

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

AN OVERVIEW

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Section 1 Short title, extent and commencement.

- This Act may be called the Protection of Children from Sexual Offences Act, 2012.
- It extends to the whole of India, including Jammu and Kashmir (JK Reorganization Act, 2019)
- Came into force on 14.11.2012 (Children Day)
- Gender Neutral

Section - 2 Important Definitions.

In this Act, unless the context otherwise requires, —

Section 2(a) "**Aggravated Penetrative Sexual Assault**" S.5

Section 2 (b) "**Aggravated Sexual Assault**" - Section 9

Section 2 (d) "**Child**" means any person > eighteen years

Section 2 (da) "**Child Pornography**" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child;]

Section 2 (f) "**Penetrative Sexual Assault**" - Section 3;

Section 2 (i) "**Sexual Assault**" - Section 7;

Section 2 (j) "**Sexual Harassment**" - Section 11;

Offences under POCSO Act

Prime Offences	Aggravated Offences	Allied Offences
Sexual Assault (Section 7/8)	Aggravated Sexual Assault (Section 9/10)	Abetment (Section 16/17)
Penetrative Sexual Assault (Section 7/8)	Aggravated Penetrative Sexual Assault (Section 5/6)	Attempt (Section 18)
Sexual Harrasment (Section 11/12)	Failure to Report (Section 21)
Using Child for Pornography (Section 13/14, 15)	False Complaint (Section 22)
Section 15(1) -failure to delete, destroy, or report child pornography in the possession of an accused person.		Disclosure of Identity Section 23(2)
Section 15(2) penalizes the actual transmission, propagation, display, or distribution of such material.		
Section 15(3) penalizes the storage or possession of child pornographic material when done with a commercial intent.		

Prime Offences under POCSO Act

Sexual Assault (SA) Section 7/8	Penetrative Sexual Assault (PSA) Section 3/4	Sexual Harrasment Section 11/12	Using Child for Pornography Section 13/14, 15	
<p>. Whoever touches</p> <p>. With Sexual Intent</p> <p>. V, P, A, Breast</p> <p>. Makes the Child touch the V, P, A, Breast.</p> <p>. Any act with sexual intent involving Physical Contact without Penetration</p> <p>. Imprisonment of Either description for a term which shall not be less than three years but may extend to five years + Fine</p>	<p># Penetration of Penis to any extent into V, M, U, A of child or makes to do so with him or any other person ,</p> <p># Insertion of any object or part of body not being the Penis into the V, M, U, A of child or makes to do so with him or any other person .</p> <p># Manipulation of any part of body of the child so as to cause penetration into the V, M, U, A of child or makes to do so with him or any other person</p> <p># Applies his Mouth to the V, P, M, U, A of child or makes to do so with him or any other person</p> <p>* Imprisonment of Either description for a term which shall not be less than ten years but may extend to LI + Fine (16-18)</p> <p>** Imprisonment of Either description for a term which shall not be less than twenty years but may extend to LI (Remainder of Life) + Fine (> 16 Years)</p>	<p>* Any person with sexual intent <i>utters any words, makes any sound , Gesture, Exhibits any object or parts of body with intention that it will be seen by child.</i></p> <p>** Makes a child exhibit the parts of body <i>with intention that it will be seen by the child</i></p> <p>**** <i>Shows any object to a Child in any form or Media for Pornography</i></p> <p>***** Repeatedly <i>follows/watches/ contacts a child through electronic, digital, or other means</i></p> <p>***** Threatents to use in any form of Media,</p> <p>***** Entices child for pornographic purpose or gives gratification</p> <p>Imprisonment of Either description for three years + Fine</p>	<p>- Use of child for Pornographic Purpose in any form including representation of sexual organs of child / Rreal simulated sexual acts. (Section 13)</p> <p><u>First Offence</u></p> <p>Imprisonment for a term which shall not be less than five + Fine (Section 14)</p> <p><u>Second Offence</u></p> <p>Imprisonment for a term which shall not be less than Seven + Fine (Section 14)</p> <p>Section 4, 6, 8, 10 Direct Participation + This Offence (Section 14(2))</p>	<p>- Storage of Pornographic materials and fails to delete destroy and keep with intention to share, circulate, transmit.</p> <p>Fine of 5,000/(first Offence)</p> <p>Second Offence 10,000</p> <p>Section 15</p> <p>- Propagating Playing Distributing</p> <p>- Storage for Commercial Purpose</p> <p>. Imprisonment of Either description for a term which shall not be less than three years but extend to five years + Fine</p>

