under POCSO Act to hold that the offences are bailable though cognizable and would fall in category 3 would be rendering an interpretation to the classification provided in second part of First Schedule of Cr.P.C contrary to the object of the special enactment. Thus offences punishable under POCSO Act including Section 12 are cognizable and non-bailable offences.”*

**5. Rape is non-compoundable**

**Shimbhu v.State of Haryana, 2014 (13) SCC 318 :** *“Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle.”*

**6. Use of Two-finger test unconstitutional**

**Lillu v. State of Haryana, AIR 2013 SC 1784:****In this case, the Supreme Court held that the “two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity.”**

**7. Credibility of testimony of rape victims and child witnesses**

**State of Punjab v. Gurmit Singh, (1996) 2 SCC 384:** *“Corroborative evidence is not an imperative component of judicial credence in every case of rape. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons' lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.”*

**Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341:** *“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”*

**Ranjit Hazarika v. State of Assam, (1998) 8 SCC 635:** *“The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking*

for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.”

**Balaji Sarjerao Kamble v. State of Maharashtra, Criminal Appeal No. 28 of 2016 decided by the Bombay High Court on 29.08.17. 2017 SCC Online Bombay 7991.**

Bearing in mind the age of the child victim who was about 6 to 8 years at the time of the alleged rape, the Bombay High Court held that “merely because date of the incident is not stated by the victim, her evidence cannot be doubted. The [victim] is not expected to have such chronometric sense at the tender age.”

## 8. Delay in lodging FIR

**State of Himachal Pradesh v. Shree Kant Shekari, AIR 2004 SC 4404**

Setting aside the acquittal in a case under Sections 376 and 506 of the IPC on grounds of delay in lodging the FIR, the Supreme Court held: “Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case.”

## 9. Test-identification

In **Rakesh Kumar v. State 2014 SCC OnLine Del 3387** the Delhi High Court laid down the following guidelines for test identification parade (TIP) where children below 12 years of age had to identify an accused:

- a) In every case where witness is a child below the age of 12 years TIP proceedings shall be held in one of the court rooms attached with the main Tihar Jail so that the child does not enter the main Jail Complex to reach the Test Identification Parade room.
- b) Installation of semi reflective screen or any other screen or mechanism in a room where TIP proceedings will be conducted so that the child witness is not confronted face to face with the criminals participating in the TIP proceedings.
- c) A person accused of the offence and the others who may be participating in the TIP will be explained the procedure and the manner of TIP proceedings to be held in a case of child witness.
- d) No officer below the rank of Deputy Superintendent of Jail shall accompany the child witness at the time of TIP proceedings and endeavour shall also be made by the Jail Superintendent that, so far as possible only female officer is deployed wherever witness happens to be a girl child for the purposes of identifying the accused person.
- e) No police official shall be seen in a uniform right from the stage when the child enters the TIP Room and till he/she leaves the premises after the completion of TIP proceedings. The child witness shall be entitled to accompany his parents/guardians or any of his close relatives so as to make the child comfortable before participating for identifying the accused in the Test Identification Parade.
- f) Endeavour shall be made by Director General (Prisons)/Jail Superintendent that a lady officer who is more humane, sensitive and compassionate is given duty to accompany the child witness.
- g) The child friendly atmosphere will be created in a room where the child is brought first and the stay of the child will be made most comfortable so that the child finds the place to be attractive and conducive to his/her requirements.
- h) Necessary arrangements for light refreshment to the general liking of children below the age of 12 years shall also remain in place to keep the mood of the child upbeat.

**10. Cross-examination of a child with disability**

**Chander Singh v. State, CrI. (2016) SCC Online Del. 3574 ; A. 751/2014 decided by the Delhi High Court on 03.06.2016**

In this case, a 12-year-old deaf girl had been sexually assaulted by the accused. Her statement had been recorded through gestures and drawings, which were interpreted with the assistance of a teacher working in a primary school for deaf children run by the Delhi Government. The defence argued that her testimony could not be read as evidence because she could not be cross-examined. The Delhi High Court held, “A party cross-examining a deaf and dumb witness like any other witness is required to act within the bounds of law and cannot be permitted to cross-examine the witness all and sundry on irrelevant questions.” It further held that, “When a deaf and dumb witness is under cross-examination, the Court is required to take due care of the fact that vocabulary of such a person is limited as he or she speaks through sign language and it may not be possible for that witness to answer, or in detail explain every answer by sign language. This disability of a limited vocabulary of sign language does not affect either the competence or the credibility of such witness. The Court is required to exercise control over the cross-examination keeping in view the ability of the witness to answer the questions.” The Delhi High Court concluded that the drawing of the victim in response to the cross-examination was sufficient compliance of the right to cross-examination of the accused and upheld the appellant’s conviction.

**11. Publication of name of the victim**

**Section 228-A** of the IPC also prohibits the publishing or printing of the name or any information which will disclose the identity of any person against whom an offence of rape as provided for in section 376, 376A, 376B, 376C or 376D of the IPC has been committed or alleged to have been committed.

Where an offence has been committed under section 23 of the POCSO Act described above, the publisher or owner of the media, studio or photographic facility will be held jointly and severally liable for the act/omission of his employee.

**Dos and Don’ts**

- The police must take great care to ensure that the victim is not re-victimised by sensitive handling of information and ensuring that private information of the child is not disclosed through the course of the investigation.
- The police should not disclose information about the case involving a child for the purpose of character certificate if the case has been closed or disposed.
- All relevant charges that may be applicable under section 228-A of the IPC or the POCSO Act must be added to the charge-sheet.

