A Decade of Protection of Children from Sexual Offences Act : Re-thinking & Possibilities

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Reading Material

Published on July, 2023

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Justice S. N. Prasad
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MESSAGE

If we are ever to have real peace in this world we shall have to begin with the children.

-Mahatma Gandhi

These wise words spoken by Mahatma Gandhi stand truer than ever today given the surge of cases of sexual abuse against children. Sadly enough, such cases are a common news these days. Protection of children against such vile activities is an onerous responsibility on the shoulders of society.

This book, "A Decade of Protection of Children from Sexual Offences Act: Rethinking and Possibilities" is a humble effort to encapsulate the existing legal provisions against child sexual abuse in India. I firmly believe that this book will play its role in helping judicial officers in their quest for knowledge enhancement.

I applaud this dedicated effort made by Judicial Academy Jharkhand for mulling over such a problem that plagues the future of our society and I wish it a grand success.
My best wishes.

(S. N. Prasad)

FROM DIRECTOR'S PEN

"Our law enforcement must be given every tool available to protect children from predators and parents need to know who is living in their community."

- Robin Hayes

This compendium titled **"A Decade of Protection of Children from Sexual Offences Act: Re-thinking & Possibilities",** prepared by Judicial Academy, Jharkhand is befitting the above words as well as the essence of the Protection of Children from Sexual Offences Act, 2012 (POCSO). The purpose behind the compilation is to best serve the different branches of legal profession specifically judges, practicing lawyers, academicians and law students. Persons outside the profession such as NGOs and social activists can as well benefit from this book. The book has been prepared to include every possible aspect of the Act keeping in view the latest amendments to serve as an aiding reading material.

The enactment of the POCSO Act was a watershed moment in the history of child rights in India. The Act provides a specialized mechanism for the adjudication of sexual crimes concerning children while prioritizing the best interest of the child. The Act makes anyone who apprehends or has knowledge of the commission of any offence under the Act, duty bound to report it. In fact, it makes failure to report despite having knowledge, a punishable offence. This is an important step towards ending the culture of silence.

In accordance with the provisions of the Act, courts have been set up to deal specifically with POCSO cases. The judges heading these courts are not supposed to be mute spectators rather they are to see that justice is delivered by actively participating in the process and ensuring that the dignity and interest of the victim are protected at all stages. But, till date, adequate numbers of such courts have not been established. Even those that have been established lack appropriate infrastructure to make courts child-friendly.

No doubt, the POCSO Act is a commendable piece of legislation in the direction of safeguarding the childhood of children from sexual offences. In fact, the 2019 Economic

Intelligence Unit Report ranks India's legal framework amongst the best in the world. However, the implementation of the Act is not up to the mark. The scale of child sexual abuse in India is staggering as every second child victim of sexual abuse is in India. There is lack of awareness amongst people regarding the Act. A combined effort is needed on part of all the stakeholders, for the Act to be a success. The executive and the judiciary must cooperate for effective implementation of the Act.

On behalf of the Judicial Academy, Jharkhand, I express my sincere gratitude to Hon'ble Mr. Justice Sanjaya Kumar Mishra, the Chief Justice-cum-Patron in Chief, Judical Academy, Jharkhand, for His Lordship's continuous encouragement in evolving the Academy as a centre for judicial research. I also express my gratitude to Hon'ble Mr. Justice Shree Chandrashekhar, Judge, High Court of Jharkhand-cum-Member Governing Body, Judicial Academy, Jharkhand for his unparalleled guidance to the Academy. I further extend my heartfelt gratitude towards Hon'ble Mr. Justice Sujit Narayan Prasad, Judge In-charge, Judicial Academy, Jharkhand for fully supporting the idea of this book for which the Academy will be eternally grateful.

This compilation is a result of persistent efforts put in by the Senior Faculty Members - Sri Rajesh Kumar, Sri Onkar Nath Choudhary; Administrative Officer - Ms. Lydia Francisca Kerketta; and the Research Scholars - Ms. Jaya Steffi Minz, Ms. Akanksha Pallav, Ms. Medha Malini Pathak, and Ms. Sarita Akhuli. I hope and wish this reading material is going to be beneficial for the readers.

Sudhanshu Kumar Shashi
Director
Judicial Academy Jharkhand

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1. INTRODUCTION

"Children are precious human resources of our country; they are the country's future. The hope of tomorrow rests on them. But unfortunately, in our country, a girl child is in a very vulnerable position. There are different modes of her exploitation, including sexual assault and/or sexual abuse. In our view, exploitation of children in such a manner is a crime against humanity and the society. Therefore, the children and more particularly the girl child deserve full protection and need greater care and protection whether in the urban or rural areas."

- ***M. R. Shah, J.***[1]

Child sexual abuse is a form of child abuse in which an adult or older adolescent uses a child for sexual stimulation. Forms of child sexual abuse include asking or pressuring a child to engage in sexual activities (regardless of the outcome), indecent exposure (of the genitals, female nipples, etc.) to a child with intent to gratify their own sexual desires, or to intimidate or groom the child, physical sexual contact with a child, or using a child to produce child pornography.

The effects of child sexual abuse can include depression, post-traumatic stress disorder, anxiety, complex post-traumatic stress disorder, propensity to further victimization in adulthood and physical injury to the child, among other problems. Sexual abuse by a family member is a form of incest, and can result in more serious and long-term psychological trauma, especially in the case of parental incest.

1.1. Global Scenario:

The global prevalence of child sexual abuse has been estimated at 19.7% for females and 7.9% for males, according to a 2009 study published in Clinical Psychology Review that examined 65 studies from 22 countries.[2] Using the available data, the highest prevalence rate of child sexual abuse geographically was found in Africa (34.4%), primarily because of high rates in South Africa; Europe showed the lowest prevalence rate (9.2%); America and Asia had prevalence rates between 10.1% and 23.9%. In the past, other research has concluded similarly that in North America, for example; approximately 15% to 25% of women and 5% to 15% of men were sexually abused when they were children. Most sexual abuse offenders are acquainted with their victims; approximately 30% are relatives of the child, most often brothers, fathers, uncles or cousins; around 60% are other acquaintances such as 'friends' of the family, babysitters, or neighbours; strangers are the offenders in approximately 10% of child

1 *Nawabuddin* v. *State of Uttarakhand*, AIR 2022 SC 910, (para. 10).

2 John Wihbey, "Global Prevalence of Child Sexual Abuse", The Journalist's Resource, November 15, 2011, available at: https://journalistsresource.org/criminal-justice/global-prevalence-child-sexual-abuse/

sexual abuse cases.[3] Most child sexual abuse is committed by men. Some sources report that most offenders who sexually abuse prepubescent children are paedophiles but some offenders do not meet the clinical diagnosis standards for paedophilia.

Under the law, child sexual abuse is an umbrella term describing criminal and civil offenses in which an adult engages in sexual activity with a minor or exploits a minor for the purpose of sexual gratification The American Psychiatric Association states that "children cannot consent to sexual activity with adults", and condemns any such action by an adult: "An adult who engages in sexual activity with a child is performing a criminal and immoral act which never can be considered normal or socially acceptable behaviour".

1.2. Indian Scenario:

The number of rape incidents in India per 100,000 citizens is 22,172 as of 2020, according to world population data as of 2010.[4] Indian children, at 440 million, constitute 19% of the world's population of children. United Nations International Children Education Fund study during 2005–2013 reported that child sexual abuse in Indian girls was 42%.[5]

In 2007 the Ministry of Women and Child Development published the *Study on Child Abuse: India 2007.*[6] It sampled 12447 children, 2324 young adults and 2449 stakeholders across 13 states. It looked at different forms of child abuse: physical abuse, sexual abuse and emotional abuse and girl child neglect in five evidence groups, namely, children in a family environment, children in school, children at work, children on the street and children in institutions.

The study's main findings included: 53.22% of children reported having faced sexual abuse. Among them 52.94% were boys and 47.06% girls. Andhra Pradesh, Assam, Bihar and Delhi reported the highest percentage of sexual abuse among both boys and girls, as well as the highest incidence of sexual assaults. 21.90% of child respondents faced severe forms of sexual abuse, 5.69% had been sexually assaulted and 50.76% reported other forms of sexual abuse. Children on street, at work and in institutional care reported the highest incidence of sexual assault. The study also reported that 50% of abusers are known to the child or are in a position of trust and responsibility and most children had not reported the matter to anyone.

3 *Ibid.*

4 World Population Review, *Rape Statistics by Country 2023*, available at: https://worldpopulationreview.com/country-rankings/rape-statistics-by-country

5 Aparajita Ray, "42% of Indian girls are sexually abused before 19: UNICEF", *Times of India*, September 12, 2014, available at: http://timesofindia.indiatimes.com/Articleshow

6 Loveleen Kacker; Srinivas Varadan; Pravesh Kumar; India, Ministry of Women and Child Development, *"Study on Child Abuse: India 2007", (2007)*, available at: https://labordoc.ilo.org

While on the one hand girls are being killed even before they are born, on the other hand children who are born and survive suffer from a number of violations. The world's highest number of working children is in India. To add to this, India has the world's largest number of sexually abused children, with a child below 16 years raped every 155th minute, a child below 10 every 13th hour and one in every 10 children sexually abused at any point of time. Despite years of lack of any specific child sexual abuse laws in India, which treated them separately from adults in case of sexual offense, the 'Protection of Children Against Sexual Offences Bill, 2011' was passed by the Indian parliament on May 22, 2012.

1.3. Overview of the POCSO Act, 2012:

In India, children's vulnerabilities and exposure to violations of their protection rights remain widespread and multiple in nature. The manifestations of these violations are various, ranging from child labour, child trafficking, to commercial sexual exploitation and many other forms of violence and abuse.

Child sexual abuse is the worst form of abuse among all kinds of violations against children. The Protection of Children from Sexual Offences Act, 2012, Act 32 of 2012 was thus enacted by the Indian government to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of special courts for trial of such offences and for matters connected therewith or incidental thereto. This Legislation aims to effectively address the heinous crimes of sexual exploitation and sexual abuse of children. The Act safeguards the interests of the child at every stage of the judicial process by incorporating child -friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts.

Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure.[7] The factors which lead to child sexual abuse are permutable. The following are some of the factors to list few:

- Isolation and social disconnection
- Normalisation of violence and abuse
- Lack of empowerment and emotional support for children
- Institutional settings

7 AIR 2022 SC 910, (para. 10).

While systematic data and information on child protection issues are still not always available, evidence suggests that children in need of special protection belong to communities suffering disadvantage and social exclusion such as scheduled castes and tribes, and the poor. The lack of available services, as well as the gaps persisting in law enforcement and in rehabilitation schemes also constitute a major cause of concern. Although poverty is often cited as the cause underlying child labour, other factors such as discrimination, social exclusion, as well as the lack of quality education or existing parents' attitudes and perceptions about child labour and the role and value of education need also to be considered.[8]

This Act aims to establish a robust legal framework for the prevention, investigation, and prosecution of sexual offenses against children. In addition to its significance within the Indian justice system, the POCSO Act also aligns with various international conventions, multilateral agreements and treaties highlighting its commitment to global child protection efforts. The POCSO Act aligns with several international conventions, multilateral agreements, and treaties that emphasize the protection and rights of children.

The Act also defines a child as any person below 18 years of age, and defines different forms of sexual abuse, including penetrative and non -penetrative assault, as well as sexual harassment and pornography, and deems a sexual assault to be "aggravated" under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority vis-à-vis the child, like a family member, police officer, teacher, or doctor. People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the said Act. The said Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine.

In keeping with the best international child protection standards, the said Act also provides for mandatory reporting of sexual offences. This casts a legal duty upon a person who has knowledge that a child has been sexually abused to report the offence; if he fails to do so, he may be punished with 6 months imprisonment and/or a fine.

The Act also casts the police in the role of child protectors during the investigative process. Thus, the police personnel receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangements for the care and protection of the child, such as obtaining emergency medical treatment for the child and placing the child in a shelter home, should the need arise. The police are also required to bring the matter to the attention of the Child Welfare Committee (CWC) within 24 hours of

8 Rajasthan Judicial Academy, "*Protection of Children from Sexual Offences Act, 2012", available at:* https://rajasthanjudicialacademy.nic.in/docs/studyMaterial07102020.pdf

receiving the report, so the CWC may then proceed where required to make further arrangements for the safety and security of the child.

The Act makes provisions for the medical examination of the child in a manner designed to cause as little distress as possible. The examination is to be carried out in the presence of the parent or other person whom the child trusts, and in the case of a female child, by a female doctor.

The Act provides for Special Courts that conduct the trial in-camera and without revealing the identity of the child, in a child-friendly manner. Hence, the child may have a parent or other trusted person present at the time of testifying and can call for assistance from an interpreter, special educator, or other professional while giving evidence, further, the child is not to be called repeatedly to testify in court and may testify through video-link rather than in a courtroom.

Above all, the Act stipulates that a case of child sexual abuse must be disposed of within 1 year from the date the offence is reported. It also provides for the Special Court to determine the amount of compensation to be paid to a child who has been sexually abused, so that this money can then be used for the child's medical treatment and rehabilitation.

The Act recognises almost every known form of sexual abuse against children as punishable offences, and makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child.

Further, by providing for a child-friendly judicial process, the Act encourages children who have been victims of sexual abuse to report the offence and seek redress for their suffering, as well as to obtain assistance in overcoming their trauma. In time, the Act will provide a means not only to report and punish those who abuse and exploit the innocence of children, but also prove an effective deterrent in curbing the occurrence of these offences.

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2. NECESSITY OF SPECIAL LEGISLATION TO PROTECT CHILDREN FROM SEXUAL OFFENCES

2.1. Inefficiency of Existing Laws before the Enactment of POCSO Act:

Child sexual abuse is increasing at an alarming rate all over the world and particularly in our country India who is among the top 5 countries of the world facing highest rate of sexual offences involving children. Malnutrition, illiteracy, trafficking, drug abuse, sexual abuse pornography etc. are not uncommon among the children in India. Child sexual abuse includes physical or psychological maltreatment of a child usually by a person who is in a position of trust and confidence in relation to the child.

Among the psychiatric disorders in childhood, a close association of conduct disorder with child sexual abuse has been reported. In preadolescent children, sexual abuse often leads to posttraumatic stress disorder (PTSD), attention deficit, obsessive-compulsive disorder, depression, and phobic and conduct disorders. In adolescent children, the experience of child sexual abuse has a strong association with feelings of hopelessness, suicidal ideation, and suicidal attempt. Despite having the highest number of sexually abused children in the world, there was no special law in India, which was fully equipped to counter the menace of sexually abused cases.

The criminal law in India seems inadequate in many respects to deal with such a sensitive issue. After the famous *Sakshi and Ors. v. Union of India and Ors.*,[9] where the petitioner, Sakshi, an organization to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, in particularly those who are victims of any kind of sexual abuse and/or harassment, violence, atrocity, etc, filed a writ petition under the Article 32[10] of the Indian Constitution by way of public interest litigation on the nature of sexual intercourse or abuse under Section 375 and 376 under IPC[11], comprehensive review has been done by the Law commission who appealed for several amendments of law. Nonetheless, the Law was not sufficient to deal with sexual offences involving children.

Before May 2012, various Sections of the IPC dealing with sexual offences were also applied to the cases of child sexual abuse resulting in serious miscarriage of justice as the provisions were not reasonably sufficient for their application to cases of child sexual abuse.

9 *Sakshi and Ors. v. Union of India and Ors*., AIR 2004 SC 3566.

10 The Constitution of India, Art. 32.

11 The Indian Penal Code, 1860 (Act 45 of 1860), ss. 375, 376.

2.1.1. Provisions under IPC to deal with Sexual Offences and its inadequacy:

Section 354: 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.[12]

Section 354-A: 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.[13]

Section 354-B: Using criminal force with intent to disrobe a woman or compel her to be naked and the abetment of such an act.[14]

Section 354-C: 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.[15]

Section 354-D: 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 the internet, email or any other form of electronic communication.[16]

Section 366: Kidnapping, abducting or inducing a 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.[17]

Section 366-A: 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 he will be forced or seduced to illicit intercourse with another person.[18]

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12 The Indian Penal Code, 1860 (Act 45 of 1860), s. 354.

13 The Indian Penal Code, 1860 (Act 45 of 1860), s. 354A.

14 The Indian Penal Code, 1860 (Act 45 of 1860), s. 354B.

15 The Indian Penal Code, 1860 (Act 45 of 1860), s. 354C.

16 The Indian Penal Code, 1860 (Act 45 of 1860), s. 354D.

17 The Indian Penal Code, 1860 (Act 45 of 1860), s. 366.

18 The Indian Penal Code, 1860 (Act 45 of 1860), s. 366A.

Section 366-B: 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.[19]

Section 370: 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. This provision is gender neutral vis-à-vis the offender and the victim.[20]

Section 375: Rape by a man of woman below 18 years, with or without her consent. The Criminal Law (Amendment) Act, 2013 has expanded the concept of penetration and rape. Which 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 party 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 7 descriptions under Section 375, IPC are met. In the context of the girl child, the 6th description which states "With or without her consent, when she is under 18 years of age will apply.[21]

Section 376-A: Causing death or resulting in persistent vegetative state of a woman during rape or aggravated rape.[22]

Section 376-B: Sexual intercourse by husband upon his wife during separation without her consent.[23]

Section 376-C: 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.[24]

19 The Indian Penal Code, 1860 (Act 45 of 1860), s. 366B.

20 The Indian Penal Code, 1860 (Act 45 of 1860), s. 370.

21 The Indian Penal Code, 1860 (Act 45 of 1860), s. 375.

22 The Indian Penal Code, 1860 (Act 45 of 1860), s. 376A.

23 The Indian Penal Code, 1860 (Act 45 of 1860), s. 376B.

24 The Indian Penal Code, 1860 (Act 45 of 1860), s. 376C.

Section 376-D: Gang rape i.e., rape by one or more persons constituting a group or acting in furtherance of a common intention.[25]

The following grounds constitute aggravated rape under the IPC[26]:

- Rape on a woman incapable of giving consent; Section 376 (2) (j).
- Rape on a woman suffering from mental or physical disability; Section 376 (2) (l).
- Rape by a relative, guardian, teacher, or person in a position of trust or authority; 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; Section 376 (2) (d).
- Rape by a person on the management or staff of hospital on a woman in the hospital; Section 376 (2) (e).
- Rape by a person in a position of control or dominance over the woman; 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, Section 376 (2) (a); by a public servant on a woman in his or his subordinate officer's custody, Section 376 (2) (b); by a member of the armed forces in the area in which he is deployed, Section 376 (2) (c);
- Rape committed during communal or sectarian violence, Section 376 (2) (g);
- Rape committed on a woman knowing her to be pregnant, Section 376 (2) (h);
- Causing grievous bodily harm, maiming, disfiguring or endangering the life of a woman, Section 376 (2) (m);
- Repeatedly raping the same woman, Section 376 (2) (n).

The IPC was not enough to protect the children and criminalize non-conventional sexual abuses like child trafficking, pornography and sale of children. There existed several loopholes in IPC due to which effective protection could not be provided to children. For example,

25 The Indian Penal Code, 1860 (Act 45 of 1860), s. 376D.

26 The Indian Penal Code, 1860 (Act 45 of 1860), s. 376.

- The offences under Section 354 and 375 only covered female victims.
- The offences under IPC are gender specific, that is, only a woman or a girl can file a complaint of rape or sexual assault against a man.
- With regard to sexual offences against men and boys, the IPC does not distinguish between consensual intercourse between adults and forced intercourse ''against the order of nature.''
- The IPC until 2013 only covered 'rape' (defined as penetration of the penis into the vagina) by a man of a woman. Now following the Criminal Law Amendment in 2013, the IPC covers a range of sexual offences against women. However, the IPC does not distinguish between women and girl children in terms of the needs of girl children for special procedures during the course of the trial.

Before the introduction of the POCSO Act, 2012 the sole legislation in India that aimed at protecting the rights of the child was the Goa's Children's Act, 2003 and Rules 2004. Until 2012, provisions of the IPC, Immoral Traffic (Prevention) Act, 1956 (ITPA), and Juvenile Justice (Care and Protection of Children) Act 2000 (JJ Act) applied to sexual offences against children. However, ITPA applies only to cases of child prostitution and the JJ Act does not explicitly provide penal provisions for sexual abuse of children.

Until recently, various provisions of the IPC were used to deal with sexual offences against children as the law did not make a distinction between an adult and a child. POCSO however, deals with sexual offences against persons below the age of 18 years. POCSO provides for relief and rehabilitation as soon as the complaint is made to the Special Juvenile Police Unit or the local police who are required to make immediate arrangements for care and protection.

2.2. Basis of POCSO Act:

2.2.1. Base from International Conventions:

The POCSO Act aligns with several international conventions, multilateral agreements, and treaties that emphasize the protection and rights of children. Some notable frameworks are:

United Nations Convention on the Rights of the Child (UNCRC): The UNCRC, ratified by India in 1992, provides a comprehensive set of rights for children, including protection from all forms of exploitation and abuse. The POCSO Act

resonates with the UNCRC's principles and aims to fulfil India's obligations under this convention.

The state parties to the Convention on the Rights of the Child, to which India is a signatory since 11th December 1992, are required to undertake all appropriate national, bilateral measures to prevent:-

a. Inducement or coercion of a child to engage in any unlawful sexual activity.

b. The exploitative use of children in prostitution or other unlawful sexual practices.

c. The exploitative use of children in pornographic performances and materials.

The POCSO Act, 2012 thus recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child.

Vienna Declaration and Programme of Action: Vienna Declaration and Programme of Action, 1993 urges at Section II Para 47, all nations to undertake measures to the maximum extent of their available resources, with the support of international cooperation, to achieve the goals in the World Summit Plan of Action and calls on States to integrate the Convention on the Rights of the Child into their national action plans. Effective measures are required against female infanticide, harmful child labour, sale of children and organs, child prostitution, child pornography, as well as other forms of sexual abuse. This gave an influence to adoptions of Optional Protocol on the Involvement of Children in Armed Conflict and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution, and Child Pornography: This protocol, ratified by India in 2005, emphasizes the prevention and criminalization of child sexual exploitation. The POCSO Act, through its provisions on child pornography and exploitation, reflects the intent to adhere to this protocol.

The International Labour Organization's Convention No. 182: India ratified this convention in 2000, committing to eradicate the worst forms of child labour, including sexual exploitation. The POCSO Act serves as a crucial tool in combating child sexual exploitation, aligning with the goals of this convention.

The Sustainable Development Goals (SDGs): The SDGs, adopted by the United Nations, include specific targets related to ending violence against children, ensuring their well-being and access to justice. The POCSO Act contributes directly to achieving these targets by addressing child sexual offences comprehensively.

2.2.2. Base from the Constitution of India:

The following Articles of the Constitution of India shows the basis of provisions to tackle the cases of children sexually abused. Thus the POCSO Act finds its constitutionality from the following Articles:

Article 14 of the Constitution of India dealing with Equality before law says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. In *State of West Bengal* v. *Anwar Ali*,[27] Section 5(1) of the West Bengal Special Courts Act was held to be violative of Article 14 of the Constitution of India and unconstitutional. The State of West Bengal keeping in view the aforesaid judgment, enacted West Bengal Tribunals of Criminal Jurisdiction Act for speedy trial of offences in disturbed areas in the interest of security of the State and the same was unsuccessfully challenged in *K. Haldar* v. *State of West Bengal*[28].

Article 15(3): It states that even though the state will not discriminate anyone, they can make special provisions only for women and children to safeguard their interests. This Act is therefore enforced to protect the dignity of the children.

Article 21A of the Constitution of India was inserted by Constitution (Eighty Sixth Amendment) Act, 2002 and this Article dealing with Right to Education says that the state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine. In *Bachpan Bachao Andolan* v. *Union of India*,[29] the aspect of rehabilitation of children saved from employment in circuses had been discussed.

Article 39(e): It states that the health and strength of workers, men and women and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.

Article 39(f): It states that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that

27 *State of West Bengal* v. *Anwar Ali*, AIR 1952 SC 75.

28 *K. Haldar* v. *State of West Bengal*, AIR 1960 SC 457.

29 *Bachpan Bachao Andolan* v. *Union of India*, AIR 2011 SC 3361.

childhood and youth are protected against exploitation and against moral and material abandonment.

Article 39A of the Constitution of India dealing with Equal Justice and Free Legal Aid says that the State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity and shall in particular, provide Free Legal Aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not derived to any citizen by reason of economic or other disabilities

Article 45**:** The Constitution of India in its Directive Principles contained in Article 45 has made a provision for free and compulsory education for all children upto the age of 6 years. This will make him/her aware of these incidents of sexual exploitation and harassments by the perpetrators. This is one of the reasons why the Right to Education Act, 2009 has been enacted by the parliament. But its needful application is still far away than it is expected.

2.3. Journey of Enactment of POCSO Act:

The Indian Constitution has a framework within which ample provisions exist for the protection, development and welfare of children as discussed above. The process to enact the legislation that finally became the POCSO Act started in 2009, when the Ministry of Women and Child Development circulated the draft Offences against Children Bill among stakeholders.

In January 2010, the National Commission for Protection of Child Rights (NCPCR) invited a few NGOs working for children, such as, Tulir – Centre for the Prevention & Healing of Child Sexual Abuse and HAQ: Centre for Child Rights, to discuss the Bill. Around the same time, the Ministry of Law & Justice, Government of India, called upon Tulir to forthwith start a consultative process to recommend contents for a law relating to child sexual offences.

Over two decades, women's rights groups in India had been demanding the need for reform of rape laws. This demand reached a crescendo in 2010 in the protests against the injustice in the *Ruchika Girhotra case*[30]. This prompted the Ministry of Home Affairs to come out with the draft Criminal Law (Amendment) Bill 2010, which proposed changes to the IPC, CrPC and IEA in relation to sexual offences. The draft Bill also contained provisions regarding sexual abuse of a minor, which galvanised child rights groups to meet and discuss it.

30 *SPS Rathore v. CBI,* 2016 SCC OnLine 988.

In July 2010, a draft Bill on Sexual Offences against Children was circulated by the Ministry of Law & Justice. Yet another draft Bill, the Protection of Children from Sexual Offences Bill 2010, was prepared by the Ministry of Women and Child Development. The Ministry of Women and Child Development requested the National Commission for Protection of Child Rights (NCPCR) to scrutinise the draft Bill. The Committee rejected the draft Bill and prepared an alternative draft, dealing with substantive and procedural aspects of the proposed law, which was then submitted by the NCPCR to the ministry. Almost simultaneously, three initiatives were on to frame legislation on sexual offences against children, and child rights activists were responding to this as best they could.