Aggravated Circumstances/Offences

Who Committed	Where Committed	How Committed	Upon Whom Committed	Punishments
Police	Police Station, During Duty, With Dress, Known to be Police	! Gang , Deadly Weapons, Fire, Heated Substance, Corrosive Substance	- Mentally Physically Challenged Child	<p>* Rigorous Imprisonment for a term which shall not be less than twenty years but may extend to LI (Remainder of Life + Fine or <u>With Death</u> (Section 6)</p> <p>** Imprisonment of Either description for a term which shall not be less than five years but may extend to Seven Years + Fine (Section 10)</p>
Armed Forces	Deployed Area, Command Area, During Duty, With Dress, Known to be Member of Armed Forces	! Grievous Hurt, Bodily Injuries on Private Parts ! Physically incapacitates, Mentally ill, HIV, Causes Death	- Pregnant - >12 Years	
Public Servant			
Management of Jail, Remand Home, Observation Home upon inmates	Jail, Remand Home, Observation Home	! More than Once ! Relative ! Fiduciary Relationship		
Management of Hospital (Govt/Pvt)	Hospital	! PSA + Attempt to Murder ! Communal Violence, Natural Calamity		
Management of Educational/Relig ious Institution (Govt/Pvt)	Education Place Religious Place	! Strip, Naked Parade		

Let us understand the nuances of definition by examples

Example 1 : Mahesh inserts his finger into the anus of a Male child aged about 17 years. Which offence is committed ?

Section 3/4(1) POCSO

Example 2 : Mahesh on the point of knife, inserts finger into the anus of a Male child aged about 11 years. Which offence is committed ?

Section 5/6 POCSO

Example 3 : David committed PSA on a child aged about 17 Years when she was pregnant. Which offence is committed ?

Section 5/6 POCSO

Example 4 : Ashraf committed PSA on a child aged about 14 Years in the month of Oct and Nov, 2024. Which offence is committed ?

Section 5/6 POCSO

Example 5 : Somra Kachhap, who is a nightguard at a Private School committed PSA on a female child and thereby caused several bruises and abrasion on her vagina. Further, while doing so he has also attempted to kill her. Which offence is committed ?

Section 5/6 POCSO

Example 6 : Abdul is a RPF Constable. During journey, he touches the breast of a female child aged about 14 years, when she was sleeping on her birth. Which offence is committed ?

Section 9/10 POCSO

Example 7 : Abdul is residing at 5th Floor of Vaishnavi Apartment. A Bank Manager along with his children also reside opposite to his flat. On 15.10.24 when children of Bank Manager were studying by sitting at Balcony, Abdul shows them a Sexual Toy. The younger son of Bank Manager resists it but Abdul did not amend himself. Hence, the matter was reported to the Police. Explain Which offence is committed ?

Section 11/12 POCSO

Section 13 Use of child for pornographic purposes.

Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes—

- (a) representation of the sexual organs of a child;
- (b) usage of a child engaged in real or simulated sexual acts (with or without penetration);
- (c) the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes.

Explanation.—For the purposes of this section, the expression “use a child” shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

Section 14 Punishment for using child for pornographic purposes.

(1) Whoever uses a child or children for pornographic purposes shall be punished with imprisonment for a term which shall not be less than five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment for a term which shall not be less than seven years and also be liable to fine.