Section 228-A of the IPC also prohibits the publishing or printing of the name or any information which will disclose the identity of any person against whom an offence of rape as provided for in section 376, 376A, 376B, 376C or 376D of the IPC has been committed or alleged to have been committed.

Where an offence has been committed under section 23 of the POCSO Act described above, the publisher or owner of the media, studio or photographic facility will be held jointly and severally liable for the act/omission of his employee.

Supreme court in the recent case of *Nipun Saxena v. Union of India*, (2019) 2 SCC 703: 2018 SCC OnLine SC 2772 at page 723 has after discussing the matter at length in following terms

- “9. Sub-section (1) of Section 228-A, provides that any person who makes known the name and identity of a person who is an alleged victim of an offence falling under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E commits a criminal offence and shall be punishable for a term which may extend to two years.
10. What is however, permitted under sub-section (2) of Section 228-A IPC is making known the identity of the victim by printing or publication under certain circumstances described therein. Any person, who publishes any matter in relation to the proceedings before a court with respect to such an offence, without the permission of the court, commits an offence. The Explanation however provides that printing or publication of the judgment of the High Courts or the Supreme Court will not amount to any offence within the meaning of IPC.
11. Neither IPC nor CrPC define the phrase “identity of any person”. Section 228-A IPC clearly prohibits the printing or publishing “the name or any matter which may make known the identity of the person”. It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. We are clearly of the view that the phrase “matter which may make known the identity of the person” does not solely mean that only the name of the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law-makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future.

12. A victim of rape will face hostile discrimination and social ostracisation in society. Such victim will find it difficult to get a job, will find it difficult to get married and will also find it difficult to get integrated in society like a normal human being. Our criminal jurisprudence does not provide for an adequate witness protection programme and, therefore, the need is much greater to protect the victim and hide her identity. In this regard, we may make reference to some ways and means where the identity is disclosed without naming the victim. In one case, which made the headlines recently, though the name of the victim was not given, it was stated that she had topped the State Board Examination and the name of the State was given. It would not require rocket science to find out and establish her identity. In another instance, footage is shown on the electronic media where the face of the victim is blurred but the faces of her relatives, her neighbours, the name of the village, etc. is clearly visible. This also amounts to disclosing the identity of the victim. We, therefore, hold that no person can print or publish the name of the victim or disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.”

**And the Hon’ble Apex court was pleased to give the following guide lines**

- “50. In view of the aforesaid discussion, we issue the following directions:*
- 50.1. *No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.*
- 50.2. *In cases where the victim is dead or of unsound mind the name of the victim or her identity should not be disclosed even under the authorisation of the next of kin, unless circumstances justifying the disclosure of her identity exist, which shall be decided by the competent authority, which at present is the Sessions Judge.*
- 50.3. *FIRs relating to offences under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E IPC and the offences under Pocs0 shall not be put in the public domain.*
- 50.4. *In case a victim files an appeal under Section 372 CrPC, it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner laid down by law.*
- 50.5. *The police officials should keep all the documents in which the name of the victim is disclosed, as far as possible, in a sealed cover and replace these documents by identical*

*documents in which the name of the victim is removed in all records which may be scrutinised in the public domain.*

50.6. *All the authorities to which the name of the victim is disclosed by the investigating agency or the court are also duty-bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the court.*

50.7. *An application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under Section 228-A(2)(c) IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228-A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organisations.*

50.8. *In case of minor victims under PocsO, disclosure of their identity can only be permitted by the Special Court, if such disclosure is in the interest of the child.*

50.9. *All the States/Union Territories are requested to set up at least one “One-Stop Centre” in every district within one year from today.”*

The court has earlier also held the same view in ***State of Punjab v. Ramdev Singh, (2004) 1 SCC 421 : 2004 SCC (Cri) 307 at page 424***

“3. We do not propose to mention the name of the victim. Section 228-A IPC makes disclosure of identity of the victim of certain offences punishable. Printing or publishing name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or is found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, High Court or lower courts, the name of the victim should not be indicated. We have chosen to describe her as “victim” in the judgment. (See *State of Karnataka v. Puttaraja [(2004) 1 SCC 475 : (2003) 8 Supreme 364]* .)”

And also in ***Lalit Yadav v. State of Chhattisgarh, (2018) 7 SCC 499 : 2018 SCC OnLine SC 680 : (2018) 3 SCC (Cri) 244 at page 499***

“2. We, however, notice from the judgments of both the trial court and the High Court that the victim in the present case who was examined as PW 2 has been named

all through. Such a course is not consistent with Section 228-A IPC though the Explanation makes an exception in favour of the judgments of the superior court. Nonetheless, every attempt should be made by all the courts not to disclose the identity of the victim in terms of said Section 228-A IPC. It has been so laid down by this Court in State of Punjab v. Ramdev Singh [State of Punjab v. Ramdev Singh, (2004) 1 SCC 421 : 2004 SCC (Cri) 307] .

3. While dismissing the present matter, we direct the Registry of the High Court to place the record of the appeal in the High Court before the learned Judge for causing appropriate changes in the record including passing appropriate practice directions so that the trial courts in the State comply with the mandate and spirit of Section 228-A IPC.”