Finally, the Ministry of Women & Child Development introduced the Protection of Children from Sexual Offences Bill, 2011 in the Rajya Sabha. The POCSO Act and the Protection of Children from Sexual Offences Rules, 2012 simultaneously came into force on 14 November 2012. Subsequent to the POCSO Act, another initiative of the Ministry of Health & Family Welfare resulted in formulation of the Guidelines for Medical Examination of Child under the POCSO Act, 2012. The Ministry of Women and Child Development also initiated and saw through the framing of the Model Guidelines under Section 39 of the POCSO Act, 2012.[31]

2.4. Importance of the POCSO Act, 2012:

Within the Indian context, the enactment of the POCSO Act was necessary to address several gaps in the existing legal framework. Prior to the introduction of this legislation, child sexual abuse cases were primarily dealt with under the IPC, which did not adequately address the specific needs and vulnerabilities of child victims.

The POCSO Act was enacted when the cases of sexual abuse against children were rising. It contains provisions regarding the protection of children from sexual assault and pornography and lays down the procedure for the implementation of these laws. The POCSO Act sought to provide a dedicated legal framework to protect children from sexual offenses, recognizing their unique circumstances and ensuring a child-friendly approach throughout the justice process.

One of the key features of the POCSO Act is its child-centric approach. The Act defines a child as any person below the age of 18 years, ensuring that all individuals falling within this age group are afforded protection. It also recognizes the principle of "best interests of the child" as a primary consideration in all matters related to child sexual offenses. This principle emphasizes the need to prioritize the well-being, safety, and rehabilitation of the child.

31 Rajasthan Judicial Academy, "*Protection of Children from Sexual Offences Act, 2012", available at:* https://rajasthanjudicialacademy.nic.in/docs/studyMaterial07102020.pdf

The Act criminalizes various forms of sexual offences against children, including but not limited to, sexual assault, sexual harassment, and child pornography. It also introduces stringent punishments for offenders, including imprisonment and fines. Additionally, the Act outlines specific procedures for the reporting, recording, and investigation of such offenses to ensure a prompt and effective response. It establishes Special Courts for the speedy trial of cases related to child sexual abuse, with a focus on protecting the child's privacy and dignity.

The POCSO Act also recognizes the importance of providing support and assistance to child victims. It mandates the appointment of Special Public Prosecutors to represent the child's interests during the legal proceedings. It also envisages the establishment of Special Juvenile Police Units and Child Welfare Committees at the district level to facilitate a coordinated response and ensure the child's welfare. Moreover, the Act emphasizes the need for sensitizing the police, judiciary, and other stakeholders involved in the justice system.

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3. UNDERSTANDING THE POCSO ACT

3.1. Objective of the POCSO Act:

In *R.* v. *Secretary of State for the environment ex parte Spath Holme*,[32] it was held that:

> *"The intention of the legislature is a short hand reference to the meaning of the words used in the statute objectively determined with the aid of the settled principles of the interpretation of statutes and the actual meaning of the statutory provisions."*

The objective of enacting the POCSO Act, 2012 is to protect the children from various types of sexual offences and to establish a 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. This is very clear that the objective of the Act is to provide protection to the children and not only to punish the child offenders.

It was held in *Alakh Alok Srivastava* v. *Union of India*[33], that the objective of the POCSO Act is to protect the child from many aspects so that he/she does not feel a sense of discomfort or fear or is reminded of the horrified experience and further there has to be a child friendly atmosphere.

The POCSO Act, 2012 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 the trial of offences involving children as the statute was enacted to protect children from offences arising out of sexual assault, sexual harassment and pornography. 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 the judicial process and gives paramount importance to the principle of "best interest of the child".

It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences

32 *R.* v. *Secretary of State for the environment ex parte Spath Holme*, (2001) 1 All ER 195.

33 *Alakh Alok Srivastava* v. *Union of India*, 2018 Cri LJ 2929 (SC).

3.2. Scope of the POCSO Act:

The Protection of Children from Sexual Offences Act, 2012 was passed by the Parliament in May, 2012. The Act has been drafted to strengthen the legal provisions for the protection of children from sexual abuse and exploitation. This Act 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 the offences of sexual assault, sexual harassment and pornography. These offences have been clearly defined for the first time in law. The Act provides for stringent punishments, which have been graded as per the gravity of the offence. The punishments range from simple to rigorous imprisonment of varying periods. There is also provision for fine, which is to be decided by the Court.[34]

An offence is treated as "aggravated" when committed by a person in a position of trust or authority of a child such as a member of security forces, police officer, public servant, etc.

The Act of 2012 has been legislated keeping in view fundamental concept under Article 15 of Constitution that empowers State to make special provisions for children and also Article 39 (f) which provides that State shall in particular direct its policy towards securing that children are given opportunities and facilities to develop in healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.[35]

3.3. An Overview of the POCSO Act:

To deal with child sexual abuse cases, the Government has brought in a special law, namely, The Protection of Children from Sexual Offences (POCSO) Act, 2012. The Act has come into force with effect from 14th November, 2012 along with the Rules framed thereunder.

The POCSO Act, 2012 is a comprehensive law to provide for the protection of children from the offences of sexual assault, sexual harassment and pornography, while safeguarding the interests of the child at every stage of the judicial process by incorporating child-friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts.

The said Act defines a child as any person below 18 years of age, and defines different forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography, and deems a sexual assault to be "aggravated"

34 Nayan Joshi, *Lawmann's Commentary on Protection of Children from Sexual Offences Act, 2012*, 3 (Kamal Publishers, New Delhi 3rd edn.)

35 *Alakh Alok Srivastava* v. *Union of India*, 2018 Cri LJ 2929 (SC).

under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority vis-à-vis the child, like a family member, police officer, teacher, or doctor. People who traffick children for sexual purposes are also punishable under the provisions relating to abetment in the said Act. The said Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine.

In keeping with the best international child protection standards, the said Act also provides for mandatory reporting of sexual offences. This casts a legal duty upon a person who has knowledge that a child has been sexually abused to report the offence; if he fails to do so, he may be punished with 6 months imprisonment and/or a fine.

The said Act also casts the police in the role of child protectors during the investigative process. Thus, the police personnel receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangements for the care and protection of the child, such as obtaining emergency medical treatment for the child and placing the child in a shelter home, should the need arise. The police are also required to bring the matter to the attention of the Child Welfare Committee (CWC) within 24 hours of receiving the report, so the CWC may then proceed where required to make further arrangements for the safety and security of the child.

The said Act makes provisions for the medical examination of the child in a manner designed to cause as little distress as possible. The examination is to be carried out in the presence of the parent or other person whom the child trusts, and in the case of a female child, by a female doctor.

The said Act provides for Special Courts that conduct the trial in-camera and without revealing the identity of the child, in a child-friendly manner. Hence, the child may have a parent or other trusted person present at the time of testifying and can call for assistance from an interpreter, special educator, or other professional while giving evidence; further, the child is not to be called repeatedly to testify in court and may testify through video-link rather than in a courtroom. Above all, the said Act stipulates that a case of child sexual abuse must be disposed of within one year from the date the offence is reported. It also provides for the Special Court to determine the amount of compensation to be paid to a child who has been sexually abused, so that this money can then be used for the child's medical treatment and rehabilitation.

The said Act recognises almost every known form of sexual abuse against children as punishable offences, and makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child. Further, by providing for a child-friendly judicial process, the said Act

encourages children who have been victims of sexual abuse to report the offence and seek redress for their suffering, as well as to obtain assistance in overcoming their trauma. In time, the said Act will provide a means not only to report and punish those who abuse and exploit the innocence of children, but also prove an effective deterrent in curbing the occurrence of these offences.

The said Act is to be implemented with the active participation of the State Governments. Under Section 39 of the said Act, the State Government is required to frame guidelines for the use of persons including non-governmental organisations, professionals and experts or persons trained in and having knowledge of psychology, social work, physical health, mental health and child development to assist the child at the trial and pre-trial stage. The following guidelines are Model Guidelines formulated by the Central Government, based on which the State Governments can then frame more extensive and specific guidelines as per their specific needs.[36]

The prevention of child sexual abuse, protection of victims, justice delivery, and rehabilitation of victims are not isolated issues. The achievement of these objectives requires a coordinated response of all the key players, which include the police, prosecution, courts, medical institutions, psychologists and counsellors, as well as institutions that provide social services to the children. The protection of children from violence and abuse thus requires an integrated and coordinated approach. Needless to say, the identification and understanding of the roles of each of these professionals is crucial to avoid duplication and promote effective convergence.[37]

3.4. Salient Features of the POCSO Act:

Gender-neutral law: By defining a child as 'any person' below the age of 18 years, the POCSO Act sets a gender-neutral tone for the legal framework available to child sexual abuse victims. Consequently, a child of any gender who has been sexually wronged has access to the remedies provided under the Act. The Act also does not distinguish between perpetrators of child sexual abuse on the grounds of gender, and there have been instances where the courts have convicted women for such abuse.

Not reporting abuse is an offence: The flagship feature of the POCSO Act, and arguably the most debated one, is the mandatory reporting obligation imposed under Section 19. It requires every person who suspects or has knowledge of a sexual offence being

36 Ministry Of Women And Child Development, *Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012* (September, 2013), *available at:* https://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf

37 Nayan Joshi, *Lawmann's Commentary on Protection of Children from Sexual Offences Act, 2012*, 3 (Kamal Publishers, New Delhi 3rd edn.)

committed against a child to report it to the local police or the Special Juvenile Police Unit.

The Act not only punishes the perpetrator of sexual abuse, but also penalises those who have failed to report the offence with either imprisonment or a fine or both. Any person in charge of a company or an institution who fails to report the commission of a sexual offence relating to a subordinate under their control is liable to be punished with imprisonment and a fine under Section 21 of the Act. The Act, however, exempts children from any non-reporting liabilities. Over the years, criminal actions have been initiated against a number of individuals, particularly those in charge of educational institutions, for hushing up child sexual abuse offences.

In the case of *State of Gujarat* v. *Anirudh Singh and Ors.*[38], the Supreme Court had observed that it is the duty of every citizen to aid and cooperate with the investigative agencies and give information regarding the commission of cognizable offences.

In various instances, schools and teachers help the child victims by reporting the sexual abuse cases to the authorities. For example, in the case of *Nar Bahadur Subba* v. *State of Sikkim*[39] , teachers received information that her student is pregnant due to repeated sexual assaults on her by an elderly accused. The teachers informed the Panchayat who lodged an FIR in the police station.

Shankar Kisanrao Khade v. *State of Maharashtra*[40] (2013) is an important case where the Supreme Court laid down guidelines regarding reporting of the offences. In this case, rape was committed on an 11-year-old child with moderate intellectual disability but it was neither reported to the police nor to the juvenile justice board. The Court observed that children with intellectual disabilities are more vulnerable and therefore, the institutions which house them have the responsibility to report sexual abuse incidents against them. Furthermore, it was laid down that non-reporting of crime in accordance with the provisions of the POCSO Act is a serious offence.

No time limit for reporting abuse: Typically, the trauma that child sexual abuse victims endure prevents them from voicing their complaints immediately. Recognising this, in 2018, the Union Ministry of Law and Justice clarified that there is no time or age bar for reporting sexual offences under the POCSO Act.[41] Consequently, a victim can report

38 *State of Gujarat* v. *Anirudh Singh and Ors.,* AIR 1997 SC 2780.

39 *Nar Bahadur Subba* v. *State of Sikkim*, MANU/SI/0055/2016.

40 *Kisanrao Khade* v. *State of Maharashtra,* [2013] 6 SCR 949.

41 Anisha Dutta, "Law Ministry Lifts Time Limit for Child Abuse Victims to File Case" *Hindustan Times,* October 16, 2018, *available at:* www.hindustantimes.com/india-news/law-ministry-endorses-removal-of-time-limit-to-report-child-sexual-abuse-maneka-gandhi/story-fxbf78duXiv3d0qQI5OIRJ.html

an offence at any time, even a number of years after the abuse has been committed. Therefore, organisations dealing with children in India cannot shun child sexual abuse complaints raised against their employees on the pretext of lapse of time. On the other hand, numerous states in the US and several countries across the European Union continue to impose limitation periods for child sexual abuse victims seeking legal recourse. Such limitation periods create formidable barriers for victims who intend on voicing their sexual abuse allegations later in life.

Maintaining Confidentiality of the victim's identity: Section 23 of the POCSO Act provides for the procedure of media and imposes the duty to maintain the child victim's identity unless the Special Court has allowed the disclosure. Section 23(2) states, *"no reports in any media shall disclose the identity of a child including his name, address, photograph, family details, school, neighbourhood and any other particulars which may lead to the disclosure of the identity of the child"*.

A violation of this Section can attract punishments under the Act, regardless of whether such disclosures are made in good faith. Reiterating this position, the Supreme Court issued a host of directions in *Nipun Saxena* v. *Union of India*,[42] forbidding, among other things, revealing a POCSO victim's identity on social media.

In another case namely *Bijoy @ Guddu Das v. The State of West Bengal*[43], the Calcutta High Court reiterated the law made under Section 23 and declared that any person including a police officer shall be prosecuted if he/ she commits such a breach.

The last seen theory: The theory of last seen is applied in the child sexual abuse trials. According to this theory, the person who is last seen with the victim is assumed to be the perpetrator of the offence when the time gap between the point when they were last seen alive is so minute that it is not possible that any other person could have committed the crime. In the case of *Shyamal Ghosh v. State of West Bengal*[44], it was observed that when the time gap is large then it is not reasonable for the Courts to apply the last seen theory.

Child-friendly investigation and trial: Sections 24, 26 and 33 of the POCSO Act lay down the procedure of investigation and trial which has been formulated keeping in mind the needs of a child. The following points are taken into consideration while investigating any crime under POCSO Act:

42 *Nipun Saxena* v. *Union of India*, (2019) 2 SCC 703.

43 *Bijoy @ Guddu Das* v. *The State of West Bengal*, CRA 663 of 2016: CRAN 4926 of 2016.

44 *Shyamal Ghosh* v. *Respondent: State of West Bengal*, AIR 2012 SC 3539, (Para 50 & 51).

1. The statement of the child is to be recorded at his/ her place of residence and generally by a woman police officer.
2. The officer who is to record the statement of the child should not be wearing a uniform.
3. The officer should ensure that the child does not come in contact with the accused during the examination.
4. A child is not to be detained in the police station at night.
5. The officer should ensure that the identity of the child is not revealed.
6. The statement of the child is to be recorded in the presence of a person in whom the child has trust, for example, their parents.
7. The statement of the child is to be recorded via audio-video electronic means.
8. The assistance of the translators or interpreters should be taken wherever necessary.
9. Frequent breaks are to be allowed during the trial.
10. The special court has to ensure that the child is not called to repeatedly testify in the trial court.
11. Aggressive questioning of the child is not permitted during the trial.

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4. CHILD AND DETERMINATION OF AGE THEREOF

4.1. Definition of Child:

Section 2 (1) (d) of the POCSO Act and Section 2 (12) of the JJ Act defines **child**, unless the context otherwise requires, it to mean any person below the age of 18 years. In *Eera through Manjula Krippendorf* v. *State (Govt. of NCT of Delhi) and Ors*.[45], while dealing with the definition of 'Child' under the Protection of Children from Sexual Offences Act, 2012, it was held that the word 'Age' only includes physical age and not mental age and hence biological age up to 18 years to be included within the meaning of the term 'Child' under the provisions of the aforesaid Act.

Section 34 (2) of the POCSO Act requires the Special Court to satisfy itself about the age of the child and record in writing its reasons for arriving at a conclusion in this regard.[46]

Section 2 (13) of JJ Act, 2015 defines child in conflict with law as a child who is alleged or found to have committed an offence and who has not completed 18 years of age on the date of commission of such offence.[47]

Definition of a **child in need of care and protection** however must be given a wider meaning and in addition to some children in conflict with law it must also include victims of sexual abuse or sexual assault or sexual harassment under POCSO Act as also victims of child trafficking. Such children must also be given protection under the provisions of the JJ Act being victims of crime under the POCSO Act as also victims of child trafficking. Such children must also be given protection under provisions of JJ Act being victims of crime under POCSO Act and Immoral Traffic (Prevention) Act, 1956.

4.2. Determination of Age:

Jurisdiction of Special Court turns on the age of the victim child. It does not matter whether the 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.

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45 *Eera through Manjula Krippendorf* v. *State (Govt. of NCT of Delhi) and Ors*., AIR 2017 SC 3457.

46 The Prevention of Children from Sexual Offences Act, 2012 (Act 32 of 2012), *Section 34. Procedure in case of commission of offence by child and determination of age by Special Court-*
(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

47 The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s. 2(13).

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 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 Section 94 of the JJ Act, 2015 and Section 34(2) of the POCSO Act, respectively, to determine age.

4.2.1. Determination of Age under POCSO Act, 2012:

- Determination of the age of a victim or of an accused person is a very important jurisdictional and substantive issue, which determines the applicability of the POCSO Act and the Juvenile Justice Act.
- Section 34 of POCSO Act- Procedure in case of commission of the offense by child and determination of age by Special Court. Section 34 (2) reads:-

> *"…(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination."*

4.2.2. Determination of Age Before the enactment of JJ Act, 2015:

The Supreme Court in *Jarnail Singh* v. *State of Haryana,*[48] held that the provisions of the Juvenile Justice Act and Rules would equally apply to determine the age for both a victim as well as an accused person. In particular, the Supreme Court relied on Rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007.[49] The documents listed in Rule 12 (3) therefore become critical to establish the age of the child, and are referred to in several of the judgements listed below.

While these judgments are in the context of determination of the age of a victim in POCSO case, they could in some instances, equally apply to determination of juvenility of a **'child in conflict with law'**.

However, the process of determining the age based on the documents was in conflict. In cases like *Mahadeo* v. *State of Maharashtra*,[50] and *State of Madhya Pradesh* v. *Anoop Singh,*[51] a dispute on determining age based on the Middle School Examination Certificate and Birth Certificate arose. The Supreme Court held that Rule 12(3) would apply and medical opinion could be looked into only in absence of documents referred to in Rule 12, JJ Rules, 2007. The court further held that Rule 12(3), JJ Rules, 2007 would also apply to determine the age of the victim.

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48 *Jarnail Singh* v. *State of Haryana,* (2013) 7 SCC 263.

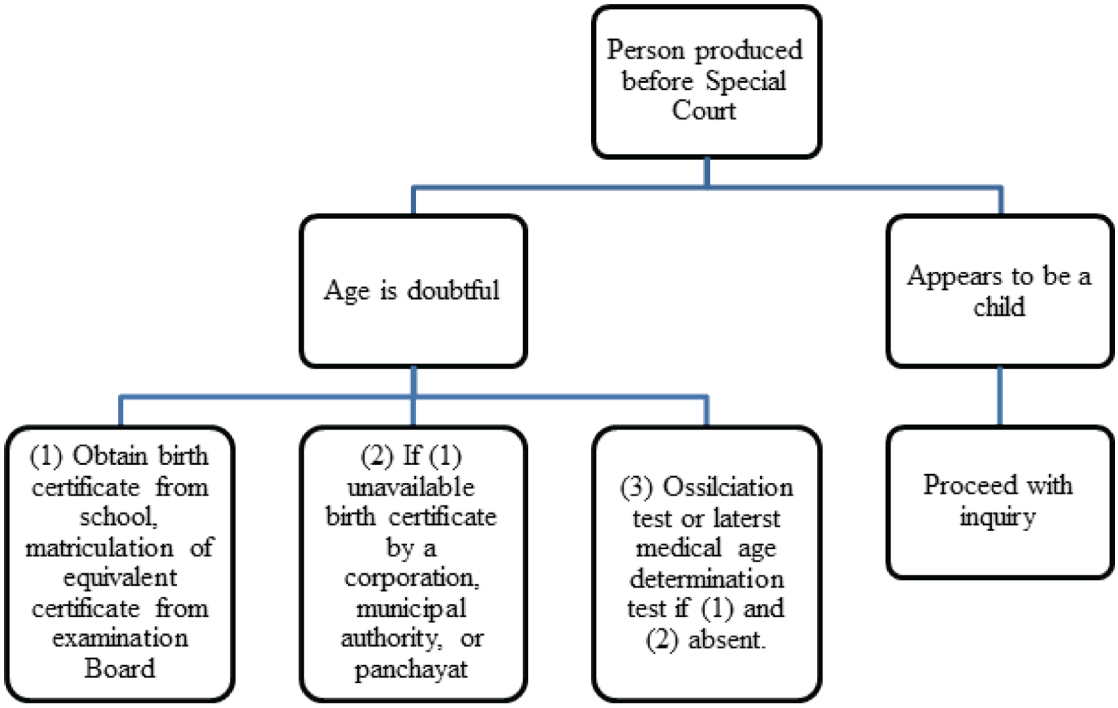
49 Juvenile Justice (Care and Protection of Children) Rules, 2007, *Rule 12. Procedure to be followed in determination of Age*
(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the 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 (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;
(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.

50 *Mahadeo* v. *State of Maharashtra*, (2013) 14 SCC 637.

51 *State of Madhya Pradesh* v. *Anoop Singh,* (2015) 7 SCC 773.

4.2.3. Determination of Age After the enactment of JJ Act, 2015:

After the enactment of new JJ Act, 2015 Section 94 has been inserted to determine the age of child. The process for Age-Determination under Section 94, Juvenile Justice Act, 2015 is as follows:



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 the 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 case[52], 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.

A comparison between the Rule 12 of J.J Rules 2007 and Section 94 of Juvenile Justice Act, 2015 is given below:

Rule 12 of J.J Rules 2007- Procedure to be followed in determination of Age.	**S. 94 of Juvenile Justice Act, 2015- Presumption and determination of Age.**
• The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail. (Rule 2). • According to Rule 12, age determination inquiry, shall be conducted by the court or the Board, as the case may be. • The Committee by seeking evidence by obtaining – • (a) (i) the matriculation or equivalent certificates, 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; • 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	• Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with, without waiting for further confirmation of the age. [Section 94(1)] • In case, the Committee or the Board has reasonable grounds for doubt regarding juvenility, it shall undertake the process of age determination, by obtaining — • (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof; • (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; • (iii) only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test [Sec 94(2)]

52 *Jarnail Singh* v. *State of Haryana,* (2013) 7 SCC 263.

The question that arises is whether Special Courts under the POCSO Act need to follow the procedure prescribed under Section 94, JJ Act, 2015. It may be argued that since Section 94, JJ Act, 2015 does not refer to a "court", a Special Court under the POCSO Act is not bound to adhere to the age-determination procedure prescribed under the JJ Act, 2015 and that Section 34(2), POCSO Act leaves it to the Special Court as to how age should be determined.

Judgments of the Delhi and Madras High Court are instructive in this regard. In *State (Govt. of N.C.T. of Delhi)* v. *Kishan*,[53] the Special Court had relied on Section 94, JJ Act, 2015 and held that the victim was a child based on the records from the first attended school and no infirmity was found with respect to this aspect of the decision by the Delhi High Court.

More specifically, in *Rajendran* v. *State*,[54] a division bench of the Madras High Court relied on Section 94(2), JJ Act, 2015 to conclude that the victim under POCSO Act was a child. In *Tulachha Ram* v. *State of Rajasthan*[55], while relying upon the school certificate the trial court referred to the principles laid down under Section 35 of the Evidence Act[56] and raised a presumption regarding genuineness of the official document produced by the prosecution. The Hon'ble High Court observed that the approach of the trial court was not appropriate in view of the fact that the complete mechanism for age determination of juveniles is laid down under Section 94 of the JJ Act. The Court held as below-

> *"30. As per clause 2 (i) of the Act of 2015, the date of birth certificate issued from the school is a governing factor for deciding the age of a juvenile. However, considering in light of various pronouncements of Hon'ble Supreme Court including the observations made in the case of Birad* ***Mal Singhvi v. Anand Purohit reported in AIR 1988 SC 1796****, it is manifest that for satisfying the court regarding genuineness of the school certificate (Ex. P.14) (in view of the fact that the father of the victim has himself gave evasive reply regarding the exact date of birth of the girl as recorded in the school certificate), the prosecution was required to produce on record and prove the date of birth of the prosecutrix as recorded in the concerned school at the time of her initial admission in the school.*

53 *State (Govt. of N.C.T. of Delhi)* v. *Kishan*, 2017 (4) JCC 2291.

54 *Rajendran* v. *State*, (Crl. A.No. 483 of 2016 decided on 23.12.16).

55 *Tulachha Ram* v. *State of Rajasthan* 2019 (2) WLN 371 (Raj.).

56 The Indian Evidence Act, 1872 (Act No. 1 of 1872), s. 35.

32. Therefore, in the facts and circumstances of the case, we have no reason to disbelieve the statements of the victim (PW 1), her father Mal Singh (PW 2) and mother Santosh Kanwar (PW 4) that the age of the victim was more than 18 years at the time of the incident. Therefore, it is a clear case of consensual relations and since the victim was above the age of 18 years on the date of the incident, the provisions of Protection of Children from Sexual Offences Act were wrongly applied in the present case as observed by us in the detailed discussion made above."

Application of Section 94, JJ Act thus differs widely depending upon the factual matrix of the case. Following are the issues which prevail in the cases where age determination is in question:

i. Absence of birth certificate and poor maintenance of records

ii. Application of JJ Act

iii. Inconsistent appreciation of school records

iv. Benefit of margin of error seldom given to the victim

v. Investigation lapses

4.2.4. Judgements Where Determination of Age is made by the Application of Section 94, JJ Act, 2015:

- *Sanat Yadav* v. *State of Madhya Pradesh*, 2017 SCC Online MP 252

  Dispute on determining age based on School Certificate or on Driving License.

  Held: School Certificate will prevail as per Section 94, JJ Act, 2015.

- *Gajab Singh* v. *State of Haryana*, (2019) ILR 1 Punjab and Haryana 465

  Dispute on determining age based on School Certificate and Matriculation Certificate.

  Held: School Certificate will prevail as per Section 94, JJ Act, 2015.

- *Rishipal Singh Solanki* v. *State of Uttar Pradesh*, AIR 2022 SC 630

  (i) A claim of juvenility may be raised at any stage, even after a final disposal

  (ii) An application claiming juvenility could be made either before the Court or the JJ Board under S. 94 of JJ Act, 2015.

(iii) Ascertainment of age shall be according to S. 94(2), JJ Act, 2015.

(iv) Burden of proof of age lies on the person challenging the age of the victim.

4.2.5. Principle on Margin of Error of Age:

Shweta Gulati v. *State (Govt. of NCT of Delhi),*[57] *2018 SCC Online Del 10448*

The Delhi High Court dealt with a bone ossification test report that had estimated the age of the victim as 17 to 19 years.