(2) Whoever using a child or children for pornographic purposes under sub-section (1), commits an offence referred to in section 3 or section 5 or section 7 or section 9 by directly participating in such pornographic acts, shall be punished for the said offences also under section 4, section 6, section 8 and section 10, respectively, in addition to the punishment provided in sub-section (1).]

Section 15 Punishment for storage of pornographic material involving child.

¹[(1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine.]

Just Rights for Children Alliance v. S. Harish, 2024 SCC OnLine SC 2611

Inchoate Crime

- *Section 15(1) penalizes the failure to delete, destroy, or report child pornography in the possession of an accused person.*
- *Clause 2 penalizes the actual transmission, propagation, display, or distribution of such material.*
- *Clause 3 penalizes the storage or possession of child pornographic material when done with a commercial intent.*

Foundational Facts under Section 15 of the POCSO

For Sec.15(1), the necessary foundational facts would simpliciter be the storage or possession of any child pornographic material and that the person accused had failed to delete, destroy or report the same.

For Sec. 15 (2) not just the storage or possession of any child pornographic material, but also any other material to indicate any actual transmission, propagation, display or distribution of any such material or any form of an overt act such as preparation or setup done for the facilitation of the transmission, propagation, display or distribution of such material. However, if any actual transmission, propagation, display or distribution of such material takes place, the offence under Section 15 sub-section (2) would be constituted, thereby seemingly not requiring any further to be proved.

For Sec. 15(3) the storage or possession of such material and further shows anything else that might indicate that the same had been done for some form of gain or benefit or the expectation of some gain or benefit.

- Any act of viewing, distributing or displaying etc., of any child pornographic material by a person **over the internet** without any actual or physical possession or storage of such material in any device or in any form or manner would also amount to 'possession' in terms of Section 15 of the POCSO, provided the said person exercised an invariable degree of control over such material, by virtue of the *doctrine of constructive possession*.

Section 19 Reporting of offences.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) 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— (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 (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands 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 (1).

Section 20 Obligation of media, Studio and photographic facilities to report cases

Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

Section 21 Punishment for failure to report or record a case.

(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both. **Bailable ?**

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year + fine. **Bailable ?**

(3) The provisions of sub-section (1) shall not apply to a child under this Act.

Section 22 Punishment for false complaint or false information.

(1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under Sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both. **Bailable ?**

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever, *not being a child*, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimizing such child in any of the offences under this Act, shall be punished with imprisonment, which may extend to one year or with fine or with both.

Section 23 Procedure for media.

(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(3) The publisher or owner of the media or studio or photographic facilities shall be *jointly and severally liable* for the acts and omissions of his employee.

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

Section 24 : Recording of statement of a child.

- (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.
- (2) The police officer while recording the statement of the child shall not be in uniform.
- (3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.
- (4) No child shall be detained in the police station in the night for any reason.
- (5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

Section 25 Recording of statement of a child by Magistrate.

- (1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974)(herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to Sub-section (1) of Section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

- (2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

Section 26 Additional provisions regarding statement to be recorded.

(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, 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, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by *audio-video electronic means.*

Section 27 Medical examination of a child.

(1) 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 under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1973).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The 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.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) 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.

Section 28 Designation of Special Courts.

(1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) *While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.*

(3) The Special Court constituted under this Act, notwithstanding anything in the *Information Technology Act, 2000 (21 of 2000)* shall have jurisdiction to try offences under section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

Presumptory Provisions

Actus Reus + Mens Rea = Offence

| |

Section 29

Section 30

Section 29 Presumption as to certain offences.

Where a person is prosecuted for committing or abetting or attempting to commit any offence under *Sections 3, 5, 7 and section 9 of this Act*, the Special Court *shall presume*, that such person has committed or abetted or attempted to commit the offence, as the case may be *unless the contrary is proved*.

Section 30 Presumption of culpable mental state.