## **12. False complaint and False information under POCSO Act**

The POCSO Act under section 22 prohibits any person from making a false complaint or providing false information against a person in respect of an offence committed under section 3, 5, 7, and 9 of the POCSO Act dealing with penetrative sexual assault and sexual assault solely with the intention to humiliate, extort or threaten or defame him. No liability is incurred in respect of information given in good faith. POCSO Act, Section 19(7)

The POCSO Act prohibits the prosecution of a child for making a false complaint or providing false information regarding the commission of an offence under the POCSO Act. Section 22(2)

## **Landmark Judgments on Sexual Harassment Delivered by Supreme Court of India Tracing The Evolution Of The Present Day Statutes**

### **1. Tuka Ram And Anrvs State of Maharashtra, AIR 1979 SC 185 (Mathura Case)**

- **Facts of the case:**

- In Mathura rape case, a young tribal girl named Mathura was allegedly raped by two policemen while she was in custody. It was the incident of custodial rape, took place on March 26th, 1972, where the girl was raped in Desai Gunj Police Station in Maharashtra.

- **Issues raised:**

- This case raised so many issues in the context of Indian rape laws that were earlier existed in prevalent Criminal law like the issue of consent, the question

of burden of proof, the reference to two-finger test and the reference to the girl's sexual history.

- **What was held?**

- Sessions Court passed the judgment in favor of defendants and held them not guilty. It was held that Mathura gave her consent voluntary as she was habituated to sexual intercourse. Learned Sessions Judge found that there was a major difference between "sexual intercourse" and "rape" so, it was a case of sexual intercourse in which she had consented voluntarily and not rape. Thus, Case was further appealed in the Bombay High Court which took note of all the findings arrived during the trial in Sessions Court. High Court appreciated the observation given by the learned Sessions Judge that there is a major difference between sexual intercourse and rape but they forgot to observe that there is a world of difference between "consent" and "passive submission". On the ground of such observations, the court held that the defendants were guilty of rape and the consent given was not voluntary and it was due to serious threats by policemen. It was held that:

- **"Mere passive or helpless surrender of the body and its resigns to the other's lust induced by threats or fear cannot be equated with the desire or will, nor can furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition."**

- Later, the case went to the Supreme Court, where court acquitted the accused and set aside the judgment passed by the Bombay High Court. The Court stated that no marks of injury were found on the person of the girl, there were no signs of any struggle, any resistance, also from the shreds of evidence it can be shown that the girl had not been put in fear of death or hurt so the consent would be considered as free or voluntary. Also, the girl was habituated to sex so, it may be possible that she might have incited the cops. So, it was concluded and held by the Supreme Court of India that the sexual intercourse which was in question in the given case is not proved to amount to rape.

- **Legal Changes brought in the Indian rape law:**

- Due to such rationale behind the judgment, so many protests and huge public outcry took place which ultimately led to the amendment in Indian rape law. At the time when Mathura rape case did take place, the rape laws in our country were heavily biased towards rapists. The main question which

was raised after this judgment was regarding the concept of consent because earlier it was so difficult for women to prove that she had not consented to any sexual intercourse. So, after the judgment of this landmark case, the Criminal Law (Second Amendment) Act, 1983 came which brought so many changes in the Indian rape law like:

- Criminal Law (Second Amendment) Act, 1983 inserted section 114(A) in the Indian Evidence Act, 1872 which states that in a prosecution for rape where it has been already proved that the sexual intercourse by accused did take place, if the victim says that she had not consented to the sexual intercourse then Court shall presume that she did not consent as a rebuttable presumption of law.
- Section 376 of Indian Penal Code, 1860 underwent a change in which sections 376(A), 376(B), 376(C) and 376(D) were added which were further amended by Criminal Law Amendment Act, 2013.
- Act added the provision for “custodial rape” under section 376(2) of Indian Penal Code, 1860 for the offenses which take place when a victim is in the custody of the state.
- The Person liable under section 376(2) shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.
- Act amended the idea of burden of proof which always lies on the prosecution. After the amendment, in cases of rape where sexual intercourse was already established, the burden of proof will lie on the accused.
- The Act introduced section 228A in the Indian Penal Code, 1860 which prohibits any publication regarding the identity of rape victims and any matter through which victim’s identity could be known, subsequently amended by Criminal Law Amendment Act, 2013.

In the case of ***Sangitaben Shaileshbhai Datanta v. State of Gujarat***, 2018 SCC OnLine SC 2300, the Supreme Court referred to its decision in *State of Punjab v. Ramdev Singh*, (2004) 1 SCC 421, wherein following observations were made:

*“True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, High Court or lower courts, the name of the victim should not be indicated.” Also, in **Nipun Saxena v. Union of India**, (2019) 2 SCC 703, the Supreme Court held “Section 228-A IPC clearly prohibits the printing or publishing “the name or any matter which may make known the identity of the person”. It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim.”*

- So, Mathura rape case was monumental in context of both social and legal perspective which sparked huge protests and public outcry for the very first time in India for the cases of rape at a very large level and which further led to so many reforms in the Indian rape law via the Criminal Law (Second Amendment) Act, 1983.

2. **Vishaka vs. State of Rajasthan and Ors., (1997) 6 SCC 241 :AIR 1997 (SC) 3011 (Bhanwari Devi Case)**

- **Facts of the Case:**

- This was a landmark case regarding the protection of women against sexual harassment at workplace. It was the incident of 1992 where a lower caste social worker for the women’s development programme in Rajasthan named Bhanwari Devi who was trying to stop a child marriage in her village was allegedly gang-raped by five men of the upper-class community. She went to the police station to lodge a complaint against the offenders but no thorough investigation was launched.