The Court held in unequivocal terms that

"Giving the benefit of doubt to the accused, the age of the victim has to be taken as 19 years of age.... It is also a settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused."

Therefore, by virtue of the benefit of doubt going to the accused the age of the victim as established by the ossification test is to be considered on the higher side.

The same view has been affirmed by the Supreme Court in *Rajak Mohammad* v. *State of H.P.*,[58] (2018) 9 SCC 248.

It is also pertinent to note that in cases of determining juvenility of the accused, the margin of error is taken at the lower side.

4.3. 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

57 *Shweta Gulati* v. *State (Govt. of NCT of Delhi),* 2018 SCC Online Del 10448.

58 *Rajak Mohammad* v. *State of H.P.*, (2018) 9 SCC 248.

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-S), 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-S 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 us 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 (Cr) 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 (in), 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 (CH) 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-S 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. Anand Purohit, 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 I1 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 AADHAR 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 been questioned by the defence, at any stage of proceedings."*

4.4. Consensual Sex: A Deformity of the POCSO Act:

4.4.1. Deformity of the POCSO Act:

Romantic relationship and sexual instinct are a universal phenomenon with its developmental significance, especially during adolescence. One of the striking features of this developmental phase is the formation of a romantic relationship. As a developmental pathway, healthy romantic relationship among adolescents plays a vital role in moulding their personal ideologies regarding intimate relationship and sexuality, along with having the enduring influence on self-esteem and overall well being with the progress to the later stage of life.[59]

59 Veenashree Anchan, Navaneetham Janardhana & John Vijay Sagar Kommu, "POCSO Act, 2012: Consensual Sex as a Matter of Tug of War between Developmental Need and Legal Obligation for the Adolescents in India," *Indian J Psychol Med. 2020, 43(2), 158–162*.

The Act has failed to sustain the growing needs of society and bring necessary amendments. It did not consider the consensual romantic relationship involving adolescents of age below 18 years. Under the Act the child is described as any person below the age of eighteen years[60], criminalising any type of sexual relationship with a person below 18 years of age.

The law overlooked that during adolescence, due to hormonal and biological changes in the body, adolescents are naturally inclined towards entering into relationships which might lead to physical intimacy. Their tendency to engage in physical relationships is due to the biological and social need of intimacy, it does not have any criminal intent behind the acts.

Criminalisation of the physical relationship between two adolescents is based on the old perceived notion that the girl is the 'victim' and the boy is 'guilty', which leads to adolescent boys being subjected to the Juvenile Justice Act as Children in conflict with law. Sometimes it can also lead to the adolescent boy being treated as an adult offender in trial courts for heinous offences such as rape rather than juvenile board, destroying their life at a tender age.

The POCSO Act is said to be gender neutral law, but it still differentiates between adolescent boy and adolescent girl. In a case involving the physical relationship between adolescent boy and adolescent girl, the girl is treated as the victim and the boy is treated as an accused. The Act prioritises the protection of the girl child over the boy child. The world is moving towards the global gender equality but still such progressive Act is putting the protection of the girl child on a higher pedestal than that of the boy child. By not acknowledging the consensual relationship between adolescents, this Act is contributing to gender inequality.

It is also shocking to note that before *Independent Thought* v. *Union of India and Anr.*[61] case judgment, the age for sexual relations in the case of marriage was 16 years, whereas in the case of romantic relations it is taken as 18 years. Marriage used to grant protection to people who engage in sexual relationships with girls of age between 16 to 18 years. The law used to have an exception for child marriage which is a result of social evil and detrimental to the development of children, but the law refused to even recognise the romantic relationship between adolescents which is a result of biological attraction. According to a report referred by the Constitutional Court of South Africa, sexual activity during

60 The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), s. 2 (1) (d).

61 *Independent Thought* v. *Union of India and Anr.,* W.P. (C) No. 382 of 2013.

adolescence is important for the development of an individual.[62] Whereas child marriage is prejudicious for their development.

In addition, the Act by criminalising the sexual relationship between adolescents is also in violation of the right to choose a partner conferred by Article 21 of the Constitution.[63] It presupposes that adolescent girls are not mature enough to be able to give consent, depriving them of the right to choose a partner.[64]

4.4.2. Repercussions of Deformity:

Due to the deformity in the Act, it is misused by the family of an adolescent girl. In cases, where the family of an adolescent girl has not accepted the boy for whatever reasons, the Act is used by the girl's parents as a weapon to frame innocent boys as criminals for serious offences like rape and abduction to reprimand them from pursuing their relationship.

The Act also prevents adolescents from seeking medical health services at registered clinics and hospitals as the Act mandates the reporting to officials.[65] Therefore, it causes fear in the minds of young couples of prosecution, encouraging them to go to illegal and unsafe clinics for medical advice and treatments putting them in danger.

The filing of romantic cases i.e., cases involving two consensual adolescents, also unnecessarily overburdens the limited resources of the judicial system. Nearly 2 lakh cases booked under the Act are still pending in the courts.[66] Due to the pendency of cases involving consensual relationships, the other serious cases which call for the immediate attention of courts are deprived of timely justice.

4.4.3. Way to Solve the Deformities:

To solve the deformity, there is a need to decriminalise physical relationships between adolescents. Decriminalising the consensual, non-exploitative sexual relationship between adolescents of similar ages will be a progressive step, as

62 *Teddy Bear Clinic for Abused Children and Another* v. *Minister of Justice and Constitutional Development and Another*, (CCT 12/13) [2013] ZACC 35, *available at:* http://www.saflii.org/za/cases/ZACC/2013/35.html

63 *Navtej Singh Johar and Ors*. v. *Union of India and Ors*., AIR 2018 SC 4321.

64 Khagesh Meena, "Deformity Relating To Age Of Child Under POCSO Act", *LiveLaw*, January 15, 2023, *available at:* https://www.livelaw.in/columns/protection-of-children-from-sexual-offences-act-age-of-child-indian-penal-code-218995

65 The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), s. 19.

66 Ministry of Law and Justice, *733 Fast Track Special Courts including 413 exclusive POCSO Courts operationalized in 28 States/UTs* (22 DEC 2022).

recommended in general comment 24 by the UN committee on the Rights of the Child.[67] For that, there is a need to lower the age of consent from 18 to 16 years as recommended by the reports of Justice J.S. Verma Committee on Amendments to Criminal of 2013[68] and the report of Why Girls Run Away to Marry – Adolescent Realities and Socio-Legal Responses in India.[69]

Lowering the age of consent to 16 years would not completely solve problems associated with the law, as it is not a stringent rule that only after attaining the age of 16 years the adolescent becomes mature enough to be able to give free consent. Therefore, some discretionary power should also be granted to the courts for determining the validity of consent, but such discretionary power must be restricted to be exercised only when the age of adolescent is below 18 years to prevent judicial arbitrariness.

Until the amendment is made in the Act, the courts need to play an active role and take the responsibility of purposively interpreting the Act. Many High courts have started to recognise the relationship between young adolescents while considering mutual love and affection, for instance in *Shri Silvestar Khonglah & Anr.* v. *State of Meghalaya & Anr.*[70]. Though, the courts have not accepted the consent given by the minor girl as valid consent but has refused to strictly follow the Act by considering that the consensual relationship borne out of mutual love between adolescents cannot attract the provisions of the Act.

In *Ranjit Rajbanshi* v. *State of West Bengal*,[71] case the court took a different approach, the court while accepting the above position interpreted the expression "penetration" as envisaged in the Act as a positive, unilateral act on the part of the accused.[72] And held that in the case of a consensual relationship between adolescents, sexual intercourse between two adolescents is not a unilateral act but it is a participatory act done out the volition of both girl and boy.

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67 Office of the United Nations High Commissioner for Human Rights, *General Comment No. 24 (2019) on Children's Rights in the Child Justice System*, (September 18, 2019), *available at:* www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child

68 Jagdish Sharan Verma, Leila Seth and Gopal Subramanian, *Report of the Committee on Amendments to Criminal Law* (January 23, 2013), *available at:* https://adrindia.org/sites/default/files/Justice_Verma_Amendmenttocriminallaw

69 Madhu Mehra and Amrita Nandy, "Why Girls Run Away To Marry Adolescent Realities And Socio-Legal Responses In India", *Partners for Law in Development*, New Delhi, ISBN: 978-93-84599-08-9, *available at:* https://ajws.org/wp-content/uploads/2020/09/why-girls-run-away-to-marry.pdf

70 *Shri Silvestar Khonglah & Anr.* v. *State of Meghalaya & Anr.*, Crl. Petn. No. 45 of 2022.

71 *Ranjit Rajbanshi* v. *State of West Bengal*, C.R.A. No.458 of 2018.

72 Shri. Manik Sunar & 2 Ors. v. State of Meghalaya, Crl. Petn. No. 43 of 2022.

The Madras High Court in *Vijayalakshmi* v. *State*[73], opined that it should be reminded that the POCSO Act was enacted with an aim to protect and render justice to victims and survivors of child abuse, not a tool to be used to abuse the process of law. It was never an objective of the Act to punish an adolescent boy who entered into a consensual relationship with the minor girl.

The Act is curtailing the right to engage in sexual activities of young adolescents, deviating from its original aim which is to protect children from sexual abuse. The law should be aimed at protecting non-exploitive consensual sexual activity between adolescents, which is protected under the constitution, making an advancement in the exercise of rights. Decriminalising sexual relations between young couples would strike a balance between the protection of children from sexual abuse and their liberty to engage in sexual activity. Recognising relationships between adolescents would mean recognising their emotions and their personal choices. Therefore, it would be a progressive step towards the betterment of the overall development of children.

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73 *Vijayalakshmi* v. *State,* Crl.O.P.No.232 of 2021.

5. OFFENCES UNDER POCSO ACT AND PUNISHMENT THEREOF

5.1. Nature of Offences under the POCSO Act:

The POCSO Act, 2012 and its rules were enacted with the objective of protecting children from physical, emotional or sexual abuse while safeguarding interest of children at all stages. The POCSO Act is a stringent law which is gender neutral and affords protection to children of all gender as well as provides for child friendly measures in investigation & prosecution within stipulated time frame. All individuals, male or female, under the age of 18 years, are entitled to get protection under POCSO Act. The Act is also gender neutral in case of the offender. As for the person who commits the crime - it does not matter whether the person is male or female. Both genders are equally punishable for offences under this law.

The POCSO Act not only spells out the punishments for offences, but also sets out a system for support of victims and improved methods for catching offenders. There are 3 broad categories of sexual offences punishable under POCSO: sexual assault, sexual harassment and using a child for pornography. Sexual assault itself has various degrees of seriousness. By sub-categorising them further, 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.

5.2. Mandatory Reporting of Offences (Section 19 & 20):

- The Act provides for mandatory reporting. Any person (including the child) who has apprehension that an offence is likely to be committed, or has knowledge that an offence is likely to be committed, or has knowledge that an offence has been committed shall complain to the Special Juvenile Police Unit or the local police.
- In case any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities comes across any child pornography (through any medium), shall provide such information to the Special Juvenile Police Unit or the local police.

5.3. Various Penal Provisions in Tabular Form:

Offences	Description of particulars	Punishment			
		Relevant Section	Minimum Sentence	Maximum Sentence	Fine
Section 3: Penetrative Sexual Assault	Infiltration/ Penetration + Touching	Section 4 (1)	10 yrs	Imprisonment for life	+ Fine
	Penetrative Assault on a child below sixteen years of age	Section 4 (2)	20 yrs	Imprisonment for remainder of natural life	+ Fine
Section 5: Aggravated Penetrative Sexual Assault	Custody + Duty to save + Penetration + Touching	Section 6	20 yrs (RI)	Imprisonment for life/ Death	+ Fine
Section 7: Sexual assault	Touching with sexual intent	Section 8	3 yrs	5 yrs	+ Fine
Section 9: Aggravated Sexual Assault	Custody + Duty to save + Touching	Section 10	5 yrs	7 yrs	+ Fine
Section 11: Sexual harassment	Verbal/ Gesture/ Threatening/ Enticing for/ Showing Pornographic purposes etc	Section 12	-	3 yrs	+ Fine
Section 13: Use of child for pornographic purposes	In any form of media for personal use or for distribution	Section 14 (1)	5 yrs	-	+ Fine
	Second or subsequent conviction	Section 14 (1)	7 yrs	-	+ Fine
	Along with offence under Sections 3, 5, 7 or 9	Section 14 (2)	Punishment under Sections 4, 6, 8 and 10 respectively + Section 14 (1)		
Section 15: Storage of Pornographic Material Involving Child	Storing/ Possession but fails to delete or destroy or report + intention to share or transmit child pornography	Section 15 (1)	-	-	Minimum Rs. 5,000
	Second or subsequent offence		-	-	Minimum Rs. 10,000

	Storing/ Possession for transmitting/ propagating/ displaying/ distributing (except for the purpose of reporting)	Section 15 (2)	-	3 yrs	/ Fine / + Fine
	Storing/ Possession for commercial purpose	Section 15 (3)	3 yrs	5 yrs	/ Fine / + Fine
	Second or subsequent conviction		5 yrs	7 yrs	+ Fine
Section 16: Abetment of an offence	Instigation/ Engaging in criminal conspiracy/ Aiding	Section 17	Punishment provided for that offence		
Section 18: Attempt to commit an offence	Attempting to commit	Section 18	½ of the imprisonment for life/ ½ of the longest term of imprisonment provided for that offence		/ Fine / + Fine
Section 21: Punishment for failure to report or record a case	Failure to report or record a case	Section 21 (1)		6 months	/ Fine / + Fine
	Failure is made by a person being in-charge of any company or an institution	Section 21 (2)		1 yr	+ Fine
Section 22: Punishment for false complaint or false information	Intention to humiliate, extort or threaten or defame	Section 22 (1)		6 months	/ Fine / + Fine
	A child makes such false complaint	Section 22 (2)	No Punishment		
	Whoever, not being a child victimises child in any offences	Section 22 (3)		1 yr	/ Fine / + 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 42A provides that if the same act is an offence under IPC the stringent punishment of the two shall be awarded because though the Act is overriding, it is not in derogation.

5.4. Cognizable but when Bailable or Non-bailable:

While providing for a whole range of offences, the POCSO Act does not specify whether the offences are cognizable or not, or bailable or not. Section 19 of the POCSO Act and Rule 4 (3) (a) of the POCSO Rules imply that the sexual offences are cognizable as the police receiving information of commission of such offence is required to record and register a First Information Report (FIR), per the provisions of Section 154 of CrPC, and furnish a copy of it, free of cost, to the person making such report.

To determine whether a sexual offence is bailable or non-bailable, it is necessary to see the First Schedule of CrPC (Part II - Classification of Offences against Other Laws):

- Whenever the punishment is less than 3 years of imprisonment, the offence is bailable.
- Any term of imprisonment equal to or more than 3 years, the offence is non-bailable.

All sexual offences under the POCSO Act are punishable with imprisonment up to 3 years or more and are, therefore, non-bailable.

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6. CHILD FRIENDLY APPROACH IN THE SPECIAL PROCEDURE UNDER THIS ACT

6.1. Meaning of Child Friendly Approach:

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."[74] 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 reintegration.

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 into 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

74 The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016), s. 2(15).

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 reunited 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).

6.2. Recording of Statement of a Child by Magistrate under Section 25 and 26:

6.2.1. Procedure under Section 25 of POCSO Act:

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 (5A) (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)***[75].

- ***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 (5A) (a)] In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/ preferably Judicial Magistrate for recording the statement under Section 164.

- ***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 statement under Section 164, the above mentioned 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.

75 *State of Karnataka* v. *Shivanna*, (2014) 8 SCC 913.

- ***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 Judicial Magistrate.

6.2.2. Additional Procedure under Section 26 of POCSO Act:

- The recording by the police of the FIR and the statement of the child under Section 161 of CrPC should be "as spoken by the child" and in the presence of the child's parents or a person in whom the child has trust or confidence. [Section 26 (1) of the POCSO Act].
- It is the duty of the police to read out the FIR to the child victim / informant as written down. [Section 19 (2) (b) of the POCSO Act and Section 154 (1) of CrPC].
- If the child does not understand the language in which the FIR is recorded, it is incumbent upon the police to seek assistance of a translator or interpreter whose qualifications and experience is prescribed under the POCSO Rules, to help the child communicate. [Section 19 (4) of the POCSO Act and Rule 3 of the POCSO Rules].
- If the child has a mental or physical disability, the police should "seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field" to enable such child to communicate [Section 26 (3) of the POCSO Act and Rule 3 of the POCSO Rules].
- Every informant has a right to get a copy of the FIR from the police free of cost as soon as it is registered. [Rule (4) (2) (a) of the POCSO Rules and Section 154 (2) of CrPC].
- The statement of the child shall be recorded by the police "at the residence of the child or at a place where he usually resided or at a place of his choice" [Section 24 (1) of the POCSO Act].
- The statement of the child shall be "recorded as far as practicable by a woman police officer" [Section 24 (1) of the POCSO Act]. The statement of a woman against whom a sexual offence is alleged to have been committed is to be "recorded by a woman police officer or any woman officer" [2nd proviso to Section 161 (3) of CrPC]. If the first informant is a woman against whom a sexual offence is alleged to have been committed, the FIR shall

be "recorded by a woman police officer or any other woman officer" [1st proviso to Section 154 (1) of CrPC].

- The police officer recording the statement of a child should not be below the rank of sub-inspector [Section 24 (1) of the POCSO Act] and should not be in uniform [Section 24 (2) of the POCSO Act].
- Where the police is to record the statement of the child, use of "audio-video electronic means", in addition to recording such statement in writing, is encouraged [Section 26 (4) of the POCSO Act and 1st proviso to Section 161 (3) of CrPC].
- An FIR has to be signed by the informant [Section 154 (1) of CrPC], but statements given to the police in the course of police investigation are not to be signed by the maker of the statement [Section 162 (1) of CrPC].
- While recording the statement of the child, the police should ensure "that at no point of time the child comes in contact in any way with the accused." [Section 24 (3) of the POCSO Act].

6.3. Medical Examination under Section 27 of the POCSO Act:

6.3.1. Section 27 of POCSO Act:

Under this provision of the POCSO Act, the medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences, be conducted in accordance with Section 164A of the CrPC, 1973. In case the victim is a girl child, the medical examination shall be conducted by a woman doctor. The Act further states that medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. Where, the parent cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

6.3.2. Section 164 of CrPC: Medical Examination of the Victim of Rape:

1) Medical examination shall be conducted within 24 hours by a registered medical practitioner of a government hospital and in the absence, by any other registered medical practitioner.

2) Consent of such a victim or of a person competent to give consent on her behalf must be obtained.

3) The registered medical practitioner shall examine her person and prepare a report giving the following particulars, namely—

a) the name, address and age of the woman

b) the description of material taken from the person of the woman

c) marks of injury

d) general mental condition of the woman

e) other material particulars found in the course of examination.

4) Exact time of initiation and completion of examination.

5) Medical report must be sent to I.O. immediately.

6.3.3.Guidelines and Protocols for Medical Examination of Victims of POCSO Act, 2014:

The Ministry of Health & Family Welfare, Government of India has regulated the following guideline.[76] The guidelines are for health professionals when a survivor of sexual violence reports to a hospital. The guidelines describe in detail the stepwise approach to be used for a comprehensive response to the sexual violence survivor as follows:

I. Initial resuscitation/ first Aid

II. Informed consent for examination, evidence collection, police procedures

III. Detailed History taking

IV. Medical Examination (2 finger test is prohibited)

V. Age Estimation (physical/dental/radiological) – if requested by the investigating agency.

VI. Evidence Collection as per the protocol

VII. Documentation (at the earliest)

VIII. Packing, sealing and handing over the collected evidence to police

IX. Treatment of Injuries

X. Testing/prophylaxis for STIs, HIV, Hepatitis B and Pregnancy

76 Guidelines and Protocols - Medico-legal care for survivors/victims of sexual violence, The Ministry of Health & Family Welfare, Government of India, Available at- https://main.mohfw.gov.in/sites/default/files/953522324.pdf

XI. Psychological support & counseling

XII. Referral for further help (shelter, legal support)

If a person has come directly to the hospital without the police requisition, the hospital is bound to provide treatment and conduct a medical examination with consent of the survivor/parent/guardian (depending on age). A police requisition is not required for this.

If a person has come on his/her own without FIR, he/she may or may not want to lodge a Complaint but requires a medical examination and treatment. Even in such cases the doctor is bound to inform the police as per law. However neither court nor police can force the survivor to undergo a medical examination. It has to be with the informed consent of the survivor/ parent/ guardian (depending on the age). In case the survivor does not want to pursue a police case, a MLC must be made and she must be informed that she has the right to refuse to file an FIR. An informed refusal must be documented in such cases.

If the person has come with a police requisition or wishes to lodge a complaint later, the information about medico-legal case (MLC) no. & police station should be recorded.

Doctors are legally bound to examine and provide treatment to survivors of sexual violence. The timely reporting, documentation and collection of forensic evidence may assist the investigation of this crime. Police personnel should not be present during any part of the examination.

Doctors shall inform the person being examined about the nature and purpose of examination and in case of child to the child's parent/guardian/ or a person in whom the child reposes trust. This information should include:

a) The medico-legal examination is to assist the investigation, arrest and prosecution of those who committed the sexual offence. This may involve an examination of the mouth, breasts, vagina, anus and rectum as necessary depending on the particular circumstances.

b) To assist investigation, forensic evidence may be collected with the consent of the survivor. This may include removing and isolating clothing, scalp hair, foreign substances from the body, saliva, pubic hair, samples taken from the vagina, anus, rectum, mouth and collecting a blood sample.

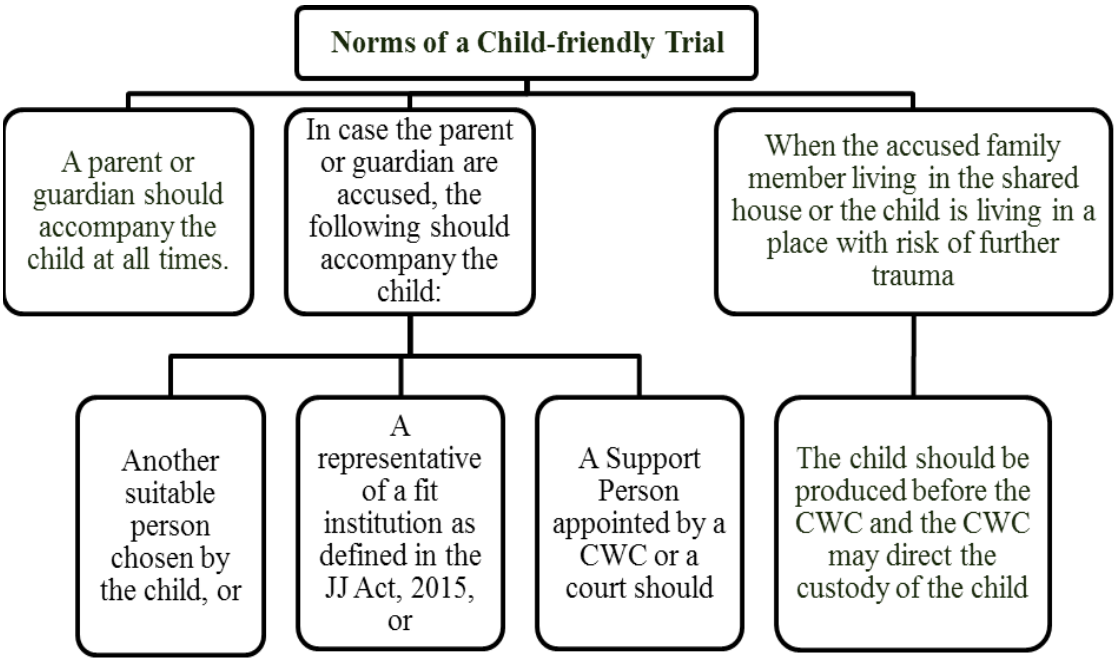
c) The survivor or in case of child, the parent/guardian/or a person in whom the child reposes trust, has the right to refuse either a medico-legal examination or collection of evidence or both, but that refusal will not be used to deny treatment to survivor after sexual violence.

d) As per the law, the hospital/ examining doctor is required/duty bound to inform the police about the sexual offence. However, if the survivor does not wish to participate in the police investigation, it should not result in denial of treatment for sexual violence.

Emphasize that seeking treatment is critical for the survivor's well-being.

- The survivor or guardian may refuse to give consent for any part of the examination. In this case the doctor should explain the importance of examination and evidence collection, however the refusal should be respected. It should also be explained that refusal for such examination will not affect/compromise treatment. Such informed refusal for examination and evidence collection must be documented.
- In case there is informed refusal for police intimation, then that should be documented. At the time of MLC intimation being sent to the police, a clear note stating "informed refusal for police intimation" should be made.
- Only in situations, where it is life threatening the doctor may initiate treatment without consent as per Section 92 of IPC.
- The consent form must be signed by the person themselves if they are above 12 years of age. Consent must be taken from the guardian/ parent if the survivor is under the age of 12 years.
- The consent form must be signed by the survivor, a witness and the examining doctor.

6.4. Norms of 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 child care 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 children, alternative methods of interaction and evidence collection that are 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.

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7. TRIAL, COMPENSATION AND DISPOSAL UNDER POCSO ACT

7.1. Trials of the POCSO Cases:

Trials under the POCSO Act are a little different than those under the CrPC. Time taken for the trial to be completed along with the way the trial is conducted is very important. Since time is of essence, speedy trials are a must. Section 28 of the Act gives way for the designation of the special courts, which have been given their status to ensure speedy redressal in these matters.

Additionally, Section 33 of the Act mentions the procedure of how a trial under this Act should be conducted.

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

7.1.1. 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 the identity of the child is not disclosed at any time during the investigation or trial unless the disclosure is in the interest of the child. Reasons should be recorded in writing if the 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 the 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]

  In the ***Sakshi case***[77], the Supreme Court observed (paragraph 31), "The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witness are able to depose about the entire incident in a free atmosphere without any embarrassment." To achieve this, the Supreme Court passed several directions, most of which are contained in the POCSO Act.

- In-camera trials in cases of sexual offences committed against children are mandatory [Section 37 of the POCSO Act]. Trials of sexual offences against women are also to be conducted in camera [Section 327 (2) of CrPC]. Under the POCSO Act, the child victim is entitled to the "presence of the parents of the child or any other person in whom the child has trust or confidence".

- The Special Court is obligated to create a child-friendly environment, and for this, allow in the court room, the presence of the child's parent or guardian or family member or friend of person in whom the child has confidence [Section 33 (4) of the POCSO Act]. A child may have trust or confidence in a support person, who should be allowed to be present to enable the child to depose without fear.