(1) In *any prosecution for any offence under this Act* which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, "**culpable mental state**" includes **intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact**

Presumptions under Other Acts Vs Presumption under POCSO Act

<p style="text-align: center;">Section 54, 35 NDPS Act</p> <p style="text-align: center;">Section 53 POTA</p> <ul style="list-style-type: none"> . Recovery of Explosives/other Substance . Had been used in committing Offence <li style="text-align: center;">or . Finger Print at Site/Arms/Vehicles <p style="text-align: center;">Section 113A Indian Evidence Act</p> <ul style="list-style-type: none"> . Committed Suicide within 7 Years . Subjected to Cruelty 	<p style="text-align: center;">Section 29 POCSO</p> <p>. Where a person is prosecuted</p> <ul style="list-style-type: none"> .Committing/abetting/attempting .Offence under Sections 3, 5, 7, 9 .The Special Court <i>shall presume</i>, .That such person has committed or abetted or attempted to commit the offence, as the case may be <i>unless the contrary is proved.</i> <p>Culpable Mental State (Section 30)</p>
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Section 29, 30 Presumption when to be invoked

At the time of Investigation |

At the time of Bail | When a person said to be Prosecuted ?

At the time of Discharge |

<p>Presumption under Section 29, 30 to be invoked - During Trial</p>

What are the pre requisites to invoke presumption under Section 29,30 of POCSO Act ?

- | | |
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| <ul style="list-style-type: none"> . Age of the Victim .That the offence has been Committed . Accused had committed the Offence (PF) . Medical Evidence in case of Physical Injury | <ul style="list-style-type: none"> <li style="text-align: center;">Foundational Facts Justin @ Renjith VS UOI (Kerla) |
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Suresh @ Sureshkumar vs. State (2021 Madras HC);

Kumod Mandal vs State of Bihar (2021 Patna HC);

Mariappan vs. The Inspector of Police (Madras HC);

Veerpaal @ Titu vs State (2024 Delhi HC);

Navin Dhaniram Vs. State of Maharashtra (2018 Bombay HC);

Deelip Tatoba Raje vs. The State of Maharashtra & Anr. (2019 Bombay HC)

Manjit Ram @ Manjit Kumar vs. State of Bihar (2024 Patna HC)

Hon'ble Jharkhand HC in *State v. Dablu Modi, 2023 SCC OnLine Jhar 1951* held inter alia that "A presumption in law does not mean that the Court cannot look into the special features of the case such as patent absurdity, inherent infirmity or improbability in the prosecution story. Like section 106 of the Evidence Act, the provisions under section 29 of the POCSO Act provide that the Special Court shall presume that the accused has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The Courts are therefore enjoined on a duty to see that the application of the presumption does not lead to any injustice.

Therefore, the presumption under section 29 of the POCSO Act is not absolute and its application is not automatic until the prosecution proves the essential basic facts, and that has been done in the present case."

Whether the Presumption under Section 30 of the POCSO can be resorted to in a Quashing Proceeding?

As such, the statutory presumption envisaged under Section 30 of the POCSO is applicable and can be invoked in any proceeding which involves an offence under the said Act that requires a culpable mental state, irrespective of the court where such proceeding is taking place. **Just Rights for Children Alliance v. S. Harish, 2024 SCC OnLine SC 2611**

Sectionn 31 Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court.

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)(including the provisions as to bail and bonds)shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

Section 32 Special Public Prosecutors.

(1) The State Government shall, by notification in the Official Gazette, appoint a *Special Public Prosecutor* for every Special Court for conducting cases only under the provisions of this Act.

(2) A person shall be eligible to be appointed as a Special Public Prosecutor under sub-section (1) only if he had been in practice for not less than seven years as an advocate.

(3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973 (2 of 1974)and provision of that Code shall have effect accordingly.

Section 33 Procedure and powers of Special Court.

- (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.
- (2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Court which shall in turn put those questions to the child.
- (3) The Special Court may, if it considers necessary, permit *frequent breaks for the child during the trial*.
- (4) The Special Court shall create a *child-friendly atmosphere* by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.
- (5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.
- (6) The Special Court shall not permit *aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial*.
- (7) The Special Court shall ensure that the *identity of the child is not disclosed at any time during the course of investigation or trial*:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child. Explanation.—For the purposes of this sub-section, the identity of the child shall include the *identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed*. **Caution Note ?**

- (9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session.