- **Issue raised:**

- This landmark case raised so many questions in the context of sexual harassment which take place at a workplace. The Issue raised whether the employer has any responsibility in cases of sexual harassment by its employee or to its employees at a workplace?

- **What was held?**
  - To get justice, she took her case to the Trial Court where Court acquitted the accused for the reason of lack of the medical shred of evidence and other reasons. Due to which so many women's groups and organizations went for appeal against the judgment. The result of which, a public interest litigation was filed in the Supreme Court of India on the issue of sexual harassment at the workplace. This judgment had its basis in so many international treaties which had not been adopted in the municipal law.
  - Supreme Court held that the sexual harassment of a woman at a workplace would be violative of her fundamental rights of gender equality and right to life and liberty under Articles 14, 15, 19 and 21 of the Indian Constitution. The court concluded that such Act would be considered as a violation of women's human rights.
- **Legal changes brought after the case:**
  - After this verdict, a statutory vacuum was observed which proposed the route of judicial legislation in the context of sexual harassment at workplace. The case laid down so many guidelines and requirements which need to be fulfilled by the employer as well as other responsible persons or institutions:
    - For preventing the acts of sexual harassment in the workplace, it should be the duty of the employer or any other responsible person to prescribe for procedures and settlements.
    - Formation of a complaint committee at all workplaces.
    - Such committee has to be headed by a woman employee only and should have NGO or third-party participation.
    - Half of the members of a committee should be comprised of women only.
    - All complaints regarding sexual harassment of a woman employee would be dealt by this committee only, appropriate action in this regard shall be initiated by the employers in accordance with the concerned law.
    - The committee would advise and recommend to the victim for the further course of action.

- Provides for the definition of sexual harassment which includes any:
  - **“Unwelcome sexually determined behaviour& demands from males employees at workplace, such as: any physical contacts and advances, sexually colored remarks, showing pornography, passing lewd comments or gestures, sexual demands by any means, any rumors/talk at workplace with sexually colored remarks about a working woman, or spreading rumors about a woman’s sexual relationship with anybody.”**
- So, these guidelines were the first of its type which created for the gender equality rights of women, which should be free from harassment in both public and private employment. This judgment led the Indian Government to enact the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 which came into force from 9 December 2013. This Act superseded the Vishaka Guidelines for prevention of sexual harassment introduced by the Supreme Court of India.

### 3. **Sakshiv. Union of India, (2004) 5 SCC 518**

**Facts :** A writ petition by way of public interest litigation was filed under Article 32 of the Constitution by an organization called Sakshi which deals with cases of violence against women and children, seeking a declaration that “sexual intercourse” as contained in Section 375 of the Indian Penal Code shall include all kinds of forcible penetration such as penile/oral, penile/anal, finger/vaginal ,finger/anal and object/vaginal penetration and not only penile/vaginal penetration. The organization contented that offences such as sexual abuse of minor children and women by penetration other than penile/vaginal penetration, which would take any other form and could also be through use of objects whose impact on the victims is in no manner less than the trauma of penile/vaginal penetration as traditionally understood under Sections 375/376, have been treated as offences falling under Section 354 IPC as outraging the modesty of a woman or under Section 377 IPC as unnatural offences.

#### **What was held?**

- The Supreme Court referred to the 156th report of the Law Commission wherein it was stated, “a distinction has to be naturally maintained between sexual assault/use of criminal force falling under Section 354, sexual offences falling under Section 375 and unnatural offences falling under Section 377 of the Indian Penal Code. It may not be appropriate to bring unnatural offences punishable under Section 377 IPC or mere sexual assault or mere sexual use of criminal force which may attract

Section 354 IPC within the ambit of ‘rape’ which is a distinct and graver offence with a definite connotation.” Therefore, the Court held that it will not alter the definition of rape under section 375 as it will not be in the interest of society at large.

- The directions of the court are extracted from **Sakshi v. Union of India, (2004) 5 SCC 518 at page 544**

“31. *The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 CrPC merely requires the evidence to be taken in the presence of the accused. The section, however, does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses. Recording of evidence by way of video-conferencing vis-à-vis Section 273 CrPC has been held to be permissible in a recent decision of this Court in State of Maharashtra v. Dr.Praful B. Desai [(2003) 4 SCC 601]. There is major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are handmaidens of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the court to expand or enlarge the meanings of such provisions in order to elicit the truth and do justice with the parties.*

32. *The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and*

when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

33. In *State of Punjab v. Gurmit Singh* [(1996) 2 SCC 384] this Court had highlighted the importance of provisions of Sections 327(2) and (3) CrPC and a direction was issued not to ignore the mandate of the aforesaid provisions and to hold the trial of rape cases in-camera. It was also pointed out that such a trial in-camera would enable the victim of the crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public. It was further directed that as far as possible trial of such cases may be conducted by lady judges wherever available so that the prosecutrix can make a statement with greater ease and assist the court to properly discharge its duties, without allowing the truth to be sacrificed at the altar of rigid technicalities.

34. The writ petition is accordingly disposed of with the following directions:

(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in *State of Punjab v. Gurmit Singh* [(1996) 2 SCC 384].

35. The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently

*required. We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.”*

- The court also relied upon *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, to direct that along with the rape cases, the inquiry and trial in the cases of section 354 and 377 should be held in camera.