- A child may also be examined at a place other than the Special Court, if required in the interest of the child, through a commission [Section 37 of the POCSO Act].

- The examination-in-chief and cross-examination of the child victim should be taken up on the day the child has attended the Special Court for such purpose. This will ensure that the child is not required to be called repeatedly to testify [Section 33 (5) of the POCSO Act]. Likewise, if on a particular date a child is unable to remain present, the Special Court should ascertain the reason for such absence and adjourn the matter to a convenient date.

- The court should allow frequent breaks to the child while recording of evidence [Section 33 (3) of the POCSO Act].

77 *Sakshi and Ors. v. Union of India and Ors*., AIR 2004 SC 3566.

- Use of screens, single visibility mirrors or curtains, video conferencing and such other devices is essential to "ensure that the child is not exposed in any way to the accused at the time of recording of the evidence" [Section 36 of the POCSO Act], to reduce the victim's stress of testifying in a court. Keeping in mind the right of the accused, an accused should be "in a position to hear the statement of the child and communicate with his advocate."

- There can be no direct questioning of the victim by the defence counsel. Under the POCSO Act, the defence counsel should communicate the questions to the Special Court, who shall "in turn put those questions to the child" so as not to frighten or confuse the child [Section 33 (2) of the POCSO Act]. The child's dignity is to be always maintained during the trial, so the Special Court should control "aggressive questioning" and "character assassination of the child" [Section 33 (6) of the POCSO Act]. The court may "forbid any questions or inquiries which it regards as indecent or scandalous" [Section 151 of IEA], as also questions "intended to insult or annoy" or are "needlessly offensive in form" [Section 152 of IEA].

- In a trial for an offence of penetrative sexual assault [Section 3 of the POCSO Act], sexual assault [Section 7 of the POCSO Act], or such offence in its aggravated form [Sections 6 and 9 of the POCSO Act], or abetment or attempt to commit such offence [Sections 16 and 18 of the POCSO Act], there is a presumption that the accused committed the offence and the burden to prove innocence is upon the accused. Hence, the accused may be required to lead evidence in his favour [Section 29 of the POCSO Act]. This provision is contrary to the philosophy of criminal jurisprudence. Generally, the burden of proof is upon the prosecution to prove that the offence was committed by the accused [Section 101 of IEA] – an accused is "innocent until proven guilty".

- When an offence requires a 'culpable mental state' on the part of the accused, the Special Court will presume that the accused had the same state [Section 30 (1) of the POCSO Act]. The "presumption of culpable mental state" relates to intention, motive, knowledge of a fact, etc. [Explanation to Section 30 of the POCSO Act]. For example, 'sexual intent' is the core ingredient of the offence of 'sexual harassment' [Section 11 of the POCSO Act], so such 'sexual intent' shall be presumed on the part of the accused. It is for the accused to lead evidence to rebut the presumption by proving "beyond reasonable doubt"16 that there was no 'sexual intent' on his part. Proof of mere "preponderance of probability" shall not establish lack of

'culpable mental state' on the part of the accused [Section 30 (2) of the POCSO Act].

- The child must be present before the Special Court to give evidence. To ensure such attendance, the child and the family member accompanying the child should be provided with reimbursement of the cost of travel to the court.

7.2. Compensation under the POCSO Act:

7.2.1. Provisions for Compensation under POCSO Act:

Under Section 33 (8) of the POCSO Act, 2020 in addition to punishment, the Special Court may "direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to her / him for immediate rehabilitation of such child."

Rule 9 of the POCSO Rules lays down the details regarding payment of compensation. Compensation is payable to the child by the State Government, and not by the accused as in the case of fine. The factors to be considered by the Special Court for computing the amount of compensation are contained in Rule 9 (3) (i) to (xii) of the POCSO Rules. The list is not exhaustive and includes: type of abuse; gravity of the offence and the severity of the mental or physical harm or injury suffered by the child; the expenditure incurred or likely to be incurred on medical treatment for physical and/or mental health; loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason; the relationship of the child to the offender, if any; financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation; etc.

- The Special Court may direct payment of compensation in the following form:-
  - I. interim compensation to meet the immediate needs of the child;
  - II. final compensation taking into account the loss or injury suffered by the child as a result of the offence.
- The Special Court may pass an order directing payment of compensation on its own or on an application made by the Special Public Prosecutor or the child's lawyer.

- Compensation may be provided at any stage after the registration of FIR, irrespective of whether "the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified" [Rule 9 (2) of the POCSO Rules]
- The interim compensation paid to the child is to be adjusted against the final compensation awarded by the Special Court, if the court decides to award any final compensation [Rule 9 (1) of the POCSO Rules].
- The needs and interests of the child should determine the amount of compensation payable.
- Once the amount of compensation is determined by the Special Court, it shall pass an order "for the award of compensation to the victim" [Rule 9 (3) of the POCSO Rules]. The order should mention the amount of compensation to be paid by the State Government to the child.

The amount of compensation is a contended issue in POCSO cases since no amount of compensation can actually undo the wrong done to a child. Taking a progressive and novel view, Justice Jasmeet Singh of the Delhi High Court, in the case of ***X* v. *State of NCT of Delhi and Ors.***[78], said that – (Para 46, 47 and 48)

> *"The compensation as per DVC scheme provides a maximum and a minimum. The statues/scheme should not decide the maximum. The court has the power to scale up and scale down. To scale down these provisions would mean injustice to the survivors who have suffered. These are the situations which require scaling up. For instance, the compensation for "rape" in the schedule has been provided as 7 lakhs maximum. In view of the aforesaid discussion, I am of the view that purposive interpretation and beneficial legislation requires the said sum of Rs. 7 lakhs to be considered as a minimum base while adjudicating compensation in POCSO cases.*
>
> *Hence for POCSO survivors of "rape," it should be 7 + 3.5 = 10.5 lakhs (50% of 7 lakhs being added in POCSO cases as per DVC scheme) lakhs. The final compensation shall not be less than 10.5. lakhs.*
>
> *The special court will be within their rights and within POCSO to adjudicate and grant compensation for more than 10.5 lakhs. The special court shall decide the final compensation amount and the interim compensation granted by the DSLSA/DLSA and the special*

78 *X* v. *State of NCT of Delhi and Ors.*, MANU/DE/4086/2022

court, shall be adjusted from the final compensation amount awarded by the special court."

7.2.2. Stage of Awarding Compensation:

The Rule 9 of POCSO Rules makes it clear that interim compensation can be awarded by the Special Court, on its own, or based on an application by or on behalf of the child, at any time after the FIR has been registered. A sustained reading of the POCSO Rules along with the objectives of POCSO makes it clear that compensation is to be given as soon as the Special Court forms an opinion that the child has suffered loss or injury.

In the above-mentioned case of ***X v. State of NCT of Delhi and Ors***.,[79] it was held that – (Para 56, 57 and 62)

"In my opinion, the pendency might be getting created because the POCSO states that compensation shall be given after registration of the FIR but does not provide a fixed time limit, within which the compensation is to be disbursed. The POCSO Rules only give the starting point as registration of the FIR. This gap allows for the delay in disbursal of interim compensation.

Thus, I am of the opinion that the interim compensation is to be paid at the earliest. Although no time frame has been given but in my understanding 2 months within filing of charge sheet to disburse interim compensation would be reasonable. Section 357A (5) of the CrPC deals with grant of compensation to the victims which contemplates a similar time frame."

"I must reiterate that the trigger to award compensation is filing of the chargesheet. The Special Court must endeavour to, within 2 months of filing of chargesheet, award the compensation. After the conclusion of trial, even if the order of acquittal is passed, but if the factum of rape/injury is substantiated, the Special Court is obligated to grant maximum permissible compensation, less the interim compensation awarded earlier by the special court and the DSLSA/ DLSA."

79 *X* v. *State of NCT of Delhi and Ors.*, MANU/DE/4086/2022

7.2.3. Hostile Victim and Compensation

It has been noted that in a lot of cases received under the Act, many victims eventually turn hostile and hence the trial has to be disposed of. Girls under the pressure of their families or owing to their poor financial backgrounds or due to some greed of monetary compensation, file a case against the accused but later on turn hostile and refuse to recognise the perpetrator. Some victims go even further and deny all claims of the crime having been committed against them. In such cases, the question arises, what happens to the compensation received by the victim and whether such persons should be allowed to keep the compensatory amount even after being declared hostile.

The Trial Court in Mumbai ordered recovery of Government aid from the victim after she turned hostile and prosecution was found guilty of perjury in a POCSO Case. It was held by the court that –

> *"It is not clear, as to whether PW 1 victim received any ex-gratia monetary aid from the State Government. If she has received any such aid, it becomes the duty of this court to appraise the Government of the fact that the FIR itself appears to have been falsely lodged by the informant, as appears from her own testimony. Thus, if any monetary benefit has been received by her from the State Government, the same deserves to be recovered back from her, by taking necessary actions, in the nature of recovery of land revenue, for the simple reason that it would otherwise amount to misappropriation of public money by an unscrupulous person."*[80]

In a similar case where the Court had to see whether the victim was genuine or not, a single judge bench of Justice Brij Raj Singh of the Allahabad High Court observed: *"The question has cropped up before me as to whether the rape victim who has become hostile is entitled to retain the amount of compensation."*

> *"In my opinion, if the victim has become hostile and does not support the prosecution case at all, it is appropriate to recover the amount if paid to the victim," the court said. "The victim is the person who comes before the court and during trial if she denies the allegation of rape and becomes hostile, there is no justification to keep the amount of compensation provided by the State Government. The State Exchequer cannot be burdened like this and there is all possibility of misuse of the laws. Therefore, in my opinion, the amount of compensation*

80 *State of Maharashtra* v. *Vicky Vinod Gajabe and Ors*. Special Case No. 258 of 2016

given to the victim or the family member, is liable to be recovered by the authorities concerned who have paid the compensation." the court observed.[81]

7.3. Disposal of POCSO Case

Section 35: Period for Recording of Evidence of Child and Disposal of Case:

Speedy disposal of cases under the Act have been mentioned under Section 35, POCSO Act. It reads –

(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

A duty of quick disposal has been placed on the Special Court, where the evidence of the child is to be recorded within thirty days and any delay must be reasonable and justified. The Act also places a duty on the Courts to deal with the case within the period of one year, which is important for the child involved. A case may get vitiated if not disposed off in a speedy manner and justice would be in danger then.

The Apex Court has issued guidelines in the case of ***Alakh Alok Srivastava* v. *Union of India and Others,***[82] 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.*

81 *Jeetan Lodh alias Jitendra v. State of Uttar Pradesh CRIMINAL MISC. BAIL APPLICATION No. - 4824 of 2023*

82 *Alakh Alok Srivastava* v. *Union of India and Others,* 2018 SCC Online SC 478

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."*

In a research done by the Vidhi Centre for Legal Policy on the completion of 10 years of the POCSO Act, a report was published. The report, a product of Vidhi's Justice, Access and Lowering Delays in India (JALDI) Initiative and the Data Evidence for Justice Reform (DE JURE) programme at the World Bank studies trends in POCSO cases through the decade and the courts' impact on its implementation. The study looks at nearly 400,000 POCSO cases and analyses 230,730 of them to understand pendency and disposal patterns.

On an average, it takes 509.78 days (nearly 1 year and 5 months) for a POCSO case to be disposed of as against the one year time period stipulated by Section 35 of the Act. Chandigarh and West Bengal are the only states where the average time taken for convictions is within the statutorily prescribed period of one year. In most states,

courts spend more time in hearing cases that ultimately end in conviction as compared to cases that end in acquittal.[83]

During its journey through the criminal justice system, a POCSO case goes through various stages, including preliminary hearing, framing of charge, evidence, and arguments.

The evidence stage involves both the prosecution and the defence presenting evidence before the court to support their case. It includes examination and cross examination of witnesses, which requires witnesses to appear before the court to give evidence.

However, the stage of evidence consumes a disproportionate amount of time (both in number of days and number of hearings) in a POCSO trial. 183.41 days (over 6 months) are spent on the evidence stage in a typical POCSO case.

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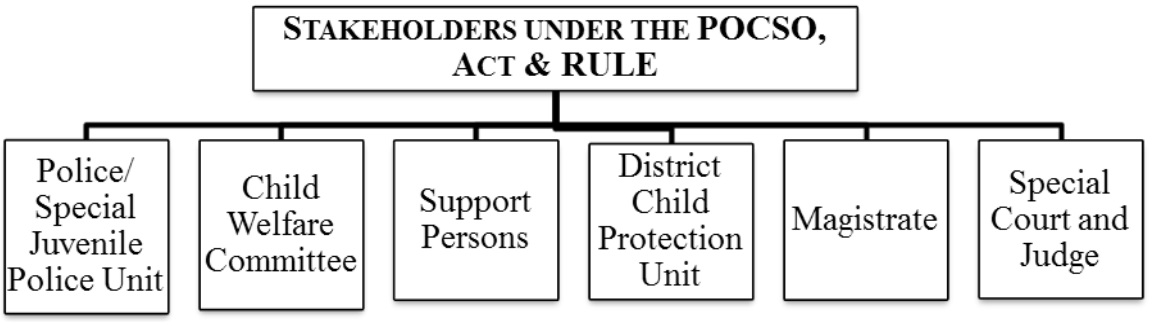
83 Apoorva, Aditya Ranjan, Sandeep Bhupatiraju, Shareen Joshi, Daniel L. Chen, "A Decade of POCSO Developments- Challenges and Insights from Judicial Data", 73, Available at - https://vidhilegalpolicy.in/research/a-decade-of-pocso-developments-challenges-and-insights-from-judicial-data/

8. ROLE OF STAKEHOLDERS UNDER POCSO RULES, 2020



8.1. Role of SJPU or Local Police:

[Sec 19 of POCSO Act, 2012; Rule 4(1);(2);(3);(4);(10);(13);(14);(15);11(1)&(2)]

The United Nations Beijing Rule 1985, emphasised and envisaged special humane treatment of a child who came in contact with the police. The Juvenile Justice Act 2000, incorporated and introduced the Special Juvenile Police Unit (SJPU), which aimed at fostering an atmosphere wherein the interaction between the child in both the categories (Child in Conflict with law and Children in need of Care and Protection) and the police officer will have undergone massive change. Section 107 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act 2015), provides for creation of a SJPU by State Governments/Union Territories Administrations for every district and city to coordinate all functions of Police related to children.[84]

8.1.1. Reporting of offences under Section 19 of POCSO Act, 2012:

Sec 19 of the POCSO Act reads as –

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-

a. the Special Juvenile Police Unit; or

b. the local police.

(2) Every report given under sub-Section (1) shall be—

84 Dr. Kavita Singh "Role of Special Juvenile Police Unit in Interface with Juvenile in Conflict with Law" 11 *Indian Journal of Law and Justice* 88 (2020).

a. ascribed an entry number and recorded in writing;

b. be read over to the informant;

c. shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-Section is given by a child, the same shall be recorded under sub-Section (2) in a simple language so that the child understands the contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-Section.

8.1.2. Rule 4, POCSO Rules, 2020: Procedure regarding care and protection of Child:

(1) Where any Special Juvenile Police Unit (SJPU) or the local police receives any information under sub-Section (1) of Section19 of the Act from any person including the child, the SJPU or local police receiving the report of such information shall forthwith disclose to the person making the report, the following details:-

(i) his or her name and designation;

(ii) the address and telephone number

(iii) the name, designation and contact details of the officer who supervises the officer receiving the information.

Rule 4(2) If any such information regarding the commission of an offence under the provisions of the Act is received by the child helpline-1098, the child helpline shall immediately report such information to SJPU or Local Police.

Rule 4(3) Where an SJPU or the local police, as the case may be, receives information in accordance with the provisions contained under sub-Section (1) of Section 19 of the Act in respect of an offence that has been committed or attempted or is likely to be committed, the authority concerned shall, where applicable, —

(a) proceed to record and register a First Information Report as per the provisions of Section154 of the Code of Criminal Procedure, 1973 (2 of 1974), and furnish a copy thereof free of cost to the person making such report, as per sub-Section (2) of Section154 of that Code;

(b) where the child needs emergency medical care as described under sub-Section (5) of Section 19 of the Act or under these rules, arrange for the child to access such care, in accordance with rule 6;

(c) take the child to the hospital for the medical examination in accordance with Section 27 of the Act;

(d) ensure that the samples collected for the purposes of the forensic tests are sent to the forensic laboratory immediately;

(e) inform the child and child's parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief;

(f) inform the child and child's parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with Section 40 of the Act.

Rule 4(4) SJPU or the local police on receiving information under S. 19(1) on reasonable apprehension that the offence has been committed/attempted/is likely to be committed by a person living in the shared household with the child, or the child is living in a child care institution without parental support, or the child is without any home and parental support, the SJPU etc. shall produce the child before the Child Welfare Committee within 24 hrs of receipt of report, with reasons in writing as to whether the child is in need of care and protection under S. 19(5), and with a request for a detailed assessment by the CWC. …

… Rule 4 (10)- Where a support person has been provided to the child, the SJPU or the local police shall, within 24 hours of making such assignment, inform the Special Court in writing.

Rule 4 (13)- It shall be the responsibility of the SJPU, or the local police to keep the child and child's parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and other court proceedings.

Rule 4 (14)- SJPU or the local police shall also inform the child and child's parents or guardian or other person in whom the child has trust and confidence about their entitlements and services available to them under the Act or any other law for the time being applicable as per **Form-A**. It shall also complete the Preliminary Assessment Report in **Form B** within 24 hours of the registration of the First Information Report and submit it to the CWC.

Rule 4 (15) The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following:-

(i) the availability of public and private emergency and crisis services;

(ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victim's compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender.

8.1.3. Rule 11, POCSO Rules, 2020: Reporting of pornographic material involving a child.

Rule 11 (1)Any person who has received any pornographic material involving a child or any information regarding such pornographic material being stored, possessed, distributed, circulated, transmitted, facilitated, propagated or displayed, or is likely to be distributed, facilitated or transmitted in any manner shall report the contents to the SJPU or local police, or as the case may be, cyber-crime portal (cybercrime.gov.in) and upon such receipt of the report, the SJPU or local police or the cyber-crime portal take necessary action as per the directions of the Government issued from time to time.

Rule 11 (2) In case the "person" as mentioned in sub-rule (1) is an "intermediary" as defined in clause (w) of sub-Section (1) of Section 2 of the Information Technology Act, 2000, such person shall in addition to reporting, as provided under sub-rule(1), also hand over the necessary material including the source from which such material may have originated to the SJPU or local police, or as the case may be, cyber-crime portal (cybercrime.gov.in) and upon such receipt of the said material, the SJPU or local police or the cyber-crime portal take necessary action as per the directions of the Government issued from time to time.

8.2. Role of Child Welfare Committee:

[Section 30 of Juvenile Justice Act, 2015;Rule 4(4); (5); (6;, (7); (8); (11) & (12)]

8.2.1. Section 30: Functions and Responsibilities of Committee (Juvenile Justice Act, 2015):

The functions and responsibilities of the Committee shall include—

i. taking cognizance of and receiving the children produced before it;

ii. conducting inquiry on all issues relating to and affecting the safety and well-being of the children under this Act;

iii. directing the Child Welfare Officers or probation officers or District Child Protection Unit or non-governmental organisations to conduct social investigation and submit a report before the Committee;

iv. conducting inquiry for declaring fit persons for care of children in need of care and protection;

v. directing placement of a child in foster care;

vi. ensuring care, protection, appropriate rehabilitation or restoration of children in need of care and protection, based on the child's individual care plan and passing necessary directions to parents or guardians or fit persons or children's homes or fit facility in this regard;

vii. selecting registered institution for placement of each child requiring institutional support, based on the child's age, gender, disability and needs and keeping in mind the available capacity of the institution;

viii. conducting at least two inspection visits per month of residential facilities for children in need of care and protection and recommending action for improvement in quality of services to the District Child Protection Unit and the State Government;

ix. certifying the execution of the surrender deed by the parents and ensuring that they are given time to reconsider their decision as well as making all efforts to keep the family together;

x. ensuring that all efforts are made for restoration of abandoned or lost children to their families following due process, as may be prescribed;

xi. declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;

xii. taking *suo motu* cognizance of cases and reaching out to children in need of care and protection, who are not produced before the Committee, provided that such decision is taken by at least three members;

xiii. taking action for rehabilitation of sexually abused children who are reported as children in need of care and protection to the Committee by Special Juvenile Police Unit or local police, as the case may be, under the Protection of Children from Sexual Offences Act,

xiv. dealing with cases referred by the Board under sub-Section (2) of Section 17;

xv. coordinate with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government;

xvi. in case of a complaint of abuse of a child in any child care institution, the Committee shall conduct an inquiry and give directions to the police or the District Child Protection Unit or labour department or childline services, as the case may be;

xvii. accessing appropriate legal services for children;

xviii. such other functions and responsibilities, as may be prescribed.

8.2.2. Rule 4, POCSO Rules, 2020: Procedure regarding care and protection of Child:

Rule 4 (4)- Where the SJPU or the local police receives information under sub-Section (1) of Section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or the child is living in a child care institution and is without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned Child Welfare Committee (hereafter referred to as "CWC") within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-Section (5) of Section 19 of the Act, and with a request for a detailed assessment by the CWC.

Rule 4 (5)- Upon receipt of a report under sub-rule (3), the concerned CWC must proceed, in accordance with its powers under sub-Section (1) of Section 31 of the Juvenile Justice Act, 2015 (2 of 2016), to make a determination within three days, either on its own or with the assistance of a social worker, as to whether the child needs to be taken out of the custody of child's family or shared household and placed in a children's home or a shelter home.

Rule 4 (6)- In making determination under sub-rule (4), the CWC shall take into account any preference or opinion expressed by the child on the matter, together with the best interests of the child, having regard to the following considerations, namely:—

i. the capacity of the parents, or of either parent, or of any other person in whom the child has trust and confidence, to provide for the immediate care and protection needs of the child, including medical needs and counseling;

ii. the need for the child to remain in the care of parent's, family and extended family and to maintain a connection with them;

iii. the child's age and level of maturity, gender, and social and economic background; (iv) disability of the child, if any;

iv. any chronic illness from which a child may suffer;

v. any history of family violence involving the child or a family member of the child; and, (vii) any other relevant factors that may have a bearing

on the best interests of the child: Provided that prior to making such determination, an inquiry shall be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience.

Rule 4 (7) The child and child's parent or guardian or any other person in whom the child has trust and confidence and with whom the child has been living, who is affected by such determination, shall be informed that such determination is being considered.

Rule 4 (8) The CWC, on receiving a report under sub-Section (6) of Section 19 of the Act or on the basis of its assessment made under sub-rule (5), and with the consent of the child and child's parent or guardian or other person in whom the child has trust and confidence, may provide a support person to render assistance to the child in all possible manner throughout the process of investigation and trial, and shall immediately inform the SJPU or Local Police about providing a support person to the child.

Rule 4 (11) The services of the support person may be terminated by the CWC upon request by the child and child's parent or guardian or person in whom the child has trust and confidence, and the child requesting the termination shall not be required to assign any reason for such request. The Special Court shall be given in writing such information.

Rule 4 (12) The CWC shall also Seek monthly reports from support person till the completion of trial, with respect to condition and care of child, including the family situation focusing on the physical, emotional and mental wellbeing, and progress towards healing from trauma; engage with medical care facilities, in coordination with the support person, to ensure need-based continued medical support to the child, including psychological care and counseling; and shall ensure resumption of education of the child, or continued education of the child, or shifting of the child to a new school, if required.

8.2.3. Rule 8, POCSO Rules, 2020: Special relief:

(1) For special relief, if any, to be provided for contingencies such as food, clothes, transport and other essential needs, CWC may recommend immediate payment of such amount as it may assess to be required at that stage, to any of the following:-

(i) the DLSA under Section 357A; or;

(ii) the DCPU out of such funds placed at their disposal by state or;

(iii) funds maintained under Section105 of the Juvenile Justice (Care and Protection of Children) Act,2015 (2 of 2016);

(2) Such immediate payment shall be made within a week of receipt of recommendation from the CWC.

8.2.4. Rule 10, POCSO Rules, 2020 Procedure for imposition of fine and payment thereof.

(1) The CWC shall coordinate with the DLSA to ensure that any amount of fine imposed by the Special Court under the Act which is to be paid to the victim, is in fact paid to the child.

(2) The CWC will also facilitate any procedure for opening a bank account, arranging for identity proofs, etc., with the assistance of DCPU and support persons.

8.3. Role of Support Persons

[Rule 5(6); Rule 4(8); (9); (11); (12) and Rule 5].

8.3.1. Rule 5(6), POCSO Rules, 2020:

Support person may be a person or organisation working in the field of child rights or child protection, or an official of a children's home or shelter home having custody of the child, or a person employed by the DCPU.

Provided that nothing in these rules shall prevent the child and child's parents or guardian or other person in whom the child has trust and confidence from seeking the assistance of any person or organisation for proceedings under the Act.

A support person renders assistance to the child in all possible manner throughout the process of investigation and trial and immediately informs the SJPU or Local Police about providing a support person to the child.

8.3.2. Rule 4, POCSO Rules, 2020: Procedure regarding care and protection of child:

Rule 4(8)- The CWC, on receiving a report under sub-Section (6) of Section 19 of the Act or on the basis of its assessment made under sub-rule (5), and with the consent of the child and child's parent or guardian or other person in whom the child has trust and confidence, may provide a, and shall immediately inform the SJPU or Local Police about providing a support person to the child. ….

Rule 4(9)- Support Persons shall maintain the confidentiality of all information pertaining to the child to which he/she has access and shall keep informed child's parents/guardian etc regarding proceedings of the case.

… Rule 4 (11)- The services of the support person may be terminated by the CWC upon request by the child and child's parent or guardian or person in whom the child has trust and confidence, and the child requesting the termination shall not be required to assign any reason for such request. The Special Court shall be given in writing such information.

Rule 4 (12)- The CWC shall also Seek monthly reports from support person till the completion of trial, with respect to condition and care of child, including the family situation focusing on the physical, emotional and mental wellbeing, and progress towards healing from trauma; engage with medical care facilities, in coordination with the support person, to ensure need-based continued medical support to the child, including psychological care and counseling; and shall ensure resumption of education of the child, or continued education of the child, or shifting of the child to a new school, if required.

8.3.3. Rule 5, POCSO Rules, 2020: Role of Interpreters, Translators, Special Educators, Experts:

(1) In each district, the DCPU shall maintain a register with names, addresses and other contact details of interpreters, translators, experts, special educators and **support persons** for the purposes of the Act, and this register shall be made available to the SJPU, local police, magistrate or Special Court, as and when required.