Section 34 Procedure in case of commission of offence by child and determination of age by Special Court.

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of ¹[the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].

(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.*

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under subsection (2) was not the correct age of that person.

Section 94 of JJ Act, 2015

Sec. 94(1)- Physically, if no doubt

Sec. 94(2) - Conduct inquiry, if doubt

(a) School Certificate

(b) Birth Certificate from Municipal authorities/panchayat

(c) in absence of the above ossification Test

It is clear from the language of section 94(2)(iii), that only in the absence of a birth certificate from school or municipal corporation or matriculation certificate, a medical opinion is to be sought. **Ram Vijay Singh v. State of U.P., (2021) 15 SCC 241**

In the presence of documents mentioned in section 94 of the Act, the bone ossification test cannot be done or relied upon. It means the legislature has given the preference to documentary evidence rather than medical evidence (Bone ossification test here) while determining the age of a person under question. **Rishipal Singh Solanki v. State of U.P., (2022) 8 SCC 602**

Even though Rule 12 of The Juvenile Justice (Care and Protection of Children) Rules, 2007 is strictly applicable only to determine the age of a child in conflict with law, the court is 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. For, in the court's view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. (Para 23) **Jarnail Singh Vs. State of Haryana, (2013) 7 SCC 263**

In the case of **Ashwani Kumar Saxena v. State of Madhya Pradesh (2012) 9 SCC 750**, the Court observed that there may be instances where the birth date mentioned in the relevant documents, prescribed by the legislation as proof of age, are wrong. However, the Court or JJ Boards are not expected to conduct such a "roving inquiry". The Court further stated that only "in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for a medical determination."

Vinod Katara v. State of U.P., (2023) 15 SCC 210 : 2022 SCC OnLine SC 1204 at page 247 The **bone ossification test** is not an exact science that can provide us with the exact age of the person. As discussed above, the individual characteristics such as the growth rate of bones and skeletal structures can affect the accuracy of this method.

This Court has observed in **Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194** , and **Jyoti Prakash Rai v. State of Bihar, (2008) 15 SCC 223 : (2009) 3 SCC (Cri) 796** , 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 is 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. It is trite that the standard of proof for the determination of age is the degree of probability and not proof beyond reasonable doubt.

Whether Principal of Margin of Error applicable in POCSO Act in determining age of victim through ossification test?

Yes

In case of **victim**- To be on **higher** side

In case of **Accused** - To be on the **lower** side

Why - it is settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused.

Shweta Gulati v. State (NCT of Delhi), 2018 SCC OnLine Del 10448,
Court on its Own Motion v. State (NCT Delhi), 2024 SCC OnLine Del 4484
Rajak Mohammad v. State of Himachal Pradesh 2018 SCC OnLine SC 1222

Section 35 Period for recording of evidence of child and disposal of case.

(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.**

Section 36 Child not to see accused at the time of testifying.

(1) The Special Court shall ensure that the child is not exposed in anyway to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

Section 37 Trials to be conducted in camera.

The Special Court shall try cases *in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:*

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to *issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973 (2 of 1974).*

Section 38 Assistance of an interpreter or expert while recording evidence of child.

(1) wherever necessary, the Court may take the assistance of a *translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.*

(2) If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child.

Section 39 Guidelines for child to take assistance of experts, etc.

Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.

On support Person

Bachpan Bachao Andolan v. Union of India, 2023 SCC OnLine SC 1031, decided on 18.08.2023.

We The Women of India v. Union of India, Civil Writ Petition No. 1156 of 2021, Order dated 9-10-2023.

Need for support person should not be left to parents' discretion, and that the State has the obligation to provide support persons to victims under POCSO Act, which cannot be made optional.