The directions of the court are extracted from ***State of Punjab v. Gurmit Singh, (1996) 2 SCC 384 at page 403***

“22. There has been lately, lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of Evidence Act regarding relevancy of facts notwithstanding, some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as “discrepancies and contradictions” in her evidence.

23. The alarming frequency of crime against women led Parliament to enact Criminal Law (Amendment) Act, 1983 (Act 43 of 1983) to make the law of rape more realistic. By the Amendment Act, Sections 375 and 376 were amended and certain more penal provisions were incorporated for punishing such custodians who molest a woman under their custody or care. Section 114-A was also added in the Evidence Act for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape, involving such custodians. Section 327 of the Code of Criminal Procedure which deals with the right of an accused to an open trial was

also amended by addition of sub-sections 2 and 3 after renumbering the old section as sub-section (1). Sub-sections 2 and 3 of Section 327 CrPC provide as follows:

“327. Court to be open.—

• \* \* \*

(2) Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under Section 376, Section 376-A, Section 376-B, Section 376-C or Section 376-D of the Indian Penal Code (45 of 1860) shall be conducted in camera:

*Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.*

(3) Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.”

24. These two provisions are in the nature of exception to the general rule of an open trial. In spite of the amendment, however, it is seen that the trial courts either are not conscious of the amendment or do not realise its importance for hardly does one come across a case where the inquiry and trial of a rape case has been conducted by the court in camera. The expression that the inquiry into and trial of rape “shall be conducted in camera” as occurring in sub-section (2) of Section 327 CrPC is not only significant but very important. It casts a duty on the court to conduct the trial of rape cases etc. invariably “in camera”. The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327(2) and (3) CrPC and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to draw the attention of the trial courts to the amended provisions of Section 327 CrPC and to impress upon the Presiding Officers to invariably hold the trial of

*rape cases in camera, rather than in the open court as envisaged by Section 327(2) CrPC. When trials are held in camera, it would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of the court as envisaged by Section 327(3) CrPC. This would save any further embarrassment being caused to the victim of sex crime. Wherever possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults on the females are tried by lady Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) CrPC liberally. Trial of rape cases in camera should be the rule and an open trial in such cases an exception.”*

**4. Mukesh & Anr. vs. State for NCT of Delhi & Ors., Nirbhaya's Case (2017) 6 SCC**

**Facts of the case:** A 23-year-old trainee physiotherapist woman was brutally got raped repeatedly by five adult men and a juvenile on the night of 16th December 2012 onto a moving bus in the capital of our country. She got attacked with an iron rod due to which she had her intestines pulled out. Later, in spite of receiving all the possible treatments, she died in the hospital in Singapore.

- **What was held?**
  - One accused hanged himself in the jail while other four adults were sentenced to death. A Bench of Justices Dipak Mishra, R Banumathi, and Ashok Bhushan were unanimously passed the judgment of Death penalty to all the accused except juvenile. The juvenile who was equally involved in the incident and raped the woman was convicted and sentenced to three years in a reformation center. Such an incident where humanity is treated with irreverence, which created a shock in the collective conscience sparked nationwide revulsion and various legislative reforms in rape laws.

- **Aftermath:**

- After the incident, a panel was set up under the chairmanship of JS Verma (former Chief Justice of India) for analyzing criminal laws and to suggest all the possible amendments which can be made to enhance punishment in case of assault of extreme nature and brutality against women in criminal law. Within a month, the panel was ready with its report consisting of so many recommendations for changing India's rape laws.
- As per the recommendations of the Justice Verma Committee, Criminal Law (Amendment) Act, 2013 has passed which provides for the amendment of Indian Penal Code, 1860; Code of Criminal Procedure, 1973, Indian Evidence Act, 1872 and Protection of Children from Sexual Offences Act, 2012 in relation of sexual offences related laws. Act widened the scope of rape's definition and provided for capital punishment in rape cases that cause the death of the victim or leave her in a permanent vegetative state. Act also provides for several new offenses to make laws more stringent.
- One of the accused in this case was just a few months away from being 18. In spite of a heinous offense committed by him, he was sentenced to only 3 years in a reform home as per Juvenile Justice (Care and Protection of Children) Act, 2000. Such verdict could encourage other teenagers also to commit the similar type of crimes. So, a need of amendment has arisen in result of which new Juvenile Justice (Care and Protection of Children) Act, 2015 has come.
- **Changes brought in JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000**
  - Section 4: The creation of one or more Juvenile Justice Boards for every district to examine children in conflict with the law.
  - Section 15 (Preliminary assessment into heinous offences by Board)- A preliminary assessment of a child who is 16 or above 16 years, shall be done with regard to his mental and physical capacity to commit such offence, with regard to his ability to understand the consequences of the offence, if the Board is satisfied that he was capable enough to understand all the consequences then the Board shall follow the procedure same as the procedure of trial in summoning cases under CrPC, 1973.

- So, Board will decide whether Juvenile is supposed to send for trial as an adult or to send him to the reform home.

Section 19 – Children’s Court may decide that child should send for a trial as an adult or not and may pass appropriate orders after trial considering his special needs, the tenets of a fair trial and to maintain a child-friendly atmosphere.

- The Court shall also ensure that such child should be sent to a safe place till he attains the age of 21 and thereafter, he shall be transferred to a jail.
  - Section 21- Death or life imprisonment cannot be awarded to a juvenile.
  - A minor who has committed any heinous crime then he would be treated as an adult.
  - A minor who has committed any serious offense then he may be treated as an adult only if he is apprehended after he has attained 21 years of age.
  - If the minor has committed any heinous offense and apprehended after the age of 21 years, in that case, he will be tried as an adult and imprisonment of 7 years and above is prescribed.