(2) The qualifications and experience of the interpreters, translators, special educators, experts and **support persons** engaged for the purposes of sub-Section (4) of Section 19, sub-Sections (3) and (4) of Section 26 and Section 38 of the Act, and rule 4 respectively shall be as indicated in these rules. …

(4) Interpreters and translators engaged under sub-rule (1) should have functional familiarity with language spoken by the child as well as the official language of the state, either by virtue of such language being child's mother tongue or medium of instruction at school at least up to primary school level, or by the interpreter or translator having acquired knowledge of such language through child's vocation, profession, or residence in the area where that language is spoken.…

(8) Any interpreter, translator, special educator, expert or **support person** engaged for the purpose of assisting a child under this Act, shall be paid a fee which shall be prescribed by the State Government, but which, shall not be less than the amount prescribed for a skilled worker under the Minimum Wages Act, 1948 (11 of 1948).

(9) Any preference expressed by the child at any stage after information is received under sub-Section(1) of Section 19 of the Act, as to the gender of the interpreter, translator, special educator, expert or **support person**, may be taken into consideration, and where necessary, more than one such person may be engaged in order to facilitate communication with the child.

(10) The interpreter, translator, special educator, expert, **support person** or person familiar with the manner of communication of the child engaged to provide services for the purposes of the Act shall be unbiased and impartial and shall disclose any real or perceived conflict of interest and shall render a complete and accurate interpretation or translation without any additions or omissions, in accordance with Section 282 of the Code of Criminal Procedure, 1973 (2 of 1974). …

(12) Any interpreter, translator, special educator, expert or **support person** appointed under the Act shall be bound by the rules of confidentiality, as described under Section 127 read with Section 126 of the Indian Evidence Act, 1872.

8.4. Role of District Child Protection Unit

[Sec 2(26) of JJ Act, 2015; Rule 5(3); and (7)]

8.4.1. Section 2 (26), POCSO Act, 2012:

"DCPU" means a Child Protection Unit for a District, established by the State Government under Section 106, which is the focal point to ensure the implementation of this Act and other child protection measures in the district.

8.4.2. Rule 5, POCSO Rules, 2020:

Rule 5(3) Where an interpreter, translator, or special educator is engaged, otherwise than from the list maintained by the DCPU under sub-rule (1), the requirements prescribed under sub-rules (4) and (5) of this rule may be relaxed on evidence of relevant experience or formal education or training or demonstrated proof of fluency in the relevant languages by the interpreter, translator, or special

educator, subject to the satisfaction of the DCPU, Special Court or other authority concerned.

Rule 5(7) Payment for the services of an interpreter, translator, special educator, expert or support person whose name is enrolled in the register maintained under sub-rule (1) or otherwise, shall be made by the State Government from the Fund maintained under Section 105 of the Juvenile Justice Act, 2015 (2 of 2016), or from other funds placed at the disposal of the DCPU.

8.4.1. Rule 8, POCSO Rules, 2020: Special relief:

Any special relief, if any, to be provided for contingencies such as food, clothes, transport and other essential needs, CWC may recommend immediate payment of such amount as it assess to be required at that stage out of such funds placed at the DCPU's disposal by state.

8.4.2. Rule 10, POCSO Rules, 2020: Procedure for imposition of fine and payment thereof.

Rule 10(2) The CWC will also facilitate any procedure for opening a bank account, arranging for identity proofs, etc., with the assistance of DCPU and support person.

8.5. Role of Magistrate

8.5.1. 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.

8.5.2 Section 164 A, Cr.P.C: Medical examination of the victim of rape:

- Medical examination shall be conducted within 24 hours by a registered medical practitioner of a government hospital and in the absence, by any other registered medical practitioner.
- Consent of such a victim or of a person competent to give consent on her behalf must be obtained.
- The registered medical practitioner shall examine her person and prepare a report giving the following particulars, namely—
    i. the name, address and age of the woman
    ii. the description of material taken from the person of the woman
    iii. marks of injury
    iv. general mental condition of the woman
    v. other material particulars found in the course of examination.
- Exact time of initiation and completion of examination.Medical report must be sent to I.O. immediately.

8.6. Role of Special Court

[Rule 5(3);(11) and Rule 9]

8.6.1. Rule 5, POCSO Rules, 2020: Interpreters, translators, special educators, experts and support persons:

Rule 5(3): Where an interpreter, translator, or special educator is engaged, otherwise than from the list maintained by the DCPU under sub-rule (1), the requirements prescribed under sub-rules (4) and (5) of this rule may be relaxed on evidence of relevant experience or formal education or training or demonstrated proof of fluency in the relevant languages by the interpreter, translator, or special educator, subject to the satisfaction of the DCPU, **Special Court** or other authority concerned.

Rule 5 (11), POCSO Rules, 2020: In proceedings under Section 38, the Special Court shall ascertain whether the child speaks the language of the court adequately, and that the engagement of any interpreter, translator, special educator, expert, support person or other person familiar with the manner of communication of

the child, who has been engaged to facilitate communication with the child, does not involve any conflict of interest.

8.6.3. Rule 9, POCSO Rules, 2020: Compensation:

(this topic has been dealt in detailed manner under chapter- 7)

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RELEVANT EXCERPTS FROM VARIOUS JOURNALS

1. Procedural Road Map For Handling Child Sexual Abuse Under The POCSO Act, 2012[85]

Child sexual abuse continues to challenge the vision of a just society worldwide. Sexual abuse has an inherent social stigma having lifelong adverse consequences for the victims, resulting in a reluctance to report the crime. Lack of fair and scientific investigation and unusual delay in court proceedings results in general in acquittal of the rape accused. The police files charge-sheets in nearly 90% cases of CSA incidents but trial results in convictions in only 30% of cases. This 60% evident gap indicates the need to promote fair and scientific investigation in order to improve the quality of evidence. Pendency of cases in trial courts is very high and is growing every year.

Timely reporting and registration of cases are essential requisites for instituting criminal proceedings. Scientific investigation is a sine qua non for a fair trial to ensure justice in criminal adjudication. The investigation is an art and science, which, in general, begins with receiving information about commission of a crime and registering a first information report (FIR). Crime investigation involves group activities, which requires a professional approach to collection of evidence. Experts from various disciplines indeed assist the investigating agency to corroborate facts to reach to the bottom of truth of various aspects of crime in hand. Usually, the defence in the POCSO cases pleads to establish:

i. inordinate delay in reporting of incident.

ii. majority of age of victim and in case sexual act is established, then pointing that it was consensual,

iii. no injuries to victim, and

iv. lack of corroboration.

These pleas help to understand dynamics of evidence collection by police and their appreciation by the courts.

Time is crucial for collection of evidence and undue delay in FIR not only compromises the evidence but also provides ground for defence to refute the allegations. Investigation

85 G.K. Goswami & Aditi Goswami, "Procedural Road Map for Handling Child Sexual Abuse under the POCSO Act, 2012" Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com

is a detailed inquiry by the law enforcement agency to assist the court in order to reach at the bottom of the truth. Evidence collection is the primary aim of investigation. The special Act, for effective implementation, requires specially trained police officer to deal with the case of child sexual abuse. Scientific temper in evidence collection ensures probity of procedure and content of evidence.

The procedural law mandates to conclude investigation and trial proceedings within the stipulated time frame. It is an uphill task to draw a scheme for timely conclusion of an investigation with scientific vigour and to devise a mechanism for a speedy trial.

After the investigation is concluded, trial proceedings must be initiated forthwith. The Public Prosecutor must be properly briefed by the Investigating Officer and charges must be framed without delay by the court. The District Police Chief must ensure attendance of the witnesses in the courts on due dates and that court orders are timely complied. Unwarranted adjournments demanded by the defence need to be opposed by the prosecutor. It is an onerous duty of the court to ensure speedy trial in accordance with the legislative intent of the special legislation. The testimony of the child must be recorded with due care and in a congenial atmosphere for the child. Section 35(2) of the POCSO Act mandates to conclude trial proceedings within a period of one year, as far as possible, from the date of taking cognizance of an offence. Recently, the Supreme Court has desired to get data from the State on various issues of sexual offences including the facts *"whether the trial relating to cases of rape is being completed within a period of two months from the date of filing of charge-sheet, if not, the reasons for the delay?"* The Supreme Court has also commented upon undue haste in trial proceedings serving the *"hurried justice - buried justice"* adage.[86]

Furthermore, a team under the district police chief or the designated officers including law officer, must review the acquittal cases of child sexual assault, and based on merit, must recommend for filing of an appeal in the constitutional courts. If needed, an appeal may also be filed by the prosecution to enhance the quantum of punishment. The appeal petition must be drafted by the Government Advocate mentioning cogent grounds in consultation with a monitoring at all stages of appeals is desired from the district police and prosecution authorities until the case reaches to its finality. *"Truth must triumph, is the hallmark of justice,"* should be the motive of all the stakeholders. Scientific investigation has direct bearing on fair and speedy trial.

Law has provisions for special POCSO courts, but desired "special arrangements" are wanting in these courts. Pendency of POCSO cases in the trial courts is burgeoning every year, which is a matter of grave concern. Section 44 of the Act, 2012 has monitoring

86 *Anokhi Lal v. State of MP,* (2019) 20 SCC 196

provision for implementation of the Act by the National Commissions for Protection of Child Rights (NCPCCR) and State Commissions (SCPRS), but legislative intent is yet to be achieved. Various stakeholders dealing with minors' issues of sexual abuse are not passably sensitive, and even higher judiciary is not an exception. Recent judgments of the Bombay High Court on interpretation of Section 7 of the POCSO Act are glaring examples pressing for mandatory training and sensitisation of all actors in criminal justice system.[87] Self- assigned investigative journalism and media trial cause great harm in administration of justice in criminal matters. Media trial potentially derails investigation process and adversely impacts the courtroom proceedings.

India is committed to protecting the best interest of the child as enshrined in the Indian Constitution and in the United Nations Convention on Child Rights. To fulfil this commitment, the Indian legislature introduced a special Act for curbing the menace of sexual exploitation of minors, but its implementation remains weak desiring pressing attention at ground level. In general, the approach in handling these cases lacks sensitivity and professionalism. The quality of evidence lacks credence and the investigators, in the name of freedom, largely avoid collection of corroborative forensic evidence such as DNA and mainly focus on oral testimony, which is susceptible to external influences, intimidation, duress, resulting in hostility led acquittals. India must adjust its procedural laws to ensure that forensic evidence is collected on top priority, and no alibi must be granted for avoiding forensic aids. Adequate funds must be allocated to enhance quality forensic facilities. By presuming that a defendant has a culpable mind, the court interrupts the cause of justice from the very beginning as the defendant is not given a fair right to defend himself, therefore voiding the presumption of innocence may be a controversial issue from a jurisprudential point of view.

2. Critical Analysis Of Reverse Onus Clauses Under The POCSO Act[88]

The Presumption of the innocence of the accused person is one of the very basic tenets of Criminal Law. This helps in the establishment of an equitable trial and ensures that the judges do not presume a person to be guilty. It is one of the most important reasons why the Burden of Proof rests on the prosecution in most cases. This principle ensures

87 In *Satish v. State of Maharashtra*, 2021 SCC Online Bom 72, *Pushpa v. Ganediwala* J. of Nagpur Bench of the Bombay High Court at para 30 has interpreted that groping a minor's breast without "skin-to-skin contact" does not constitute "sexual assault" as mandated in Section 7 of the POCSO Act. However, the Supreme Court in *Attorney General for India v. Satish*, 2021 SCC Online SC 42, has annulled the impugned order of the High Court. The same female Judge of the Bombay High Court in *Libnus v. State of Maharashtra*, 2021 SCC Online Bom 66, has earlier decided that holding hand and opening pants zip does not constitute "sexual assault" under Section 7.

88 Arijit Sirpukar, "Critical Analysis Of Reverse Onus Clauses Under The POCSO Act" 542 JCLJ (2022) *available at:* http://www.scconline.com

that the fundamental freedoms and human dignity of the accused are protected and that the trial proceeds in a fair and equitable manner. The concept of presumption has evolved over a very long time, dating back to the times of the Magna Carta, following which due process and the presumption of innocence began to become a regular part of the common law system. When a suspect is arrested and charged, the presumption of innocence comes in. The constitutional right in certain countries to pretrial release through bail was one of the most important safeguards that came with the presumption of innocence. This Presumption has also been accepted in the Indian Thought of Jurisprudence and has also been recognised by the Supreme Court. It recognised its importance in *Noor Aga v State of Punjab*.[89] However, in certain special cases, this presumption may be on the wrong side of the defendant.

In the Indian Legal System, there exists Special Criminal Acts, that consist of provisions that allow for the presumption of an accused person's guilt, and men's rea, the Protection of Children from Sexual Offences Act is a part of these acts. Section 30 of the Act allows the court to presume a culpable mental state, and the defendant must prove the contrary in his defence. This provision is defended by many considering the nature of offences under the POCSO Act, but such a reverse presumption may hamper a person's right to justice as it may add to an already opinionated decision-making society. However, in a delicate situation, it could lead to cases of unjust rulings or a violation of the natural principles of law.

Once the very important shield of presumption of innocence is done away with, the burden of proof or evidential burden shifts upon the accused person, known as the reverse evidential burden. Essentially this means that now the defendant is required to prove his innocence to the point that there is reasonable doubt regarding at least one or more ingredients of the offence. Section 105 of the Indian Evidence Act provides for exceptions regarding the burden of proof. It states that in case of special Acts or if provided by the Indian Penal Code, the burden of proof may be on the defendant as in the present case. This may be because of the nature and seriousness of the offences discussed in the Act. The statute was passed for an enhanced focus on crimes related to sexual offences against children and to bring about a more stringent way of trying such offences. Accordingly, when a person is accused under this Act Sections 29 and 30 of the Act shift the responsibility of proving their innocence to the defendant. The Apex Court made a passing observation[90] on the reverse burden clause, "These provisions are a clear indication of the seriousness with which crimes against women and children have been viewed by the legislature. It is also evident from these provisions that due

89 [2008] INSC 1067

90 *Federation of Obstetrics And Ors*., v. *Union Of India* (2019) 6 SCC 283

to the pervasive nature of these crimes, the legislature has deemed it fit to employ a reversed burden of proof in these cases."

One of the reasons why the POCSO Act has employed these clauses is that in such cases there are seldom witnesses. Further, the victim being children, it may be harder for the prosecution to obtain proof. To countermeasure these obstacles, the statute shifts the onus onto the defendant. Despite these reservations, reversing the burden of proof is a dangerous endeavour. Accused and arrested persons in India possess certain constitutional rights, and when an individual is criminally tried, such a power may be used draconic ally or may lead to the miscarriage of justice. The criminal adjudication system in India does not consider a number of crimes as crimes against an individual but as crimes against society. Therefore, whenever a person commits or is accused of committing an offence under the POCSO Act, he is deemed to have committed a crime against society. Applying this ideology, where the state considers such prosecution in the public interest, the reverse onus clauses have been provided using the same justification, considering the nature of the act. Considering this justification, many have also pointed out that the reverse onus may be in contravention of some constitutional rights of individuals. One of these is Article 14 of the Constitution of India. In the usual course of proceedings, the Burden of Proof and presumption of innocence are safeguards for the accused individual to bring a semblance of equality between the prosecution and defence. When the burden of proof rests on the prosecution, they are required to prove a rational nexus between the men's rea and actus rea, if the men's rea is presumed to be guilty in such a situation, it would lead to a grave endangerment of the accused person's rights. Therefore, an accused could be convicted despite the presence of a reasonable doubt if he is unable to satisfy the persuasive burden, which contravenes the presumption of innocence. Thus, reverse onus clauses prevent the prosecution from establishing an intelligible differentia and a rational nexus and therefore could be considered in violation of Article 14 as they very visibly obstruct the balance and equality of the two sides in the prosecution. The Hon'ble Apex Court has decided on the constitutionality of such clauses in a number of cases, so the question that arises here is whether the stringent measures of the Act are worth risking the miscarriage of justice in certain situations. It could be opined that such clauses are necessary to prevent gruesome and unthinkable acts against children, but the seriousness of such an accusation and the ramifications of a further false conviction should also be kept in mind. This matters as a high conviction rate is not directly proportional to less crime. Article 21 protects the right to life and personal liberty, therefore by providing an accused with a presumption of innocence and a burden of proof on the prosecution, his personal liberty and maybe even life is safeguarded, reversing the onus of proof may bring a hindrance to this process. Article 20 of the Constitution, likewise, provides specific safeguards for the accused persons,

which includes the right against self-incrimination. Sections 29 and 30 of the POCSO Act presume an accused person of having a culpable mind and require him to prove his innocence, this automatically does away with the right against self-incrimination, as the accused person is presumed to have a guilty mind.

More importantly, Article 21 also gives the accused person a right to a fair trial, which is according to 'procedure established by law' that is just reasonable and fair. Reverse onus clauses raise questions regarding the fairness and reasonability of the procedure adopted in a trial. Such clauses endanger individuals to the risk of wrongful convictions which in result could massively obstruct and hamper their personal liberty as well as their right to live a dignified life. The POCSO Act is composed of some very serious offences and charges, upon conviction of which, an individual's dignity and reputation are exposed to serious harm, a wrongful conviction in such a circumstance could be seriously disparaging for such a person's life and dignity. Further, it can be argued that the POCSO Act and the reverse onus clauses divert from the due process that is followed in regular criminal trials.

Article 21 guards life and personal liberty and it cannot be deprived without following due process. As observed in Maneka Gandhi v Union of India,[91] liberty under Article 21 cannot be deprived without following due process and the rules of natural justice, and similarly, when a person is not given a fair chance to defend their Right to life and personal liberty is exposed to great danger. Along with the POCSO Act, a number of laws in the Indian Legislature, provide for a reverse onus clause. These include the Narcotics Drugs and Psychotropic Substances Act, of 1985, and the Unlawful Activities Prevention Act, of 1967. As this issue has been a point of contention in Indian Jurisprudence for quite some time, it has been pondered upon by various courts and benches, and a number of observations regarding its validity and constitutionality have been made. The concept of presumption of innocence was discussed by the House of Lords where in *Woolmington v D.P.P.*[92] the golden thread of the presumption of innocence was laid down. In India, it was given major legitimacy by the Indian Evidence Act, but it was first observed by the courts in the cases of *Ashraf Ali v. the Emperor*[93] and *Queen-Empress v. Raman.*[94] One of the most relevant landmark judgements regarding the burden of proof and presumption of innocence was passed in Noor Aga v State of Punjab,[95] in this case, the clauses in contention were of the NDPS Act, but its observations also apply to POCSO and other similar statutes. The Court held that Sections 113A and

91 *Maneka Gandhi v. the Union of India* (1978) 1 SCC 248

92 *Woolmington* v. *D.P.P.*, [1935] UKHL 1

93 43 Ind Cas 241

94 (*1898) ILR 21 Mad 83*

95 (2008) 16 SCC 417

113B of the Indian Evidence Act, along with certain Sections of the Indian Penal Code allow for reversing the Burden of Proof and presumption of Innocence. It held that considering the grave nature of offences and the punishments, in certain acts such clauses were valid. While observing this, the court also took notice of the Human rights issue of such reverse onus clauses. It observed various judgments which had outlined the importance of the presumption of innocence as well as international agreements in support of it. The court therefore while laying down the law, highlighted the importance of this facet of natural justice. Additionally, the court specified while dealing with the burden of proof that, "Whereas in India the statute must not only pass the test of reasonableness as contained in Article 14 of the Constitution of India but also the "liberty" clause contained in Article 21 of the Constitution of India." And that "Placing persuasive burden on the accused persons must justify the loss of protection which will be suffered by the accused. Fairness and reasonableness of trial as also maintenance of the individual dignity of the accused must be uppermost in the court's mind."

Apart from the threats to Fundamental Rights mentioned previously, incorrect convictions due to reverse onus clauses pose a possibility for a number of ill consequences. An incorrect conviction threatens the liberties of the individual as well as the safety of society. Since these clauses make it mandatory for a defendant to prove his innocence, it leaves him vulnerable to being falsely convicted. A mistaken conviction in such a circumstance brings a multitude of disadvantages and hazards for the defendant. The first is the seriousness of the offence charged. The POCSO Act deals with the sexual misbehaviour against children, an accusation much less a conviction of such an offence is a grave matter. If such a conviction is mistaken or wrongful due to the reverse onus, it brings serious ramifications for such a person, apart from the penalty he has to undergo it also affects the social reputation and personal dignity of the person, this is therefore the first threat of a wrongful conviction.

Another threat that wrongful convictions pose is the harshness of the penalty; most punishments under the POCSO Act amount to imprisonment, but, Sections 4,5, and 6 of the Act provide for the death penalty. In such a case, wrongful conviction points towards depriving an individual of their life and personal liberty, both of which are covered under Article 21 of the Constitution. A presumption of guilt that leads to harsh penalisation may not be the most effective way of carrying out a fair trial. Despite the validity of such clauses, the courts should keep such factors in mind, while arriving at a decision, as with the burden of proof on the defendant the stakes are even higher.

The Protection of Children from Sexual Offences Act was passed with a very just and noble intention, and the need for passing the Act is expressly justified. Keeping these

intentions in mind, the Act consists of various provisions to ensure that a decision is arrived at, and the perpetrators of such crimes are convicted. For the commutation of such interests, the Act imposes a presumption of guilt and a reverse burden of proof on the accused. As the Article mentions, there are certain criticisms these provisions may be vulnerable to. The presumption of innocence has been considered the "golden thread" in criminal law. When this facet is taken away from the defendant, it puts the fairness of the trial and proceedings to the test. Such circumstances require that justice is done immaculately with the utmost caution. The age-old saying that "1000 culprits can escape, but one innocent should not be punished" applies here. The courts must make sure that the onus is weighed in while deciding the matters and analysing the arguments. The Indian Constitution ensures rights not only for the citizens but for the arrested and accused persons so that the rules of natural justice are followed in every situation possible. The very same rights include the Right against self-incrimination under Article 20(3). The validity of these clauses though confirmed by various statutes and judgements does pose a challenge to this right. Nevertheless, sexual crimes against children deserve to be treated with as much caution and severity that can be spared, and considering this the measures seem justified, the only danger that needs to be dealt with is that of wrongful convictions.

3. The Determination Of The Victim's Age In Rape Cases Through The Bone Ossification Test: Legal Analysis[96]

The bone ossification test is a test that determines age based on the "degree of fusion of bone" by taking the x-ray of a few bones. In simple words, the ossification test or osteogenesis is the process of the bone formation based on the fusion of joints between birth and the age of 25 years in an individual. Bone age is an indicator of the skeletal and biological maturity of an individual which assists in the determination of age. The most common method used for calculation of the bone age is radiography of the hand and wrist until the age of 18 years beyond which the medial age of clavicle is used for bone age calculation till the age of 22 years as the hand and wrist bone radiographs cannot be computed beyond 18 years of age as the elongation of the bone is complete after adolescence. However, it must be noted that the ossification test varies slightly based on individual characteristics, therefore the ossification test is relevant however it cannot be called solely conclusive.

The Juvenile Justice Act under Section 94(2) (iii), Section 68(1) read with Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 provide the

96 Gaurav Puri, "The Determination of the Victim's Age in Rape Cases through the Bone Ossification Test : Legal Analysis", Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com

legislative sanction for conduct of ossification test or other medical age determination test available in the absence of other documentary proof of age i.e. matriculation certificate or birth certificate, which has to be given within 15 days from the date of such order. The test is to be conducted by the Child Welfare Committee (CWC). The provision mentioned herein is the basis for determining the age of a child under the JJ Act which even includes a child who is a victim of crime in addition to a child in conflict with the law.

The need for a medical test such as the ossification test in order to determine the age of the victim in cases of rape arise primarily as the consent of a minor does not hold any statutory or judicial value under the Indian law. Therefore, institutions where there are no other documentary evidence available that establish the age of the victim it is pertinent that the ossification test be carried out in the interest of justice and owing to the fact that in such cases there is a reversal of the burden of proof. The problem of no age proof documents is widespread in India especially in the rural areas. Secondly, the ossification test gains relevance in situations wherein the prosecution or the victim may attempt to falsify the age in order to attain a conviction and/or make their case stronger by removing the legal issue pertaining to consent, therefore this may lead to an abuse of the legal process. Further, by virtue of age falsification or lack of proof pertaining to age will go against the tenets of a fair trial to which the accused is entitled to and would result in attracting stringent Sections under the POCSO Act. An example of forged and fabricated documentation pertaining to age can be seen in *Ram Suresh Singh v. Prabhat Singh,*[97] wherein the documentary proof of age given by the respondent was found to be false and fabricated, the Court herein held that in such a situation it had no other option but to rely on the ossification test.

ADVISORY NOT BINDING

The evidentiary value given to an ossification test is the same as has been given to the opinion of experts under Section 45 of the Evidence Act, 1872. In *Ramdeo Chauhan v. State of Assam,*[98] it was held by the Supreme Court that *"the statement of the doctor is no more than an opinion, the court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform."* In *Vishnu v. State of Maharashtra*[99] the Court clarified further that the ossification test by the medical officer is to assist the court which falls under the ambit of medical expert

97 (2009) 6 SCC 681.

98 (2001) 5 SCC 714.

99 (2006) 1 SCC 283.

opinion i.e., advisory in nature and not binding. However, such an opinion cannot overrule ocular or documentary evidence, which has been proved to be true and admissible as they constitute statement of facts. The Court in Vishnu placed reliance on *Madan Gopal Kakkad v. Naval Dubey*[100] to hold that a medical witness is not a witness of fact therefore the opinion rendered by such a medical expert is merely advisory until accepted by the Court however once accepted they become the opinion of the Court.

MARGIN OF ERROR PRINCIPLE

The bone ossification test is not an exact science that can provide us with the exact age of the person. As discussed above individual characteristics such as growth rate of bones and skeletal structures can affect the accuracy of this method. The courts in India have also observed in *Ram Suresh Singh v. Prabhat Singh* and *Jyoti Prakash Rai v. State of Bihar* that the ossification test is not conclusive for age determination because it does not reveal the exact age of the person, but the radiological examination leaves a margin of two years on either side of the age range as prescribed by the test irrespective of whether the ossification test of multiple joints are conducted. The courts in India have accepted the fact that after the age of thirty years the ossification test cannot be relied upon for age determination.[101] It is trite law that the standard of proof for age determination is the degree of probability and not proof beyond reasonable doubt.[102]

BENEFIT TO THE ACCUSED

The position of law with regard to who gets the benefit of this two- year margin of error as recognised by the courts in India is settled by *Shweta Gulati v. State (Govt. of NCT of Delhi)*[103] wherein the Delhi High Court dealt with bone ossification test report that had estimated age of the victim as 17 to 19 years. The Court determined that in such a case applying the margin of error principle, of two years on either side could put the age anywhere between 15 to 21 years. The Court concluded that even if the age is not taken on the higher side in such cases the age of the victim would be 19 years by application of the margin of error principle. The Court held in unequivocal terms that: *"Giving the benefit of doubt to the accused, the age of the victim has to be taken as 19 years of age. It is also settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused."* Therefore, it is now settled law that by virtue of the benefit of doubt going to the accused the age of the victim as established by the ossification test is to be considered on the higher side. The same

100 (1992) 3 SCC 204.