**5. State of Maharashtra vs. Madhukar Narayan Mardikar, AIR 1991 SC 207**

- **Facts of the case:**
  - This is the case where a police inspector of Bhiwandi town police station alone in uniform in the night went to the hutment of a woman named Banubi. There, he tried to ravish her. The woman resisted and nearby people assembled. The respondent's version was that he had raided her hutment on receipt of information that she was dealing in illicit liquor and although nothing incriminating was found from her house, some articles like a rubber tube, a bottle, etc. containing country liquor were found from a nearby place which were attached as unclaimed property. In the course of evidence recorded at the departmental enquiry it was also brought out that Banubi was a woman of easy virtue and was having extra-marital relationship with one Behram Irani, the Manager of Bhiwandi Talkies. She admitted that she was the mistress of that person. Evidence was also led to show that she was known as an ‘awara’ (vagrant) in the locality. The find of liquor from near her hutment had upset her and in order to escape from the clutches of law she had filed a false complaint against him. The respondent further contended that a woman

with such antecedents could stoop to any level and it would be hazardous to rely on her version.

- **What was held?**

- High Court of Bombay held that he cannot be removed from his service since Banubi was a woman of immoral character. Court held that, “she was an unchaste woman so, it would be unsafe to allow the career of that inspector to be put in jeopardy upon the uncorroborated version of such a woman who makes no secret of her illicit intimacy with another person.”
- Supreme Court overruled the judgment and gave the order of removal of his service. Supreme Court opined that “even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard.” So, she is very much entitled to protect her in case of any attempt to violate her as a person. Also, while deciding the cases of rape, past history of victim’s sex life does not matter, she is very much entitled to the protection of the law.

## 6. **Independent Thought vs. Union of India and Anr.,(2017) 10 SCC 800**

- **Facts of the case:**

- Independent Thought, one of the leading NGOs which deals with the child rights, had filed a public interest litigation in the Supreme Court of India. It challenged the constitutional validity of exception 2 to section 375 (Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape) of the Indian Penal Code.

- **Issues raised:**

- Whether sexual intercourse between a husband and wife, where she is between 15 and 18 years of age would amount to rape?
- Whether section 375, exception 2 is violative of fundamental rights of a girl child?

- **What was held?**

- In the judgment, Supreme Court has criminalized the sexual intercourse with a minor wife whose age lies between 15 and 18 years. The Court opined that the exception 2 in section 375 is violative of Articles 14, 15 and 21 of

the Indian Constitution which allows intrusive sexual intercourse with a girl who is below 18 and above 15 years on the ground of marriage. Such exception clause in Indian rape laws negates the very purpose of Prohibition of Child Marriage Act, it violates the provisions of Protection of Children from Sexual Offences Act (POCSO) in context of the age of consent and some other international conventions to which India is a signatory. In this landmark verdict, Supreme Court has struck down section 375, exception 2 of the Indian Penal Code. Now, the law cannot protect a man who is engaged in sexual relations with his wife where she is between 15 and 18 years because irrespective of the status of a child whether married or not, she will always remain a child

**7. Virender v. State of NCT of Delhi, 2009 SCCOnline Del 3083**

**Facts:** A girl aged between 12-13 years was raped by her neighbor who has loaned some money to her father. The trial court had found him guilty. In appeal it was contended that there were inconsistencies in the statements made by her under section 161 of the Criminal Procedure Code (hereinafter, Crpc), section 164 of the Crpc and her deposition in the court regarding the place of occurrence of rape. The medical certificate also did not disclose any finding of rape.

**What was held?**

The girl defined “galatkaam” as the act done by husband and wife at night. However, her testimony does not reflect her understanding of the relationship shared by a husband and a wife. Therefore, the High Court opined, “the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same.”

**Guidelines:** In the cases of sexual offences where there is a child victim or a child witness, the Delhi High Court culled out several guidelines related to investigation, medical examination and trial which are as follows:

**I. RECORDING OF COMPLAINT AND INVESTIGATION BY POLICE**

- (i) On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately. (Ref: Court On Its Own Motion v. State &Anr.)
- (ii) Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice. (Ref :Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)
- (iii) The investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime. (Ref: Court On Its Own Motion v. State &Anr.)
- (iv) The statement of the victim shall be recorded verbatim. (Ref: Court On Its Own Motion v. State &Anr.)
- (v) The officer recording the statement of the child victim should not be in police uniform. (Ref: Court On Its Own Motion v. State &Anr.)
- (vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear. (Ref: Court On Its Own Motion v. State &Anr.)
- (vii) The statement should be recorded promptly without any loss of time. (Ref: Court On Its Own Motion v. State &Anr.)
- (viii) The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present. (Ref: Court On Its Own Motion v. State &Anr.)
- (ix) The Investigating Officer to ensure that at no point should the child victim come in contact with the accused. (Ref: Court On Its Own Motion v. State &Anr.)
- (x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination. (Ref: Court On Its Own Motion v. State &Anr.)