101 State of MP v. Anoop Singh, (2015) 7 SCC 773

102 Mukarrab v. State of UP, (2017) 2 SCC 210

103 2018 SCC Online Del 10448

view has been affirmed by the Supreme Court *in Rajak Mohammad v. State of H.P.*[104]It is also pertinent to note that in cases of determining juvenility of the accused, the margin of error is taken at the lower side i.e. *"in favour of holding the accused to be a juvenile in borderline cases."*[105] It is therefore clear that the ossification test is used as per the intention of the particular legislation and the spirit of law.

PROSECUTORIAL BURDEN

The proof of age irrespective of whether it is vide documentary proof or in absence of such documents via an ossification test lies upon the prosecution to establish. In the absence of such a proof the defence can at any time ask the prosecution to produce proof of age.[106]

In a country such as India documentary proof of age may not always be present with the victim owing to a multitude of reasons, therefore conducting a medical test to determine age becomes essential in order to administer justice. The bone ossification test is however not completely reliable and does not hold good after the victim crosses a certain age as has been mentioned above.

In light of the same it is essential that firstly, the bone ossification test of the victim is conducted as soon as the prosecution realises that the victim's age is a matter of contention for the adjudication of the case and further that documentary proof pertaining to the victim's age is either not present or not reliable in accordance with the Evidence Act. The role of the defence where the prosecution fails to present age proof is to ask for the conduct of bone ossification test or any other medical test to determine age at the earliest instance. Secondly, the bone ossification test must be coupled with other medical tests to determine age such as dental age, sexual maturity, x-rays of other body parts which will in turn assist the court better in determining the age of the victim through corroboration of these various techniques.

4. "Skin-To-Skin" Touch For Defending Child Sexual Assault: Interpretational Vagaries Of The POCSO Provisions[107]

Nearly 500 million children below the age of 18 constitute 41% of the population in India. 10 Child sexual abuse has been posing a socio-legal challenge since time immemorial.

104 (2018) 9 SCC 248

105 Arnit Das v. State of Bihar, (2000) 5 SCC OnLine Del 9172

106 Abuzar Hossain v. State of WB (2012) 10 SCC 489

107 G.K. Goswami & Aditi Goswami, "Skin-To-Skin" Touch For Defending Child Sexual Assault: Interpretational Vagaries Of The POCSO Provisions", Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com

Historically speaking, CSA was addressed differently in various societies, but never considered a legal issue, until formally recognised as a crime during the 19th century. In the Indian Penal Code, child sexual abuse was not classified as a separate offence but clubbed with adult sexual exploitation, hence it lacks statutory status. Since rape was limited to peno-vaginal penetration, the Penal Code was neither able to protect male children from rape nor defined "unnatural offences" dealt under Section 377 of the Penal Code. Forced lesbian conduct among adults continued to be unrecognised wrong; even though such conduct may be booked under the POCSO Act provided the victim is a minor, and the aggressor is an adult.

In consonance with the expectations of the UN Convention on the Rights of the Child, 1989 (UNCRC), the Indian Parliament, as a part of the child protection policy, enacted the POCSO Act, 2012 to guard children from the offences of sexual assault, sexual harassment and pornography and created special juridical machinery like the POCSO Courts, Prosecutors, etc with procedural provisions in order to protect the best interest of child and to meet the ends of justice. The Act is intended to enforce the rights of children to safety, security and protection from sexual abuse and exploitation. Unlike the provisions under the Indian Penal Code, the Act is gender neutral and prefers the term "penetrated sexual assault" to replace the term "rape" to counter enduring social stigma attached with rape.

Several terms of vital importance have not been defined in the special Act, which, for various contexts, have been interpreted from time to time by the constitutional courts. Few terms construing definition of the offence under Section 7 of the POCSO Act have been defined by the High Court, which became cause of action for the instant petition[108] before the Supreme Court. The Supreme Court dealt with five petitions which interpreted various provisions mainly under Sections 7 and 11 of the POCSO Act.

Brief facts of cases leading to this petition are as follows:

Jageshwar Wasudeo Kawle v. *State of Maharashtra:*[109]

The Sessions Judge, Hinganghat on 12-11-2019 convicted the accused for rape of a girl, three months short of attaining the age of majority, under Section 376(2)(n) of the Penal Code and Section 5 punishable under Section 6 of the POCSO Act, and awarded ten years rigorous imprisonment with fine. The accused preferred an appeal before the High Court. Both the prosecutrix and the accused were in love affair and she willingly went to his sister's house and both stayed there and had sexual intercourse multiple

108 *Attorney General for India v. Satish,* (2021) 4 SCC 712.

109 2021 SCC OnLine Bom 7859

times. A rape case with minor was slapped on paramour by her father. She was found impregnated during medico-legal test. The appellate court on 14- 1-2021 observed that the prosecution could not establish, beyond reasonable doubt, the offence of rape against the appellant/accused and acquitted him.

Libnus v. *State of Maharashtra*[110]:

In 2020, an appeal was filed before the Nagpur Bench of the Bombay High Court by the appellant against his conviction by the order dated 5-10- 2020, delivered by the Special Judge, Gadchiroli, in Maharashtra. The facts of the prosecution case indicate that the mother of victim girl lodged a written complaint at the police station on 12-2-2018 stating that her two daughters of age 3 and 5 years were alone at home since she had gone out to work between 8 o'clock in the morning and returned at 4 o'clock in the evening. On the fateful day, father of the victim had also gone to another village. In the evening, when she returned home from workplace, she noticed presence of the appellant-accused in her house molesting her elder daughter. She also noticed the victim daughter raising her pants upwards. Seeing this scenario, she shouted and neighbours started gathering at her home Thereafter, the accused ran away, however, he was identified as Libnus F. Kujur. The gathered neighbours with the victim's mother tried to search for the accused, but could not trace him. The victim child also disclosed that the accused moved her frock upward and also lowered her pants, He unzipped his pants and showed his penis to her and then asked her to lie down on the wooden cot. On her information to the police, a crime was registered under Sections 354-A(1)(i) and 448 IPC, and Sections 8, 10, 12 read with Section 9(m) and Section 11(i) of the POCSO Act. After completing the investigation, police filed charge-sheet against the accused under the relevant provisions of the said enactments. The accused was prosecuted for 'aggravated sexual assault', since the victim was below 12 years. After concluding the trial proceedings, the Special Court held the accused guilty, and awarded maximum punishment of five years' imprisonment with fine under various Sections of law. The convicted accused preferred appeal before the Nagpur Bench of the Bombay High Court, which was decided on 15-1-2021. The Court observed*: "In the case in hand undisputedly, the age of the prosecutrix is five years. If the offence of sexual assault is proved against the appellant accused, the prosecutrix, being of age below twelve years, the conviction must be recorded for the offence of aggravated sexual assault."*

It was further explicated that the definition of 'sexual assault' under Section 7 of the POCSO Act has the words 'any other act' which on the principle of *ejusdem generis* encompasses the act of similar nature or close to that. The Court interpreted that the

110 2021 SCC OnLine Bom 66

acts of 'holding the hands of the prosecutrix,' or 'opened zip of the pants' as alleged by the mother as prosecution witness does not fit in the definition of 'sexual assault.'

On this point, the High Court explained: *"The appellant-accused is prosecuted for the charge of 'aggravated sexual assault.' As per the definition of 'sexual assault' a 'physical contact with sexual intent without penetration' is essential ingredient for the offence. The definition starts with the words 'whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person or does any other act with sexual intent…' The words 'any other act' encompasses within itself, the nature of the acts which are similar to the acts which have been specifically mentioned in the definition on the premise of the principle of 'ejusdem generis'. The act should be of the same nature or closer to that. The acts of 'holding the hands of the prosecutrix' or 'opened zip of the pants' as has been allegedly witnessed by PW 1. in the opinion of this Court, does not fit in the definition of 'sexual assault'."*

Consequently, the punishment awarded by the trial court under Sections 8 and 10 was set aside by the High Court. However, the punishment under other Sections was modified to the extent the accused has already undergone incarceration.

Satish v. *State of Maharashtra*[111]:

In 2020, an appeal was filed by the appellant against conviction order dated 5-2-2020, delivered by the Extra Joint Additional Sessions Judge, Nagpur. The factum of this case revealed that the victim minor girl of age 12 went out to bring guava. When the child did not return, the mother started searching for her and a neighbour informed that the accused, who was living in the vicinity, has taken the minor to his house and she showed his house. The mother loudly called out the child's name; then the accused came down from the first floor, but denied knowing the whereabouts of the child. The informant mother, however, barged into his house to search for her daughter as she heard the shouts coming from a room situated on the first floor. She went to the first floor and rescued her daughter lodged in a room, which was bolted from outside. The daughter told her mother that the accused took her to his house to give her guava. There, he pressed her breast and tried to remove her salwar. At this point, the victim tried to shout but the accused silenced her by pressing her mouth. Thereafter, the accused left the room and bolted the door from outside. On complaint, when the police rushed to the spot of crime, they saw that the accused was trying to commit suicide by hanging himself. He, therefore, was sent to hospital for treatment. On written complaint of victim's mother, police registered a case on 14-12-2016. During investigation, the

111 2021 SCC OnLine Bom 72

minor victim supported the allegations in her statement before the Magistrate. The trial court convicted him under Sections 354, 363 and 342 of the Penal Code; and Section 8 of the POCSO Act. The accused preferred an appeal against the conviction order of the trial court On 19-1-2021, the High Court decided the appeal, and absolved the appellant-accused of the charges under Section 7 after observing that:

"Admittedly, it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact ie, skin-to-skin with sexual intent without penetration. However, the High Court upheld the conviction awarded under Sections 342 and 354 of the Penal Code."

Attorney General for India v. *Satish:*[112]

Recently this judgment caught limelight in the media wherein the Supreme Court held that it is not "skin-to-skin" touch but the "sexual intent" ex facie to constitute an offence under Section 7 of the POCSO Act, 2012. The Bench was comprised of U.U Lalit, S. Ravindra Bhat and Bela M. Trivedi, JJ. Bela M. Trivedi, J., the author of the judgment observed, "The purpose of law cannot be to allow the offender to sneak out of the meshes of law & two judgments of the Bombay High Court (Libnus and Satish) were contested through two separate petitions filed by the Attorney General for India and the National Commission for Women, and two appeals by the State of Maharashtra before the Supreme Court. Further, Satish, the convict, aggrieved by the same order filed an appeal against his conviction. All these five matters pertaining to both cases were clubbed together by the Supreme Court to pass the extant judgment and deliberated upon the connected germane doctrines and legal tenets of the child sexual assault.

CONTOURS OF LEGAL INTERPRETATION

Lord Denning on interpretation of law had observed, *"A Judge must not after the material of which it is woven but he can and should iron out the creases."* It is said that a statute is an edict of the legislature. The elementary principle of interpreting or construing a statute is to gather the mens or sententia legis of the legislature, observed the Supreme Court of India.[113] The Court further elaborated: Where, therefore, the 'language' is clear, the intention of the legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless

112 2021 SCC OnLine SC 1076

113 *JP Bansal v. State of of Rajasthan*, (2003) 5 SCC 134.

it is covered by the rule of exception, including that of necessity, which is not the case here. In *State of W.B. v. Union of India*[114], it was observed: *"The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute, it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."*

The Supreme Court in *Balram Kumawat v. Union of India*,[115] has succinctly reflected upon the interpretation of penal laws as under: *"Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so."* The courts will therefore reject that construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used.

The Supreme Court in *Satish*[116] case has observed that: *"... As per the rule of construction contained in the maxim 'ut res magis valeat quampereat,' the construction of a rule should give effect to the rule rather than destroying it."*

These principles of legal construction, as discussed below, have been taken into consideration in Satish by the Supreme Court.

RULE OF LENITY

The rule of lenity, also known as the canon of strict construction of legislation, was first conceived by English Judges. In the American courts, the doctrine was cited first by John Marshall, C.J. in *United States v. Wiltberger*.[117] Interestingly, the rule of lenity takes on special significance on the canons of construction. This doctrine suggests that the court must prefer statutory interpretation of ambiguous component of criminal law in the manner that is most beneficial or favourable to the accused. In *Ladner v. United States,*[118] Brennan, J. of the US Supreme Court held that *"The meaning of this criminal statute being ambiguous, the policy of lenity in the construction of criminal statutes requires that the less harsh of two possible meanings be adopted."* It applies both for guilt determination as well as awarding quantum of punishment. In Satish case, the

114 AIR 1963 SC 1241.

115 (2003) 7 SCC 628.

116 *AGI v. Satish*, 2021 SCC OnLine SC 1076

117 1820 SCC OnLine US SC 3

118 1958 SCC OnLine US SC 3

rule of lenity would not be applicable since there being no obscurity or uncertainty in the provisions of the POCSO Act. The Supreme Court of India observed: *"....in view of the settled proposition of law that the statutory ambiguity should be invoked as a last resort of interpretation. Where the legislature has manifested its intention, courts may not manufacture ambiguity in order to defeat that intent."*

On the issue of lenity in Satish case, the Supreme Court of India explicated, it is also trite that a court should not be overzealous in searching for ambiguities or obscurities in words which are plain. So far as the provisions contained in Section 7 of the POCSO Act are concerned, the court does not find any ambiguity or obscurity to invoke the rule of lenity.

ANALYSIS OF SECTION 7 OF THE POCSO ACT

Section 7 defines 'sexual assault', and this provision may be bisected into two limbs, first part thereof pertains to the act of touching with sexual intent the vagina, penis, anus or breast of the child or making the child touch the said organs of such person or any other person; and the second part pertains to 'any other act' with sexual intent which involves physical contact without penetration. Incidentally, the phrases like 'touches','physical contact', and 'sexual intent' have not been defined in the POCSO Act. The first part of Section 7 criminalises the act of touching specific body parts of the victim child with sexual intent. The expression 'sexual intent' is fact dependent as the Explanation to Section 11 specifies, and cannot be confined to any premeditated format or structure. Thus, sexual intent of an accused constitutes culpable mental state i.e. mens rea as core matrix in both limbs of Section 7. The court is expected to presume the existence of culpable mental state on the part of the accused, and it is for the accused to prove in defence that he had no such mental state with respect to the offensive act charged against him. Thus, the act of touching any part of the body with sexual intent will not be trivialised and not be excluded under Section 7 of the POCSO Act.

The second part 'any other act' done with sexual intent mentioned in Section 7 addresses physical contact without penetration. The Court further deliberated upon linkages, if any, of the words 'touch' and 'physical contact' with 'any other act'. The word 'touch', as defined in the Oxford Advanced Learner's Dictionary, means *"the sense that enables you to be aware of things and what they are like when you put your hands and fingers on them."* The word 'contact' is used in the second limb of Section 7, though has wider connotation, but it is always limited to 'touch', in the present context. The legal relationship of these words within Section 7 has been described as under: *".... The word 'Touch' has been used specifically with regard to the sexual parts of the body,*

whereas the word 'physical contact' has been used for any other act. Therefore, the act of touching the sexual part of body or any other act involving physical contact, if done with 'sexual intent' would amount to 'sexual assault' within the meaning of Section 7 of the POCSO Act."

Limiting the ambit of 'touch' to a narrow and pedantic definition would lead to an 'absurd interpretation', which cannot be justified as it would grossly defeat legislative intent. It cannot be extended to 'skin-to-skin' touch as interpreted by the Bombay High Court to overturn the conviction under Section 7 in Satish case. If the law is so construed, touching the sexual or non-sexual body parts of a child with gloves, condoms, sheets or with cloth. though done with sexual intent, would not constitute an offence of sexual assault as defined under Section 7.

The Supreme Court observed: *"Restricting the interpretation of the words 'touch' or 'physical contact' to 'skin-to-skin contact' would not only be a narrow and pedantic interpretation of the provision contained in Section 7 of the POCSO Act, but it would lead to an absurd interpretation of the said provision, 'skin-to-skin contact' for constituting an offence of 'sexual assault' could not have been intended or contemplated by the legislature."*

In Section 354 of the Penal Code, the phrases 'assault' or use of 'criminal force' to woman with intent to outrage her modesty are broad requisites; and these terms cannot be imported to describe 'sexual assault' under Section 7 of the POCSO Act, though permitted under Section 2(2) of the POCSO Act. The provisions under Section 7 are supported by the exceptional necessities of presumption against the accused. The principle of *ejusdem generis* was also thoroughly misconceived by the High Court. This device for legal interpretation should be applied only as an aid to the construction of the statute, and not to be used if it defeats the very legislative intent.

The Supreme Court held that, *"the most important ingredient for constituting the offence of sexual assault under Section 7 of the Act is the 'sexual intent' and not the 'skin-to-skin' contact with the child."* The prosecution was not required to prove a 'skin-to-skin' contact for the purpose of proving the charge of sexual assault under Section 7 of the Act, deliberated the Court. These legal provisions cover and are meant to cover both direct and indirect touch. Therefore, the reasoning in the High Court's judgment quite insensitively trivialises indeed legitimises-*"an entire range unacceptable behaviour which undermines a child's dignity and autonomy, through unwanted intrusions"* adjudicated the Supreme Court. In both the appeals, finally the Supreme Court restored the trial court orders.

ADVERSE PRESUMPTION AGAINST AN ACCUSED

The provisions of the POCSO Act are intended to protect the best interest of a child and to protect her/him from all variants of sexual offences. Hence, contrary to general canon of criminal jurisprudence, this special enactment through Section 29 presumes that the accused has committed or abetted or attempted to commit the offences embodied under Sections 3, 5, 7 and 9 of the Act. Further Section 30 enables the court to presume the existence of culpable mental state of the accused and it further shifts the burden on the accused of child sexual assault to prove his innocence. However, for the application of Section 30, the fact must be proved beyond reasonable doubt by the prosecution, and not merely its existence is established by the preponderance of probability. Explanation to Section 30 clarifies that 'culpable mental state' includes intention, motive, knowledge of a fact and the belief in, or reason to believe a fact. The Court observed:*"... Thus, on the conjoint reading of Sections 7, 11, 29 and 30, there remains no shadow of doubt that though as per the Explanation to Section 11,'sexual intent' would be a question of fact, the Special Court, when it believes the existence of a fact beyond reasonable doubt, can raise a presumption under Section 30 as regards the existence of 'culpable mental state' on the part of the accused."*

THE WAY FORWARD

The evils of violence against children, and especially the girl child, continue to happen even in 'the best of homes' and children often called 'blossoms' linger to wallow or lie in the "dust" for no fault of theirs. The society at global landscape has millennially produced social indifference towards child sexual abuse. In India, the POCSO Act, 2012 was spectacularly introduced on the Children's Day-2012 to address a cry for justice. However, there are ongoing challenges at various levels of legal administration, including scientific investigation, adversarial courtroom contest by the prosecution and defence, legal interpretation for handling perils of child sexual abuse. Multifaceted biases at various levels may be exemplified by investigating and prosecutorial misconducts husking the very purpose of law. In many cases, the defence advocates contesting mainly for the marginalised and poor accused miss professionalism leading to miscarriage of justice. Sometimes, overzealous Judges also construe law in haywire fashion to nourish their self-created social ethos and norms. Handling statutory sexual offences poses multi-pronged challenges. Despite being a special enactment, the POCSO Act has several evident limitations, the procedure for determination of age is wanted. In absence of explicit protocol for age estimation for a child of sex abuse, Rule 12 of the JJ Act 2000 was permitted by the Supreme Court of India. Sexual activity with a child, irrespective of consent, constitute statutory rape. However, jurisprudence of CSA in India keeps conspicuous silence to determine the victim in case both male and

female involved in sexual activity are minor. In such cases, the female minor many times accuses male minor, and police also prosecute him after registering and investigating the allegations. In true sense, this scenario countermands the spirit of the POCSO Act, since it differentiates a victim based on gender.

The Madras High Court in *Vijayalakshmi v. State*[119] held that the scheme of the POCSO Act clearly shows that it did not intend to bring within its scope or ambit, cases of nature where adolescents or teenagers involved in romantic relationships are concerned. The Court said that hormonal and biological changes in adolescent age drive the immature decision-making ability regarding sexuality. The Court suggested that: *"... It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act."*

In *Sabari v. Inspector of Police,*[120] the Court had pondered upon the issue where persons of the age group of 16 to 18 years were involved in love affairs, but some cases ultimately ended up in criminal case booked for an offence under the POCSO Act. The Madras High Court in Sabari case observed: *"... Sometimes it happens that such offences are slapped against teenagers, who fall victim of the application of the POCSO Act at a young age without understanding the implication of the severity of the enactment."*

In fact, India must consider introducing legal device for 'Age Differential Clause' alike the Romeo-Juliet clause of the United States for addressing such critical scenarios. Further, despite the court verdict holding two-finger test violative of bodily integrity of rape victim, and guidelines being made available to the medico-legal practitioners, virginity test is conducted in umpteen number of rape cases in India. The courts also take notice of such blatant violations, but hardly order any punitive action against such erratic conduct of medical experts.

Criminal justice administration is conditioned to reach out to truth through scientific enquiry for collecting cogent evidence. Further fair trial, a celebrated doctrine, remains an empty vessel unless fairness is ensured in investigation. The judiciary has acknowledged the strength of forensic science for delivery of justice, but unless collection of forensic evidence is made compulsory, police will enjoy cherry-picking approach frustrating the very purpose of justice. The judiciary must also set its house in order. Despite special POCSO Courts in each district of India, disposal of trials is dismal. The compiled data of pending appeals in every constitutional court must be available in public domain by publishing it in Crime in India, an annual publication of

119 2021 SCC OnLine Mad 317.

120 2019 SCC OnLine Mad 18850

the National Crime Records Bureau. Indeed, judicial sensitisation, not sanitisation, is both a necessity and a duty.

CONCLUSION

Benjamin Nathan Cardozo aptly said, 'the great tides and currents which engulf the rest of men do not turn aside in their course and pass the Judges by.' The case in hand rightly buttresses the adage by the American polymath Benjamin Franklin, 'The strictest law sometimes become the severest justice.' Interpretation of statutes is a very subtle but indispensable responsibility of the judiciary. The legislature not only must construe law without interpretational ambiguity but also provide operative tools for effective execution to truly serve the desired legislative intent. Various words and phrases of critical significance used in various legal provisions must be defined in the statute for interpretational clarity. Several gaps and inadequacies existing in POCSO law need attention. All actors handling CSA in collaboration with academicians must identify grey areas and cull out a list of 'ought to be' to synergise between legal framework and its effectual administration.

Children suffer from faith deficit in reporting child sexual abuse incidents since they perceive that even their family members may not believe the allegations especially when abuser is either a relative or known to the family. Children between 14 to 18, even though legally declared as a child, are more disbelieved as sexual abuse victims in comparison to children below 14 years. For various stereotypical reasons, people mostly react first in denial mode to discredit or disbelieve the allegations of rape or other sexual abuse. Against all odds, the parents, more particularly the mothers, heroically stand with victim children to prosecute the abusers. Umpteen number of incidents are either not reported for various compelling reasons, or do not get registered in police stations.

Satish and Libnus are not the only clarion call cases. These episodes could surface due to media attention since the Judge in these appeals displayed extreme personal bias for unfounded legal interpretation and have defied all rules of reasonableness and logic. These judgments further buttressed that misogynistic mindset embodied an enduring culture towards sexual conduct, which exists irrespective of gender. Like police, other actors of the criminal justice system equally suffer from institutionalised chauvinistic sub-culture and judiciary is no exception. Even some of the female Judges evaluate facts using a dogmatic lens and cannot resist their misogynistic outlook in decision making.

5. Determination Of Age: A Medico-Legal Conundrum[121]

Estimation of age is an essential but complex procedure used for various purposes in administration of justice in determination of culpability and socio-legal categorization and human identification. Determination of age with greater precision is essential for ascertaining criminal liability, especially for invoking provisions of the POCSO Act, 2012 and the Juvenile Justice Act, 2015, where age is a crucial factor. Besides, age of consent, a significant legal doctrine which illuminates the relationship between law, morality, and liberty, necessitates establishing the age of a victim below certain years for charging an accused for statutory rape. In the global legal right discourse, age connotes chronological age, but cognitive capacity and mental age also become crucial for determination of guilt, and protection of victims' rights. Age has a direct bearing on human trafficking and smuggling, prostitution, sex tourism and child pornography. In civil matters, adoption, determination of custody and guardianship, capacity to contract, dealing financial and property-related transactions, eligibility for social benefits such as asylum-seeking and medical care, competitive sports to ensure athletes compete within appropriate age bands and grants for educational assistance are various domains where age diagnostics may potentially change the course of legal action.

Normally issues referred for age diagnostics are predominantly within juvenile age spectrum, but sometimes elderly age assessment may be required to ascertain eligibility for state-funded pension support or retirement age. In a country like India, mass scale ignorance and illiteracy of parents and poor maintenance of records obscure the problem since registration of birth of a child is not properly secured, resulting in the absence of credible legal documentation for ascertaining age. Forensic age assessment, being an inter-disciplinary procedure, assists the judicial system mainly when details of birth of a subject are either not recorded as per conventional methods or contested in the court on various grounds.

CLASSIFICATION OF AGE IN LEGAL REALM

In various parameters, age may be classified as chronological (legal age), biological (physiological) and mental (Intellect and maturity) age. Chronological age denotes number of years the subject (here human) has lived, but biological age or physiological ageing refers to how old a person appears. Biology of a person is conditioned upon his physiology and so is his age. Chronological and biological age are interchangeably used

121 GK Goswami & Aditi Goswami, 63 JILI (2021) 102, Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com

despite the fact that medico-legal tests determine only biological ageing. Law, in *stricto sensu*, recognizes only chronological age, being irreversible and resistant to external factors. Mental or brain age denotes cognitive capacity and is determined by various biomarkers such as telomere, DNA methylation; and generally calculated based on intelligence quotient (IQ). Chronological age, if known correctly, is free from ambiguity. However, both biological and mental age assessment hinges on several assumptions and probabilities, hence, suffer from wide inconsistencies and ambiguities. Linking biological and mental age with chronological age is a utopian expectation and lacks precision and admissibility at present.

PROVISIONS OF AGE DETERMINATION IN THE INDIAN LEGAL SYSTEM

Age determination is an essential procedure, because minors (victim as well accused) have special privileges under law. Procedural latches may potentially be exploited in order to enjoy privileges: hence, age valuation becomes a decisive step in judicial proceedings. Provisions have been enacted in Indian legislation for proving claim of minority; however, no specific provision is available for establishing age of the elderly. The JJ Act has prescribed procedure to determine age to adjudicate claim of juvenility of a wrong doer, but there is no specific legal roadmap for ascertaining minority of a victim. This legal conundrum was dealt in *Jarnail Singh v. State of Haryana*[122] where the Apex Court held that *"Even though Rule 12 [the JJ Rules, 2007 under the 11 Act, 2000] 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 of a child who is a victim of crime. There seems hardly any difference as far as the issue of minority is concerned, between a child in conflict with law and a child who is a victim of crime",* Aadhaar card has not been mentioned in the list of documents for age determination, but High Court of Delhi accepted it since veracity of age was not challenged by the defence during trial proceedings. However, Aadhaar based age needs to fulfil legal requisites as illustrated under Section 35 of the Evidence Act, 1872.

AGE ESTIMATION UNDER THE 33 ACT OF 2000 AND 2015

As per Section 3(1) of the Indian Majority Act, 1875 every person domiciled in India shall attain the age of majority on completion of 18 years and not before. Section 2 (35) of the JJ Act, 2015 defines Juvenile as a child below the age of eighteen years Sub-rule 5 of Rule 22 of the 11 Rules, 2001 framed under Section 68 of the JJ Act, 2000 dealt with age determination. Subsequently, these rules were amended and Rule 12 of the JJ Rules, 2007 prescribed the procedure to determine age in order to establish Juvenility

122 1993 SCR (1) 260.

In *Lourdhe v. State represented by the Inspector of Polices the High Court of Madras*[123] has observed that *"the manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of option under Rule 12(3), an option expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause."* The court further mentioned extract of Rule 12(3) that *"Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of child."*

After the Act, 2000 was repealed, Section 94 of the 33 Act, 2015 provided preferential steps to determine age of the subject. Rule 18(iv) of the JJ Rules, 2016 clarifies that *"For the age determination of the victim, in relation to offences against children under the Act, the same procedures mandated for the Board and the Committee under Section 94 of the Act to be followed."* In 2019, the Apex Court observed that Section 94(2)(i) indicates a significant change over the provisions which were contained in Rule 12(3)(a) of the Rules of 2007 made under the Act of 2000. Under Rule 12(3)(a)(i), matriculation or equivalent certificate was given precedence and it was only in the event of the certificate not being available that the date of birth certificate from the school first attended, could be obtained. In Section 94(2)(i) both the date of birth certificate from the school as well as the matriculation or equivalent certificate are placed in the same category. In case claims of age create confusion due to conflicting school certificates, an enquiry must be conducted by the court or the Board to take evidence for establishing credibility and authenticity of the documents to determine age. In *Arnit Das v. State of Haryana*,[124] the court held that while deciding juvenility, a hyper technical approach should be avoided by the court.

In Nirbhaya gang rape case, one accused was merely six months short to attain age of 18; and prosecutions plea to conduct forensic age assessment was rejected by the court holding that medical test cannot be permitted in presence of a positive evidence such as birth certificate. This observation paved the way to introduce Section 15 of the JJ Act, 2015 to treat an adolescent between age 16 to 18 years in conflict with law as an adult in case of heinous crimes. This special provision of law enables the Juvenile Justice Board, to take the decision (optional), after conducting enquiry, to transfer the criminal case to the court of sessions. This age group of a child is a critical factor to be assessed with precision especially in the absence of credible birth records. Similarly, the age determination is very crucial for the child as the same has the potential to

123 2019 SCC OnLine Mad 5524.

124 (2000) 5 SCC 488.

expose him to the possibility of being transferred to the Children's Court to be tried as an adult.

AGE ASSESSMENT UNDER THE POCSO ACT, 2012

Section 34 of the POCSO Act, 2012, empowers the court to determine the victim of sexual offence; however, no procedure is laid down in this piece of age of the legislation. Thus, provisions of the Act, apply for age determination of the minor victim as discussed in pre paragraphs. The Apex Court in *Sunil v. State of Haryana*[125] held that it would be quite unsafe to base conviction on an approximate date of birth of the prosecutrix, and it is the onerous duty of the prosecution to prove age of minority of victims under the POCSO Act. This legal requirement necessitates determination of age as a crucial factor to administer justice under this special registration. In catena of cases, various courts have exonerated accused of rape since prosecution could not establish age of prosecutrix below 18 years at the time of incident. Indeed, if prosecutrix age could not establish her as a minor such cases must be adjudicated under Section 376 of the penal code.

The cardinal principle of law including the POCSO Act demands that the best interest of the child must be protected. Keeping in view the objectives of the POCSO Act, if doubt on age of prosecutrix is cast, the court must lean towards juvenility of the victim. However, as globally accepted doctrine of law, the benefit of doubt leans heavily in favour of the accused. The Apex Court held that any benefit of doubt, other things being equal, at all stages goes in favour of the accused. High Court of Delhi in *Shweta Gulati v. State (Govt of NCT of Delhi)*[126] has deliberated whether the issue of benefit of doubt in age of the victim estimated by bone ossification test is to go to the accused or the victim. The court held that in case a victim has no valid document of age then benefit of doubt of age assessed through ossification test must be in favour of the accused.

Thus, in child sexual abuse cases, if prosecutrix of nearly 16 years does not hold age proof admissible under law, she may not get justice under the POCSO Act since medical report on age assessment has variance of two years. In this regard observation in *Sucha Singh v. State of Punjab*[127] is relevant where the Apex Court determined that "*Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile*

125 (2010) 1 SCC 742

126 2018 SCC OnLine Del 10448

127 (2003) 7 SCC 643

on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law."

RELIABILITY OF DOCUMENTS AS PROOF OF AGE

Birth certificate or education certificate being primary documentary evidence are reliable under the Evidence Act, 1872. However, mere submission of birth certificate, even with proven genuineness, is not enough to fulfil legal requirements. Section 35 of the Evidence Act, 1872 necessitates that source of information for recording the date of birth in records including matriculation certificate is important for ascertaining age. In *Birad Mal Singhul v. Anand Purohit*,[128] *"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…"* This legal requirement compels inherent incapacity amongst illiterate and marginalised families to produce proof of authenticity of date of birth furnished in the age records of their wards. Such socio-legal hindrance becomes a roadblock in the delivery of justice both for minor victims and the accused.

FORENSIC AGE ESTIMATION

Medical exam determines biological or physiological age which is presumed to correlate with chronological age. In true sense, chronological and biological age may not perfectly correlate because skeletal ageing process may vary among individuals. The scientific basis of forensic age assessment is predetermined temporal progression of defined developmental stage of various characteristics that are identical in all persons of a reference population. Forensic age determination in living individuals mainly focuses on:

(a) assessment of dental development,

(b) evaluation of skeletal maturation and

(c) expression of secondary sexual characters.

128 1988 Supp SCC 604

Medical fraternity employs anthropometry, secondary sexual characters, radiological array (bone age and dental age) by capturing physiological changes inter alia synchronizing with the chronological age per se, X-rays of hands, panorama films of jaws, a thin slice Computed Tomography (CT) of medical clavicular epiphysis are various medical indices for age approximation. Indeed, forensic odontostomatology for estimating dental age is more reliable since the process of tooth development reflects less variability than other developmental features in ageing. DNA methylation is yet another marker which serves a similar purpose. Several techniques on age estimation may make tall claims but are yet to be accredited and approved for scientific accuracy and legitimacy. These medico-legal tests in conjunction with statistical analysis for quantification of age may provide results with varying degree of uncertainty and precision variance may be. A blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion. However, age in younger children can be estimated with more accuracy compared to older children. Forensic estimation of age of adults suffers from more challenges than that of minors.

LEGAL ISSUES WITH MENTAL AGE

In the legal system, mental capacity has relevance for determining rights and abilities, but mental age per se has no overt relevance. Interestingly, in the *Eera*[129] case, the issue of considering mental age for invoking provisions of the POCSO Act, 2012 was raised by a public-spirited petitioner on behalf of the mentally challenged victim of rape. Section 2(d) of the Act, 2012 defines a child as any person below the age of 18 years. The petitioner argued that a mentally retarded or highly intellectually challenged person who has crossed the chronological age of 18 years must be included within the holistic conception of the term child. The petitioner contended that construction of the word 'age' must compositely include chronological and mental age. The victim in the extant case was 38 years old with a mental age of approximately six to eight years as certified by the medical experts. It was argued that various provisions under the special Act are expressly designed to enable a mentally challenged victim child of sexual abuse. In the Indian Penal Code several provisions have been enacted to protect or exempt a person from criminal liability purely based on mental incapacity. Despite strong arguments, the Apex Court turned down the prayer by observing that stretching of the words age and years would be encroaching upon the legislative function. The Bench further held, *"...it is clear that viewed with the lens of the legislator, 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."* Indeed, the apex judiciary has not rejected the idea of considering mental age, but refused to interfere in the domain of legislature for law making.

129 *Eera Through Manjual Krippendorf v. State (NCT of Delhi)* (2017) 15 SCC 133

JUDICIAL OBSERVATIONS ON AGE ASSESSMENT

Age determination remains a hotbed for adjudication. Parties interested in a *lis* contest to establish age to serve their purpose particularly when date of birth records are inadequate. The Supreme Court, in *Fateh Chand v. State of Haryana,*[130] held that the parents of the victim of rape are the most natural and reliable witnesses with regard to her age. In *Aswani Kumar Saxena v. State of Madhya Pradesh*[131] the Apex Court held not to conduct roving enquiry, except only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Board or committee need to go for a medical report for age determination as the Apex Court in *Mukkarrab v. State of Uttar Pradesh*[132] succinctly dealt with the issue of age determination by observing*: "Time and again, the questions arise: How to determine age in the absence of birth certificate? Should documentary evidence be preferred over medical evidence? How to use the medical evidence? Is the standard of proof, a proof beyond reasonable doubt or can the age be determined by preponderance of evidence? Should the person whose age cannot be determined exactly, be given the benefit of doubt and be treated as a child? In the absence of a birth certificate issued soon after birth by the concerned authority, determination of age becomes a very difficult task providing a lot of discretion to the Judges to pick and choose evidence. In different cases, different evidence has been used to determine the age of the accused."*

The Apex Court further held that radiological based x-rays ossification test for determination is no doubt a useful guiding principle to know the span of age but evidence is not of a conclusive and incontrovertible nature and it is subject to margin of error. Such medical opinion can, by no means, be infallible and accurate test to ascertain the correct number of years and days of a person's life. However, if need be it must be considered along with other circumstances. The court also observed that age of a person above 30 years cannot be determined with precision. In *Jodhbir Singh v. State of Uttar Pradesh*[133] the Apex Court held that for matriculation certificate or mark sheet, the Board or court is not required to go for other evidence for age determination. But, there should be no doubt on the genuineness and authenticity of the matriculation certificate or mark-sheet.

In *Suhani v. State of U.P.*[134] the Apex Court has placed reliance on the medical report of All India Medical Institute, New Delhi negating the age indicated in CBSE certificate.

130 (2009) 15 SCC 543

131 (2012)9 SCC 750

132 (2017) 2 SCC 210

133 2013 (1) SC Cri. R 36

134 2018 SCC OnLine SC 781.

In *Nisha Naaz v. State of U.P.*[135] the issue was raised whether Suhani's case overrules earlier judgments on age determination. In *Priyanka Devi v. State of U.P.,*[136] the Apex Court further observed that there is no significant change brought about in age determination under the JJ Act, 2015 and the earlier 2000 and the Rules framed there under, in so far as weightage to medico legal evidence is concerned. The High Court of Allahabad in Nisha Naaz case held that *"The said decision [Suhani's case] cannot be taken as a decision that overrules the earlier binding precedents which lay down the manner in which the age of a child is to be determined."*

CONCLUSION

In the realm of administration of justice, age estimation remains a crucial precept. In absence of legally admissible documentary age proof, age diagnostics become more challenging. It is a proven fact that poor and ignorant persons of adolescent age may be deprived of benefits of special provisions under laws due to lack of a credible system of age determination. In absence of universally agreed minimal standards with relation to data collection, forensic diagnostics for estimating age suffers heavily from variability and errors and must not rely on a cookbook approach. The courts must act as alert gatekeepers for inexperienced and unscrupulous medico-legal experts whose overzealous opinion on age may do more harm than good. In forensic world, metadata of diagnostics may be a crucial area for judicial scrutiny to know the reasoning behind expert opinion. This approach may truly establish a judge as 'gatekeeper' as enshrined under the Daubert standard.

The registration of birth must be made compulsory with proper maintenance of public records. Further, global attention is desired to prioritise medico-legal research with adequate funding to develop age diagnostics to ensure greater precision in age determination of people irrespective of their age profiles. Especially trained public functionaries of the criminal justice system including police, prosecutors and judges must be deployed to deal with matters, if minors are involved as victims or persons in conflict with law. Sensitivity and domain expertise are the foundation of justice while dealing with minors.

135 2019 SCC OnLine SC 4062.

136 2018 (2) ALJ 203.

6. A Scenario Of Digital Rape In India With Special Reference To Akbar Ali Case[137]

Rape is becoming far more than it is typically thought to be in India. Unfortunately, this tragic reality is still being ignored by our laws and lawmakers. Defining rape as "sexual intercourse with a woman against her will, without her agreement, by coercion, misrepresentation, or deception, or at a time when she is inebriated, misled, or is of unstable mental state, and in any event if she is under 18 years of age" in Section 375 of the IPC. Digital rape serves as a warning sign about the depth of social depravity present as well as a sign that rape laws need to be improved. The terrible truth is that young girls and elderly persons are frequently the victims of digital rape. It is obvious that our society is failing, with little consideration given to young people or the old. Recognising that a man can abuse the dignity of a woman and child in various ways the Supreme Court had to modify its definition of rape. The definition of rape was expanded in 2013 while keeping in mind all the aforementioned examples and severe crimes. The revised definition of rape was expanded to include "forcibly inserting a penis, a foreign object, or any other part of the body into a woman's vagina."

CASE DETAIL

On August 31, a 75-year-old man named Akbar Ali from Malda, West Bengal, was found guilty of digitally raping a 3-year-old girl and was given life sentence. The incident happened in 2019 in Noida, Uttar Pradesh. The father of the girl complained about Akbar Ali on January 21, 2019. In a statement, Special Public Prosecutor Neetu Bishnoi said, "The plaintiff alleged his daughter was playing outside her house that day at 11 a.m." The father of the victim claimed, "My daughter came home crying and revealed her ordeal to her mother. Akbar lured her with toffee and took her to his room."

Akbar was residing in the neighbourhood at the home of his son-in-law. He performed the crime on a day when no one was home. The little girl gave evidence in court, telling the jury that during playing outside one day, Akbar used toffee to entice her into his room, where he sexually raped her. Dr. Pushpalata performed the girl's medical examination, and according to her report, "There was no injury mark on the private region... In my medical report, any rape cannot be proved through a medical inspection. The victim's inside examination revealed nothing abnormal." His granddaughter, a witness for the defence, asserted Akbar was innocent and that the charges against him were baseless. She claimed that two days before the incident, her family had cooked some meat and thrown the bones throughout the neighbourhood, which caused a fight with the victim's

137 Devashish Raturi& Harpreet Kaur JCLJ (2022) 935, *available at:* http://www.scconline.com

family. “The complaint filed is a bogus case against my grandfather,” she declared. However, the victim was used as evidence by the court. By the POCSO Act, the court sentenced Akbar to life in jail and assessed a punishment of Rs. 50,000. According to the court, the girl is entitled to 80% of the fine as compensation for trauma, pain, and suffering under Section 357-A of the Criminal Procedure Code. Akbar’s attorney, Irshad Ali, stated in a statement that the verdict was unsatisfactory. The medical report found no evidence of rape or assault, he declared.

DEFINITION OF DIGITAL RAPE

The term “digital rape” is all the rage now. The term “digital rape” can lead one to believe that it is connected to the internet or the digital world. It wouldn’t be unusual to think in those terms given how heavily our world has been digitised, especially given the prevalence of sexual harassment on the internet.

The term “digital rape” refers to the unlawful penetration of someone’s toe, finger, or thumb; it has nothing to do with cybercrime. In English, the word ‘digit’ refers to these body parts. Because it was once thought of as molestation rather than rape, the majority of people are not familiar with this term. In a digital rape, the offender presses his or her finger(s) on the victim’s skin and forces them to perform a sexual act. A person is charged with digital rape when, in plain English, he or she inserts one or more of his or her fingers into the victim’s vagina without her consent.

WHY THE TERM DIGITAL RAPE WAS COINED

After the Nirbhaya rape case, ‘digital rape’ was recognised in 2013. The victims of ‘digital rape’ in India were not given justice before 2013 because there was no such law. In 2013, following the notorious Nirbhaya rape case, the term ‘digital rape’ was coined. Later, it was included under a different portion of the POCSO Act’s new rape legislation. India didn’t have legislation that offered justice to those who had been the victims of ‘digital rape’ before 2013. The Penal Code, 1860’s definition of rape did not include digital rape before the Nirbhaya Act of 2013. To the extent that ‘any item or a portion of the body, not being the penis, is inserted into the vagina, the urethra, or the anus of the child, or causes the kid to do so with him or any other person,’ as defined in Section 3 of the POCSO Act, it is already constituted penetrative sexual assault.

Legislators divide rape victims into two groups: majors and minors. Major digital rapists are apprehended and prosecuted by Sections 375 and 376, whereas minor digital rapists are tried under Sections 375 and 376 as well as the POCSO Act. These created several gaps in the laws governing rape, sexual offences, and related issues. Previously,

the government had trouble handling these cases by India's rape statutes. The Supreme Court had to alter its definition of rape because men can abuse a woman's or child's dignity in other ways besides sexual assault. The term rape was expanded in 2013 while keeping in mind all the aforementioned cases and horrifying criminal acts.

DATA ANALYSIS OF DIGITAL RAPE

The most recent statistics released by the National Crime Records Bureau are even more important evidence in this perspective. 33.5% of all urban child rapes in the country occur in Delhi. According to statistics, the victim's friendly neighbour or someone else they know abuses the child in 98% of these situations. It has been stated in numerous publications that the individual who violated a woman's or a child's dignity 70% of the time was someone they knew intimately. Typically, those close to the victim are the ones who commit these crimes. Their father, a close friend, an uncle (or other relatives), neighbours, and in some cases, the cousin all came forward with accusations. According to allegations in the media, people who have violated a child's dignity were close to and known to them 70% of the time. They knew 29% of the offenders through social networks, while 1% of cases included offenders who were strangers.

CONCLUSION

It was realised right away that India's rape laws needed to be changed in the wake of the 'Nirbhaya rape case.' Before 2013, the definition of rape did not include digital rape. However, following several horrifying rape incidents, the Supreme Court was forced to modify its definition of rape because there are additional methods for a male to disrespect a lady or child's dignity.

In 2013, the definition of rape was expanded to include "forcibly inserting a penis, a foreign object, or any other part of the body into a woman's vagina, mouth, anus, or urethra." This was done to account for all of these incidents and horrible crimes. According to an activist who works with senior citizens, most elderly ladies don't report sexual assault because they think no one will believe them. In addition, little is known about digital rape. The sooner our politicians look into the matter, the better for society, and all of this should serve as a warning. To fulfil societal demands, laws must be modified. Although digital rape is a terrible indictment of our culture, it is best to embrace the dismal trend and make sure that criminals are not let off the hook because the legislation is insufficient to hold them accountable.

7. Reassessing Age Under POCSO : A Step Forward[138]

The age of giving consent to engage in sexual acts is a matter of great importance as it plays a pivotal part in determining the nature of the relationship. The Chief Justice of India, Dr D.Y. Chandrachud, at the inaugural two-day session of the National Stakeholders Consultation on the Protection of Children from Sexual Offences Act, 2012 addressed the issue of age of consent and various difficulties being faced by Judges of trial and appellate courts in examining cases of consensual sex among adolescents.

Since its enactment in 2012, the primary objective of the POCSO Act has been to safeguard minors from offences of sexual abuse and exploitation and provides for severe punishment for any person who is found guilty of committing sexual offences against children. The Act defines a child as any person below the age of 18 years. The consent of a 'child' is immaterial and consensual sexual intercourse with or among adolescents is treated on a par with rape.

However, in recent years, there have been calls for reconsideration of the age limit under the Act due to the increasing number of cases of sexual offences between the age group of 16-18. Many experts argue that the age limit of 18 years is too low and that it fails to take into account the complexities of adolescent relationships. Mostly cases under the POCSO Act are of romantic relationships between an adult and an adolescent which given a colour of sexual offence to punish the boy by families of the girl.

Enfold Proactive Health Trust, an NGO based in Bengaluru, conducted a study with UNICEF (United Nations International Children's Emergency Fund) India and UNFPA (United Nations Population Fund), analysing 1715 such 'romantic cases' registered under the POCSO Act in Assam, Maharashtra and West Bengal between the year 2016-2020. The study revealed that 'romantic cases' accounted for 24.3 per cent of all POCSO cases between 2016 till 2020 and 80.2 per cent of these cases were filed by parents and relatives of the girl.

In numerous cases, a couple elopes fearing opposition from parents resulting in a situation where families file a case, for which the police book the boy for rape under the POCSO Act and abduction with the intent to marry under the Penal Code (IPC), 1860 or the Prohibition of Child Marriage Act, 2006. In such scenarios, the consent of the girl (if under 18 years of age) becomes invalid and the boy is branded as a criminal

138 O.P. Harsh Singh Munday & Tanushi Pate, "Reassessing Age Under POCSO : A Step Forward", Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com

regardless of the fact that the relationship might have been a mutually consented one. Such instances demonstrate the ineffectiveness of the courts in being able to differentiate between genuine cases which results in miscarriage of justice as it not only ruins the life of the accused but also hampers the mental growth of adolescents by treating them as children incapable of making decisions on their own.

The Karnataka High Court has directed the Law Commission of India to reconsider the age of consent under the POCSO Act. A Division Bench, consisting of Suraj Govindaraj and G. Basavaraja, JJ. of the Karnataka High Court in a judgment passed on 5-11-2022 observed that there are several cases relating to minor girls above 16 years having fallen in love and eloped which results in having sexual intercourse with the boy and opined that the Law Commission of India should rethink on the age criteria, so as to take into consideration the ground realities.

Such offences are slapped against teenagers, who fall victim to the application of the POCSO Act at a young age without understanding the severity of the enactment. It impacts the delivery justice system as these cases constitute a large burden on our courts and divert attention from investigation and prosecution of actual cases of child sexual abuse and exploitation.

In *Ajay Kumar v. State (NCT of Delhi),*[139] the Delhi High Court stated that the intention of the POCSO Act was to protect children below the age of 18 years from sexual exploitation and not to criminalise romantic relationships between consenting young adults. Various High Courts of India have advised the legislature to amend the age of consent and some step ahead further by sidestepping the law and recognising the consent of adolescents. This, itself, demonstrates the willingness of the courts to evolve with time and adapt as per society's growing needs so as to effectively administer justice. There are many instances where the courts have granted bail to the accused on ground of romantic relationships.

The high rate of acquittals under the POCSO Act shows that the law is not in sync with the social realities of adolescent relationships. The legal aspects of teenage sexuality have undergone several changes since colonial times. The law disregards the likelihood of a minor girl engaging in sexual activity voluntarily. But as per the survey conducted by National Family Health Survey (NFHS-5), 39 per cent of women had their first sexual experience before turning 18 years of age.

Many countries like Japan, which has the legal age of consent set to be 13 years of age and where Germany, Austria, Italy, Hungary and Portugal have their legal age of

139 (2022) 6 HCC (Del) 530

consent set to be 14 years of age. The basic difference between countries like these and India is that they acknowledge the fact that adolescents are indeed capable of taking decisions for themselves as per their judgment of what is good for them. India's tendency to underestimate the decision-making prowess of adolescents and their subsequent refusal to teach children about subjects inappropriate for their age results in young adults who often fall victim, either to an unjust law or to unspeakable evil.

The legal age at which a person is considered able to make decisions is not similar to the actual age at which an adolescent becomes able to make decisions for them. This drift between the two causes friction which ends up in gross injustice. It is unfair to criminalise them for their actions, particularly if they are engaged in a consensual relationship with another minor. There is a growing need to reconsider the age limit under the POCSO Act, particularly in cases involving romantic relationships between minors. This would ensure that minors are not criminalised for adolescent behaviour and they are not subjected to the trauma and stigma of being charged with sexual offences. A more nuanced approach that takes into account the complexities of adolescent relationships is needed, in order to provide adequate protection for the children while ensuring that they are not unfairly criminalised.

8. POCSO Act v. Personal Law – Application Of POCSO Act Over Muslim Personal Law[140]

To constitute a crime, the two main elements are mens rea and actus rea. But in this strange case, the marital status and the religion of the victim become the determining factor in whether the act constitutes a crime or not. The question of whether consummation of marriage with a minor girl constitutes 'penetrative sexual assault' under the Protection of Children from Sexual Offences Act, 2012 read with Section 375 of the Penal Code, 1860 attains significance in such cases.

As per the exceptions mentioned in Section 375 which defines 'rape', a husband cannot be held guilty of rape if he commits sexual intercourse with his wife, the wife not being under the age of 15, without her consent is not rape. The Supreme Court in the landmark judgment in *Independent Thought v. Union of India*[141] increased the age of the wife to 18 under which the husband will be guilty of rape if sexual intercourse is committed irrespective of the consent. The Court stated: *"... merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a*

140 Vansh Bhatnagar, "POCSO Act V. Personal Law – Application Of POCSO Act Over Muslim Personal Law", Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com.

141 (2017) 10 SCC 800.

child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations."

The Supreme Court in Independent Thoughts held that the minimum age prescribed for a valid marriage as per Section 5(iii) of the Hindu Marriage Act, 1955 and the Prohibition of Child Marriage Act, 2006 is 18 in the case of females. The Supreme Court denoted a direct link between the minimum age of marriage and the exception provided in Section 375 IPC. The Court, therefore, held that because the minimum age of marriage under various laws is 18 in the case of females, any sexual intercourse between a husband and wife must be considered rape if it has taken place when the wife is under the age of 18. The direct result of this landmark judgments is that a person can be convicted of rape if he commits sexual intercourse with his wife who is under the age of 18 irrespective of her consent. If a person will be held guilty of rape with his wife (or any other child) under the age of 18, he shall be convicted under the Protection of Children from Sexual Offences Act, 2012. Section 4 of the POCSO Act prescribes a maximum punishment of seven years, which may extend to imprisonment of life, for penetrative sexual assault of a child.