- (xi) The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.(Ref: Court On Its Own Motion v. State &Anr.)
- (xii) In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.(Ref: Court On Its Own Motion v. State &Anr.)
- (xiii) The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A Cr.P.C) at the nearest government hospital or hospital recognized by the government.(Ref: Court On Its Own Motion v. State &Anr.)
- (xiv) The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.(Ref: Court On Its Own Motion v. State &Anr.)
- (xv) The Investigating Officers shall promptly refer for forensic examination, clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.(Ref: Court On Its Own Motion v. State &Anr.)
- (xvi) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.(Ref: Court On Its Own Motion v. State &Anr.)
- (xvii) The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.(Ref: Court On Its Own Motion v. State &Anr.)
- (xviii) To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O, for investigations on any particular aspect of the matter, the same shall be adverted to by the I.O Proper entries shall be made by I.O in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant,

however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations. (Ref :Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)

- (xix) Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration. (Ref: Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)
- (xx) The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref: Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)
- (xxi) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref: Mahender Singh Chhabra v. State of N.C.T of Delhi &Ors.)
- (xxii) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded. (Ref: Court On Its Own Motion v. State &Anr.)

## II RECORDING OF STATEMENT BEFORE MAGISTRATE

- (i) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref: Court On Its Own Motion v. State &Anr.)
- (ii) In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital. (Ref: Court On Its Own Motion v. State &Anr.)
- (iii) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded. (Ref: Court On Its Own Motion v. State &Anr.)
- (iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of “Ascertaining voluntary nature of statement” unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice. (Ref: Court On Its Own Motion v. State &Anr.)

- (v) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion v. State &Anr.)
- (vi) No Court shall detain a child in an institution meant for adults.(Ref: Court On Its Own Motion v. State &Anr.)

### III MEDICAL EXAMINATION

- (i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts.(Ref : Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)
- (ii) While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.
- (iii) In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.(Ref: Court On Its Own Motion v. State &Anr.)
- (iv) In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.(Ref: Court On Its Own Motion v. State &Anr.)
- (v) The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.(Ref: Court On Its Own Motion v. State &Anr.)
- (vi) In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.(Ref: Court On Its Own Motion v. State &Anr.)
- (vii) The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.(Ref: Court On Its Own Motion v. State &Anr.)
- (viii) Emergency medical treatment wherever necessary should be provided to the child victim.(Ref: Court On Its Own Motion v. State &Anr.)
- (ix) The child victim shall be afforded prophylactic medical treatment against STDs.(Ref: Court On Its Own Motion v. State &Anr.)

- (x) In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.(Ref: Court On Its Own Motion v. State &Anr.)

#### **IV PROCEEDINGS IN COURT**

- (i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref : Court On Its Own Motion v. State &Anr)
- (ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.
- (iii) The trials into allegations of commission of rape must invariably be “in camera”. No request in this behalf is necessary. (Ref: State of Punjab v. Gurmit Singh)
- (iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: (2007) (4) JCC 2680 Court On Its Own Motion v. State &Anr.)
- (v) The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.
- (vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref :Sakshi v. UOI).
- (vii) Competency of the child witness should be evaluated and order be recorded thereon.
- (viii) The trial court is required to be also satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the

truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence. There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

- (ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.
- (x) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion v. State of N.C.T Of Delhi)
- (xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her.
- (xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim.
- (xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure;
- (xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref SudeshJakhu v. K.C.J &Ors). This may include an expert supportive of the victim or child witness in whom

the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony.

- (xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing.
- (xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.
- (xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref :Sakshi v. UOI).
- (xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref :Sakshi v. UOI)
- (xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.
- (xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref :ZahiraHabibulla H. Sheikh &Anr. v. State of Gujarat &Ors.)
- (xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels

necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref: AIR 1997 SC 1023 (para 12) State of Rajasthan v. Ani alias Hanif&Ors.)

- (xxii) The court should ensure that the embarrassment and reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.
- (xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance “gandiharkatein” or “batamezein” have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.
- (xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court has to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.
- (xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.
- (xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref :Sakshi v. UOI)
- (xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab v. Gurmit Singh)

To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced, humane and ensure protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child.

## **V GENERAL**

- (i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.
- (ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.
- (iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness. This would create and inspire a feeling of confidence and trust in the child.
- (iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of “Ascertaining voluntary nature of statement” unless the parents/guardian is reported to be abusive or

the Magistrate thinks it appropriate in the interest of justice.(Ref : Court On Its Own Motion v. State of N.C.T Of Delhi)

- (v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out.
- (vi) No court shall detain a child in an institution meant for adults.(Ref : Court On Its Own Motion v. State of N.C.T Of Delhi). This would apply to investigating agencies as well.
- (vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted.

#### **8. Mahesh Yadav V. The State of Jharkhand 2017 SCC Online Jhar 923**

- The Jharkhand High Court in this case directed to issue notice to all the POCSO Courts, Jharkhand, annexing a copy of the judgment in Virender v. The State of NCT of Delhi which has laid down the compulsory guidelines, steps and duty of the police officer and also the Magistrate and Special Court and called for the information from all the POCSO courts, Jharkhand regarding the steps taken in compliance of the judgment.
- Further, POCSO Courts were also directed to submit information as to whether the procedures prescribed in the provisions of Section 35, 36, 37 and 38 of the POCSO Act are being complied with or not.