The curse of child marriage is to a large extent penalised by the effect of Independent Thought as the person committing sexual intercourse will be prosecuted under the POCSO Act. However, it becomes a substantial question of law whether this judgment applies to every person irrespective of the personal laws relating to marriage.

APPLICATION OF THE POCSO ACT ON MUSLIM PERSONAL LAW

Marriages in India are governed by the personal laws of every religion. Marriages between Muslims are regulated by Muslim personal law. The Muslim personal law is not a codified law, but it is based on the sources of Islamic law, especially the Quran and the Hadiths. As per Muslim personal law, the minimum age of marriage for girls is when the girl attains the age of puberty. Leading author on the subject of Muslim law Sir Dinshaw Fardunji Mulla in his seminal book "Mulla's Principles of Mahomedan Law" in Article 195 states, "Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years." Therefore, it can be generally presumed that the minimum age for a girl, unless the age of puberty is different, is 15 years.

According to the Sharia, once a Muslim enters into a marriage contract with a woman, she becomes his wife and becomes entitled to all of the husband's rights. Additionally, if they agree to it, the couple can get married and move into their new home at any time. However, it is strongly advised for them to cut this time in half as much as they can in order to enjoy the benefits of marriage unless there are some pressing issues,

like furnishing the home or being preoccupied with other activities like studying or other obstacles that might postpone the consummation.

A question then arises, if a marriage of a girl of less than 18 years of age is consummated, would the husband be held guilty of rape? It is a substantial question of law, as its determination in a positive way will conclude that the POCSO Act will have an overriding effect on the Muslim personal law.

A comparative analysis between the Hindu and Muslim marriages suggests that if a Hindu girl marries before the age of 18 and has sexual intercourse in the course of the marriage, the husband will be held guilty of penetrative sexual assault under the POCSO Act, irrespective of whether the sexual intercourse was consensual or non-consensual. There are various conflicting judgments of different High Courts which deals with the question that whether the POCSO Act will have an overriding effect on the Muslim personal law on marriage.

JUDICIAL DECISIONS

The Delhi High Court in the judgment of *Fija v. State (NCT of Delhi)*[142] held where the accused, who was a Muslim, had sexual intercourse in the course of marriage with his wife who was under the age of 18 and a Muslim, was not guilty under the POCSO Act as the personal law has an overriding effect on special laws. The Delhi High Court differentiated this case from the judgment of *Mohd. Imran Khan v. State (NCT of Delhi)*[143] in which it denied to quash the FIR filed against the petitioner who was accused under the POCSO Act of having sexual intercourse with a girl under the age of 18. The Court in this case stated that the sexual intercourse did not take place in the course of a marriage but in the garb of a promise to marry the girl, therefore, the POCSO Act will be applicable.

The Karnataka High Court in *Aleem Pasha v. State of Karnataka*[144]observed that the POCSO Act is special legislation to protect children from sexual offences and therefore, it will have an overriding effect on Muslim personal law. The Court noted that a person will be held guilty of penetrative sexual assault under the POCSO Act if the wife is under the age of 18 even if the sexual intercourse took place in the course of the marriage. The petitioner, who was seeking bail, argued before the High Court that since the girl had reached puberty in the present case and that Muslim Law treats reaching puberty as a consideration for marriage at the age of 15, there had been no violation

142 2022 SCC OnLine Del 2527

143 (2011) 10 SCC 192

144 2022 SCC OnLine Kar 1588

of Sections 9 and 10 of the Child Marriage Restraint Act, 1929. The High Court strongly disagreed with this argument, stating that the POCSO Act overrides personal law and that the age for engaging in sexual activity is 18 years old. The Karnataka High Court also noted in *Rahul v. State of Karnataka*[145] that the POCSO Act will have an overriding effect on Muslim personal law.

ANALYSIS

The conflicting judgments of the Delhi and Karnataka High Courts have created this question of law which must be settled by the Supreme Court. The POCSO Act is a special legislation with a narrow and specific purpose. The Act is not confined to any particular religion or faith. The Act aims to provide strong legal protection to children from sexual offences. If the POCSO Act is made subject to personal laws, the aim of the Act will become infructuous. The Independent Thought judgment of the Supreme Court clearly stated that there must be no differentiation between a married and an unmarried girl under the age of 18 for the purpose of Section 375 IPC. Any distinction based on the religion of a girl under the age of 18 for the purpose of the POCSO Act will have the same effect of inequality which was shattered by Independent Thought. The law laid down in the landmark judgment of *State of Bombay v. Narasu Appa Malia*[146] states that personal laws cannot be tested on the touchstone of fundamental rights, hence the meaning of law under Article 13 of the Constitution will not include personal laws. However, the application of Narasu will not come into play because the question of law here is not related to the application of personal laws, but a distinction created in the application of the POCSO Act between married girls under the age of 18 belonging to the Muslim religion and other religions. The inequality does not arise from the fact that it will have an effect on personal law but from the situation that the effect of discrimination creates inequality on the basis of religion hence violating Article 14. Further, the Supreme Court has now in the landmark Sabarimala judgment has laid down that the personal laws can be tested on the ground of violation of the fundamental rights.

Therefore, the judgment of the Delhi High Court in *Fija* case is per incuriam to the law laid down in Independent Thought. Therefore, the views expressed by the Karnataka High Court in Aleem Pasha hold the constitutional spirit of liberty and dignity and it should be the law of the land. The spirit of the POCSO Act, being special legislation for the protection of children against sexual offences, must be protected. Hence, the application of the POCSO Act must have an overriding effect on Muslim personal law.

145 2021 SCC OnLine Kar 12728

146 1951 SCC OnLine Bom 72.

9. "Age Of Consent" Under The POCSO Act[147]

With the enactment of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act), the offence of "rape" as then defined under the Penal Code. 1860 (IPC) was expanded to cover not only penile-vaginal penetration, but penetration by different parts of the body and objects into specified orifices of the child, and labelled, "penetrative sexual assault". Along with the finer calibration of sexual offences, the legislature found it fit to raise the "statutory age of rape" or "the age of consent to sexual activity" from sixteen years to eighteen years, and to delete the discretion given to courts to impose a punishment of less than the minimum statutory sentence.

Consequent to this amendment and the taking away of the court's discretion in the context of sentencing, upon conviction, an offender will undergo imprisonment for a period of ten years or twenty years, at the minimum.

DATA PERTAINING TO THE POCSO ACT

Data as reflected in Crime in India 2011 shows that 7112 instances of rape against children (Section 376 IPC) were reported at the all-India level, whereas data as reflected in Crime in India 2019 shows that 4977 instances of rape against children were reported at the all-India level. This decrease in numbers is attributed to the fact that Crime in India 2019, has a separate Table for sexual offences committed under the POCSO Act. Crime in India 2019 denotes that 26,192 incidences of penetrative sexual assault (Section 4 of the POCSO Act) and aggravated penetrative sexual assault (Section 6 of the POCSO Act) were reported in 2019. The rate of rape against children in 2011 was 0.6, and the same has increased to 5.9 in 2019 for cases registered under Sections 4 and 6 of the POCSO Act. A comparison of these figures portrays that reporting of penetrative sexual offences against children has increased manifold, but these figures could be due to the fact that the definition of "rape" has been expanded under the POCSO Act, that the offences under the POCSO Act are gender neutral, or that the age of consent has been increased to eighteen years. It may also indicate that the POCSO Act has enhanced the trust of victims and their caregivers in the criminal justice system. It would be expected that a child's journey through the criminal justice system would be facilitated by the child-friendly structures and trained personnel as mandated under the POCSO Act, thereby increasing the conviction rates, but that is not so. In 2011, the conviction rate for child rape was 31.8%, which minimally increased to 34.7% in 2019, under Sections 4 and 6 of the POCSO Act. This minimal increase becomes naught, when examined against the legislative changes brought about by the POCSO Act.

147 Maharukh Adenwalla and Prakriti Shah, Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com

ANALYSIS OF "ROMANTIC RELATIONSHIP" JUDGMENTS

Perusal of judgments of cases disposed of under the POCSO Act by the Mumbai Sessions Court at Greater Mumbai and Dindoshi registered in court in 2019, show that out of the total of 59 cases, in which trials were concluded, 33 cases related to "romantic relationship" (56%). In Greater Mumbai, 44 cases were disposed of, out of which 24 cases (54.5%) were those of romantic relationship. In the Special Court at Dindoshi, in 15 cases, trials were concluded, out of which 9 cases (60%) were those of romantic relationship. In all these 24 cases prosecuted in Greater Mumbai and 9 cases prosecuted in Dindoshi, which involved romantic relationships, the accused were acquitted. In none of the romantic relationship cases in Greater Mumbai did the "victim" support the prosecution's case. Before the Dindoshi court, in 6 cases of romantic relationship, the "victim" did not support the prosecution's case (67%).

The data denotes that it was not the "victims" who had initiated criminal action. It was mainly her family members who approached the police stating that their minor daughter had been kidnapped. In Greater Mumbai, eleven (45.8%) of the informants were fathers, ten (41.6%) were mothers, and one each was a brother, police and the victim herself. In Dindoshi, five (56%) informants were mothers, two each were fathers and the victim herself. The fact that the informants were mostly the parents of the "victim" shows that the girls had no grievance against the accused. Moreover, the high rate of girl's turning "hostile" to the prosecution's allegation of penetrative sexual assault suggests that the girls were in a romantic relationship.

In 50% of the romantic relationship cases in Greater Mumbai, the first informant turned hostile or testified that they did not want to pursue the case against the accused, and several first informants did likewise during the Dindoshi trials. This data indicates that the parents' initial opposition to their daughter's choice of partner was the reason for them having approached the police, and by the time the parents' testimony was recorded, they had reconciled to the fact that their daughters were happily married. In 75% and 67% of the cases before the courts at Greater Mumbai and Dindoshi, respectively, the "victim" and the "accused" had gotten married, and in 28% and 22% of the cases, respectively, a child had been born to the couple. The three "victims" who themselves registered the FIR had done so as they believed that their partners were unwilling to get married, but by the time the trials commenced, the "victims" had gotten married to the "accused" and they were living happily together.

As police are duty-bound to register FIRs and file charge-sheets, a large number of romantic relationship cases are before the Special Courts for trial.

RESPONSE OF SPECIAL COURTS TO ROMANTIC RELATIONSHIP CASES

As aforementioned, the "accused" have been acquitted by the Special Courts in all romantic relationship cases. Perusal of the judgments show that the acquittals have been on the ground that the "victim" could not recall her age when she had sexual intercourse, or that a valid marriage had taken place and the prosecution could not prove commission of sexual intercourse prior to eighteen years, or that the prosecution could not prove forcible sexual intercourse, or that the "victim" did not identify the accused, or that the "victim" was found to be above eighteen years when sexual intercourse occurred.

One would think that romance between the "victim" and the "accused" would be treated as a mitigating factor, but the police reports and charges framed reflect that cases of romantic relationship are handled as aggravated penetrative sexual assault per Section 5(l) of the POCSO Act. In 13 cases (54%) and 5 cases (56%) of romantic relationship decided by the courts in Greater Mumbai and Dindoshi, respectively, Section 6 of the POCSO Act had been applied, and such cases were treated as "aggravated" i.e. punishable "with rigorous imprisonment for a term which shall not be less than twenty years".

Though in 87.5% and 56% of cases in Greater Mumbai and Dindoshi, respectively, the "accused" were released on bail, there were cases of romantic relationship wherein the "accused" remained in custody till conclusion of trial. In one case, an "accused" remained in custody for two years and eighteen days before being acquitted, though the "victim" and the "accused" had gotten married.

IMPACT OF INCREASING THE "AGE OF CONSENT"

Sixteen years was the "age of consent" under IPC for more than eighty years. What was the reason for having increased the age to eighteen years? The Statement of Objects and Reasons of the POCSO Act does not throw any light on this aspect. It relies on the United Nations Convention on the Rights of the Child (UNCRC) which "requires the State parties to undertake all appropriate national, bilateral and multilateral measures to prevent:

(a) the inducement or coercion of a child to engage in any unlawful sexual activity", and

(b) that "the data collected by the National Crime Records Bureau shows that there has been an increase in cases of sexual offences against children", and

(c) that such legislation is necessary "to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard to safeguarding the interest and well being of the child at every stage of the Judicial process"

Do the judgments examined by the Special Courts reflect that the "victims" were induced or coerced into underage sexual activity? The age and education levels of the "victims" show that they had sufficient maturity and knew what they were doing when they eloped with the person of their choice. Seventeen years was the age of the "victim" in 62% and 78% of the cases of "romantic relationship" disposed of by the Special Courts in Greater Mumbai and Dindoshi, respectively, and other "victims" were mainly 16 or 15 years of age. From 9 cases of romantic relationship entertained by the Special Court at Dindoshi, information regarding education of the "victim" girls could be gathered in 8 cases - 50% were studying in XIth or XIIth standard (junior college) or had completed their XIIth standard and 37.5% were in secondary school or had completed schooling. In 1965, the Supreme Court in *S. Vadarajan*[148] dealt with the term "inducement" in the context of Section 361 of IPC (kidnapping from lawful guardianship) and Section 363 of IPC (punishment for kidnapping). The Supreme Court, while holding that no inducement nor case for kidnapping was made out, observed: *"…. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area."*

Applying the test in *S. Varadarajan case*, the Special Court judgments do not reflect that the girls were "induced" or "coerced" into sexual activity. Not only were the girls on the verge of attaining majority, their educational qualifications and exposure to life in Mumbai indicates that they knew what they were doing. Hence, a couple of the judgments of the Special Courts refer to *S. Varadarajan case* while acquitting the accused.

Increase in the age of consent, has resulted in cases of "romantic relationship" taxing the criminal justice system. At the all-India level, 52% of the cases under the POCSO Act were those in which the victims were between 16 years to 18 years, and in Maharashtra, 51% of such cases fell under such age group. How many such cases were those of "romantic relationship" is not indicated, but the judgments perused in Mumbai for 2019 show that more than 50% of the cases were of "romantic relationship" and that the majority of the "victims were between 16 years to 18 years of age.

Criminalising of cases of "romantic relationship" within the age group of 16 years to 18 years, perpetuates gender discrimination in its application as the male adult/ male child is being treated as an accused/child in conflict with the law, though the sexual activity is consensual in nature and the offence is gender-neutral. Such gender

148 *S. Varadarajan v. State of Madras*, (1965) 1 SCR 243: AIR 1965 SC 942

discrimination is reflected in the Mumbai cases as none of the "accused" were female in cases of romantic relationship. It is also important to note that in 2019, 77% of children in conflict with the law arrested under the POCSO Act were between the age group of 16 years to 18 years, of which only 0.4% were girls.

Due to the large number of POCSO cases instituted, the Special Courts are unable to expeditiously record the child's statement and conclude the trials per the time schedule under the POCSO Act. The all-India pendency of cases under Section 4 and 6 of the POCSO Act, at the end of 2019 was 88.8%, and the Maharashtra pendency was 93.5%. Speedy disposal of cases was the purpose for establishing Special Courts, but in 2011, when cases of "child rape" were handled by the regular criminal courts, the all-India and Maharashtra pendency was lower at 48% and 25%, respectively. The rate of disposal being much higher in 2011, when the age of consent was 16 years and there were no Special Courts, indicates that the POCSO Act has not fulfilled its objective of "speedy disposal".

This high percentage of pendency of cases begets a question - are the cases of sexual violence against children receiving the attention they deserve, or are such cases being delayed due to the Special Courts having a heavy caseload of cases of romantic relationship, between the age group of 16 years to 18 years.

The data of Special Courts in Mumbai reflects that the legislature had arbitrarily and hastily risen the age of consent to sexual activity, without foreseeing its impact.

NEED TO RECONSIDER THE "AGE OF CONSENT"

Several authorities and expert bodies have applied their minds on the subject of the "age of consent".

The Justice Verma Committee Report, on interpreting Article 34 of the United Nations Convention on the Rights of the Child, recommended that the age of consent under the POCSO Act should be reduced to sixteen years, stating that the POCSO Act *"was aimed inter alia to protect children from sexual assault and abuse and not to criminalise consensual sex between two individuals even if they are below eighteen years of age."*

Statistics of the National Family and Health Survey reflects the ground reality - "The NFHS4 (2015-16) records 11% of girls had their first sexual intercourse before the age of 15, and 39% before the age of 18. In the same survey, 6.3% of women who got married at the age of 18 years or above have reported having their first sexual intercourse before 15 years." In view of the ground reality and expert opinion, should not legislature reconsider the "age of consent" under the POCSO Act?

The High Courts too have observed that the "age of consent" should be reviewed. Dealing with the case of a seventeen-year-old girl who did not support the prosecution's case, the Madras High Court, while acquitting the accused, stated[149] that such *"relationship invariably assumes the penal character by subjecting the boy to the rigours of the POCSO Act"*, and that *"the boy involved in the relationship is sure to be sentenced to 7 years or 10 years as minimum imprisonment, as the case may be"*, and suggests to the legislature, *"on a profound consideration of the ground realties, the definition of "Child" under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18."*

Globally, the "age of consent" (legal age for sexual activity) provision is included in domestic legislations. The purpose for fixing the age of consent is *"to preserve the special nature of childhood: to shelter children from sexual exploitation and corruption by adults",* and is premised on the assumption that below such fixed age, sex is physically and psychologically harmful Setting of the "age of consent" should consider the concept of evolving capacities of a child. General Comment No. 20 (2016) *on the implementation of the rights of the child during adolescence*, published by the Committee on the Rights of the Child, explains the term "evolving capacities", and more particularly mentions, *"State parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalising adolescents of similar ages for factually consensual and non- exploitative sexual activity."*

CONCLUSION

The legislature should revisit the "age of consent" under the POCSO Act, so as not to unnecessarily push an adolescent into the criminal justice system, whether as a victim or an "accused". It is vital to acknowledge that exploration and experimentation with one's sexuality is a trait of adolescents, for which they should not be penalised. The Kerala High Court, referring to the POCSO Act, recently observed: (*Anoop case*[150], SCC OnLine Ker para 2)

Unfortunately, the statute does not distinguish between the conservative concept of the term "rape" and the "sexual interactions" arising out of pure affection and biological changes. The statutes do not contemplate the biological inquisitiveness of adolescence and treat all "intrusions" on bodily autonomy, whether by consent or otherwise, as rape for certain age group of victims. The Kerala High Court described sexual activity amongst "students or persons young in age" as "a result of relationships that went beyond platonic love".

149 *Sabari v. State of T.N.*, 2019 SCC OnLine Mad 18850.

150 *Anoop v. State of Kerala*, 2022 SCC OnLine Ker 2982

Prosecuting and sentencing a person found to have engaged in consensual sexual intercourse with a 16 or 17 years old to a minimum sentence of 10 years or 20 years is contrary to the principle of proportionality, which principle should be kept in mind not only when sentencing an offender, but also when enacting substantive criminal legislation. Legislators need to acknowledge that the successful enforcement of criminal legislation is dependent on its acceptance by society, as otherwise its defiance will be justified by those for whose supposed protection such law was enacted.

As the "age of consent" fixed by the POCSO Act is arbitrary, one would ask, what should it be set at. This is a difficult task. There are two factors that require to be kept in mind. Firstly, "to allow sexual freedom to young, physically mature people; and to protect young, psychologically immature people from harm and exploitation". Secondly, it should be evidence based and done in a scientific and rational manner, with detailed deliberations amongst the relevant professionals; emotions cannot dictate the fixing of the "age of consent".

Provisions of the law should be such that it addresses the extraordinary, and not ordinary situations a law that criminalises normal behaviour and activity, arouses sympathy amongst the public towards the "accused", instead of condemning his conduct. The POCSO Act by increasing the age of consent, prevailing in India for over eighty years, has done just that.

Till the "age of consent" is not thoroughly discussed, it is hoped that the courts will come to the rescue of adolescents in a consensual romantic relationship, and protect them from the harsh consequences of the POCSO Act.

10. Quagmire Of A Minor Wife In Filing A Complaint Case[151]

The criminalisation of marital rape remains off limits of the legislature and the judiciary, except sexual intercourse with minor wives below 15 years of age. In *Independent Thought*,[152] the Supreme Court removed an arbitrary discrimination and held that sexual intercourse with a wife below 18 years of age is statutory rape. A dichotomy arises in the implementation of this judgment, since for prosecution of any offence against a marriage, a complaint must be filed under Section 198 CrPC. This procedural provision limits the deterrent effect of Section 376 of the Penal Code (IPC) in addition to contradicting overriding provisions under special laws. In 2012, India had enacted child specific laws for protection of children against sexual offences, the POCSO Act, but marital rape has no mention therein.

151 Dr. G.K. Goswami and Aditi Goswami, Supreme Court Cases, 2023, Eastern Book Company, *available at:* http://www.scconline.com

152 *Independent Thought v. Union of India*, (2017) 10 SCC 800

Independent Thought is an erudite and landmark judgment for removing gross injustice to a segment of minor brides by reinforcing the "bodily integrity" and "reproductive choice" of a girl. It wrote off legal discrimination by reading down Exception 2 to Section 375 of the Penal Code, 1860, and provided for a recourse to justice to all minor wives who suffer from coerced sex by their husbands. On one hand, Justice Deepak Gupta holds that in cases of sexual intercourse with a wife below 18 years, cognizance by the court would be taken only in accordance with the provision of Section 198(6) CrPC within one year of the date of commission of the offence. On the other hand, it is unjustified to presume that a minor victim of statutory rape can muster courage and get the requisite support and wherewithal to raise her voice and file complaint before a Magistrate within the span of one year.

It is, therefore, submitted that the said provision of CrPC discriminates against the minor wife by placing her in a situation, where though she has been provided a legal remedy, but has to face defying practical hardships while seeking the available remedy.

LEGAL INCONSISTENCIES IN MARITAL RAPE OF MINORS

Unfortunately, the practice of child marriage continued to be a potent modus operandi for human trafficking within India and across transnational borders. For the first time this issue was legally addressed in India by enacting the Child Marriage Restraint Act, 1929, which was repealed in 2006 by way of the Prohibition of Child Marriage Act, 2006 (PCMA), which enhanced valid age for marriage to 18 years for women and 21 years for men. However, child marriage is not illegal but voidable at the option of contracting party being a child, by filing a petition under Section 3 (3) of PCMA before completing two years of attaining majority.

The Union of India in its counter-affidavit filed in the Court in *Independent Thought* referred to provisions under PCMA for protection of minor wife's interest, but it appears incongruous arguing that a minor has a legal option to get her child marriage annulled. In fact for annulling child marriage, a minor victim has to face cumbersome legal proceedings, in addition to lifelong suffering from social stigma of being a divorcee.

On the government standpoint, the Supreme Court has commented: *"In other words, a child marriage is sought to be somehow legitimised by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom."* In a true sense, every child marriage is a violation of the POCSO Act, 2012, since every instance of consummation of marriage of a minor bride amounts to statutory rape. However, the POCSO Act, 2012 has no mention of marital status of a victim child. The exclusion of marital rape in the POCSO Act reflects unreasonable classification of sexual abuse with a child based on marital status. The Supreme Court in *Independent Thought* stopped short of declaring child marriages to be *ab initio*

void, missing a historic opportunity to set free the lives of millions of minors from the shackles of premature marriage.

MARITAL RAPE AS A COMPLAINT CASE: PROCEDURAL DISCRIMINATION

The POCSO Act is purposively designed with several special enabling provisions to protect the best interests of child victims of sexual abuse ranging from reporting, procedure for media, recording of statements of child by the police and the Magistrate, presumption of onus on accused, trial by the Special Court of Sessions, and so on. There is no period of limitation imposed under the Penal Code or the POCSO Act, for reporting a sexual offence. Law in general permits at least two years of grace period to a minor after attaining maturity to serve the best interest for claiming any legal right. It is disheartening to note that a minor married girl is deprived of all special provisions enshrined under the POCSO Act. Further, Section 198(6) of the Criminal Procedure Code contravenes the provisions under Section 42-A of the POCSO Act enabling overriding effect of the provision under the POCSO Act, in case of any inconsistency with another law. This discriminatory percept again reinforces that the legislative intent in dealing with marital sexual violence largely suffers from patriarchal notion of wife to be treated as a chattel and thus inherently diluting the rigor of cognizable rape laws in favour of the accused husband.

It is submitted that the current provision of law dealing with filing of a complaint case for an offence under S. 375 (2) of the Penal Code are grossly whimsical, arbitrary and violative of the rights of a girl child under Articles 14, 15 and 21 of the Constitution. The Supreme Court's clarification on Section 198 (6) is really disappointing, which says, *"It is also clarified that Section 198 (6) of the Code will apply to cases of rape of wives' below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198 (6) of the Code".* The Supreme Court kept a conspicuous silence on the fairness of timeline; and sequitur to reading down Exception 2 to Section 375, the judiciary missed an opportunity of judicial review for rescinding the absurdity in procedural law by way of declaring Section 198 (6) of the Code unconstitutional and arbitrary, so that legislative intent enshrined under Section 42-A of the POCSO Act could be strengthened.

CONCLUSION

Despite tall claims, the fact remains that the legal regime for protection of women and children are tinged with female subjugation in continuing with child marriage and sexual exploitation of married women of all ages. Lives of millions of minors ought not to be put at risk for the sake of customs and cultural ethos to justify customary child marriages and male dominance in marital relationships. The State as *parens patriae* is duty-bound for providing statutory provisions for protecting females against

sexual assault in marriage, enabling their rights to enjoy a dignified life. It is apparent that PCMA has not been able to check the menace of child marriage, which needs to be banned by enacting stringent legislation to deal violations with an iron hand. The existing set of substantive and procedural laws is grossly discriminatory to married minors. The sexual offences with children irrespective of marital status must be dealt with under POCSO Act, 2012. The Indian judiciary has made creditable contribution in upgrading the rights of women and children, but much is yet to be done. The lawmakers must honestly synchronise intertwined socio-legal issues pertaining to child marriages and sexual exploitation of minor brides in addition to human trafficking having multiple dimensions.

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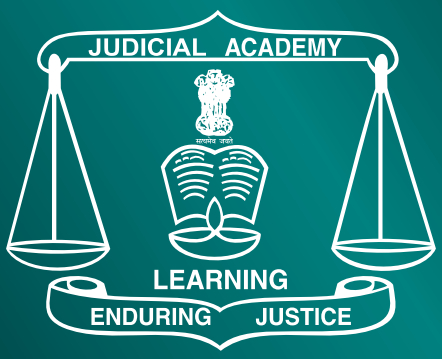

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