#### **9. Gaya Prasad Pal @ MukeshVs. State, 2016 SCC Online Del 6214**

**Facts:** A man was convicted for penetrative sexual assault under section 4 of Protection of children from Sexual Offences Act, 2012 ( hereinafter, POCSO Act) read with section 376 of the Indian Penal Code for raping his step daughter aged less than 14 years of age and making her pregnant. The delay in the filing of FIR had been properly explained as the girl was worried about the wellbeing of her mother and step brother if the step father

would have been convicted and sent to jail. By subsequent order, separate punishments were awarded against the appellant for offences punishable under Section 376 IPC, Section 6 POCSO Act, Section 354 IPC and Section 506 IPC. The appellant challenged his conviction and the order on sentence.

### **What was Held?**

- The appellant was not put to trial for the offence under section 6 of the POCSO Act (i.e aggravated penetrative sexual assault) by the trial court. Therefore, it was illegal to award him punishment for the same offence.
- The Court observed that “rape” (Section 375 IPC) may also constitute “penetrative sexual assault” (Section 3 POCSO Act) in case of a child. And acts constituting the offence of “penetrative sexual assault” against a girl child would also amount to rape. However, the Court held “a person may not be punished twice over for the same set of acts of commission or omission which collectively constitute an offence covered by two different provisions of law. Though the law permits trial on alternative charge to be held for both the offences, the punishment may be awarded only for one of them, the one which is graver in nature.”
- Further, the court held that the charge under section 4 of POCSO Act on which the appellant has been found guilty is in addition to his conviction for the offence under section 376 IPC. And the acts committed by the appellant attract section 376(2) which prescribes a punishment extendable to life imprisonment meaning thereby an imprisonment for the remainder of such person’s natural life and, fine, which is higher than punishment under section 4 of POCSO Act. In these circumstances, Section 42 of POCSO Act would come into play and the court is duty bound to punish the offender for the offence under Section 376(2)(f)(i) and (k) of IPC; which is greater in degree in comparison to the offence under Section 4 of POCSO Act.

## **10. Deaf and Dumb Victim**

### **The State of Maharashtra v. Bandu @ Daulat, 2018 (11) S CC 163**

**Facts:** A 14 year old deaf and dumb girl who is also mentally challenged to some extent was raped by her landlord after being lured away by the offer of sweet meat. She explained to her mother by gesture as to what happened with her. The High Court held that since the victim herself was not examined, the factum of rape and the involvement of accused could not be proved.

### What was Held?

- The Supreme Court restored the conviction of the accused under section 376 IPC and sentenced him to undergo rigorous imprisonment for seven years based on the fact that the victim immediately after the incident narrated the same to her mother with the help of gestures and the medical evidence confirmed rape.
- The Court directed the setting up of special centres for the examination of vulnerable witnesses in every district and at least two such centres in each High Court's jurisdiction to be set up within three months of the judgement.
- The Court also reiterated the directions issued in the case of Sakshi v. Union of India, (2004) 5 SCC 518 which are as follows:
  1. The provisions of section 327(2) Crpc shall in addition to the offences mentioned in the subsection, also apply in inquiry or trial of offences under sections 354 and 377 of the IPC.
  2. In holding trial of child sex abuse or rape:
    - (i) a screen or some arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
    - (ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and not embarrassing;
    - (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

**BIRESH KUMAR**

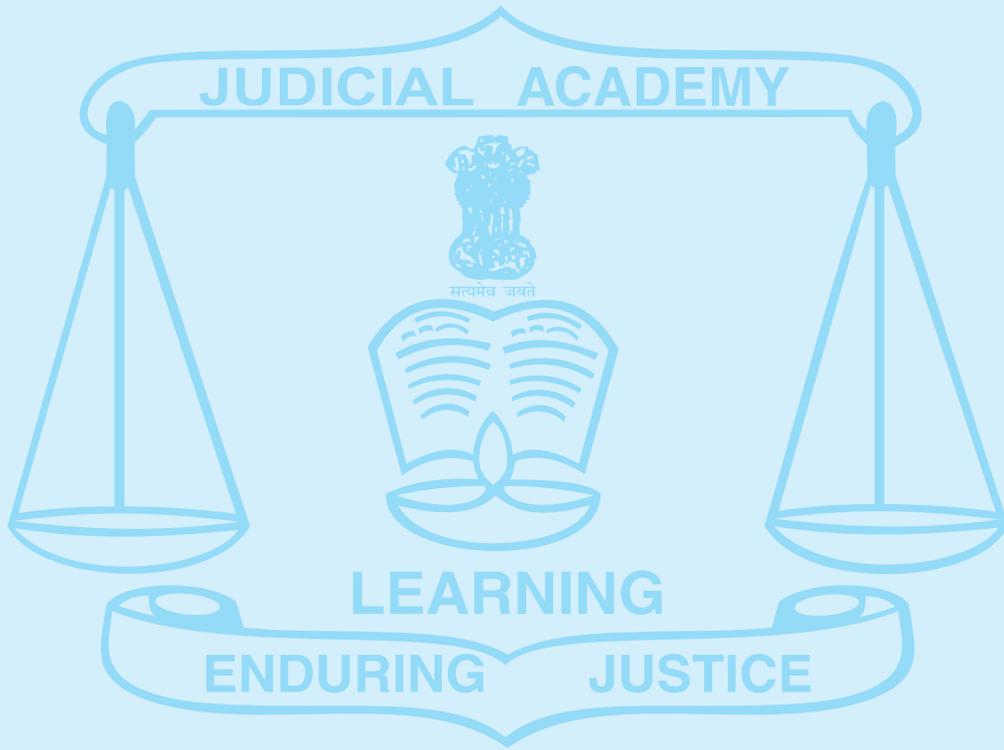
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