Section 40 Right of child to take assistance of legal practitioner.

Subject to the proviso to Section 301 of the Code of Criminal Procedure, 1973 (2 of 1974) the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.

Section 41 Provisions of sections 3 to 13 not to apply in certain cases.

The provisions of sections 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with the consent of his parents or guardian.

Section 42 Alternative punishment

[Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, ²[376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], ³[376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment **which is greater in degree**.

Whether the accused can be convicted both under Sec. 376 IPC as well as also under Section 6 of POCSO Act ?

YES

*Manoj Pratap Singh v. State of Rajasthan,
(2022) 9 SCC 81 : (2022) 3 SCC (Cri) 596 :
2022 SCC On Line SC 768 at page 150*

*The mandate for awarding punishment which is greater in degree does not correspondingly lead to the proposition that the appellant could not have been convicted of the offence under Section 376 IPC as also under Section 6 Pocso Act.
(Para 61*

Section	Punishment	POCSO	Punishment	Applicable Provision
Sec. 166A IPC	Not less than 6 Months, extend 2 years + Fine	Section 21(1)	Imprisonment upto 6 Months/Fine/Both	Section 166A
Sec. 354A IPC SH	** RI for 3 Yrs or Fine or Both	Section 12	Imprisonment upto 3 Yrs + Fine	Section 354A
Sec. 354B IPC DIS	RI for 3 Yrs, extend 7yrs + Fine	Section 10	NLT 5 Yrs may extend to 7 Yrs + Fine	Section 10
Sec. 354C IPC VOY	RI for 3 Yrs, extend 7yrs + Fine	Section 15(2)	Imprisonment upto 3 years or Fine or Both	Section 354C
Sec. 354D IPC STA	RI for 3 Yrs + Fine	Section 12	Imprisonment upto 3 Yrs + Fine	Sec. 354D(2)
Sec. 376(1) IPC	NLT 10 Yrs, extend Life + Fine	Section 4(1)	Imprisonment NLT 10 Yrs may extend to LI + Fine	Same Punishment
Sec. 376(2) IPC	NLT 10 Yrs, extend Life + Fine	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Sec. 6 POCSO DP
Sec. 376(3) IPC > 16	NLT 20 Yrs, extend Life + Fine	Section 4(2)	NLT 20 Yrs extend to LI (R) + Fine	Same Punishment
Sec. 376A IPC Death	NLT 20 Yrs, extend Life (R) or Death	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Same Punishment
Sec. 376AB IPC > 12	RI for 20 Yrs, extend Life or Death + Fine	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Same Punishment
Sec. 376C IPC	RI for not less than 5 years, extend to 10 + Fine	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Sec. 6 POCSO DP
Sec. 376D IPC	NLT RI 20 years may extend to LI (R) + Fine	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Sec. 6 POCSO DP
Sec. 376DA IPC G/R > 16	LI (Remainder of Life + Fine)	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Sec.376DA (LI) Mi
Sec. 376DB IPC G/R > 12	LI (Remainder of Life + Fine) / Death	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Sec.376DB (LI) Mi
Sec. 376E IPC Repeat	LI (Remainder of Life + Fine) / Death	Section 6	NLT 20 Yrs RI extend to LI (R) + Fine or Death	Sec. 376E (LI) M
Sec. 509 IPC		Section 12		Same Punishment

Section 42A Act not in derogation of any other law.

[The provisions of this Act shall be *in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.*]

Mistakes often committed while framing Charges

(A) An accused namely Rafiq committed rape upon 'X' aged about 15 years, on 18.02.20 at Pisca More, Ranchi. What will be appropriate charge ?

- Section 6 POCSO (Wrong)
- Section 6 POCSO, Section 376(2)(i) IPC (Wrong)
- Section 4(2) POCSO, Section 376(3) IPC *(Correct)
- **Date of Enforcement - 21.04.18**

Section 6 POCSO	20 Years (Minimum) / LI (RI)	Alternative Punishment Section 42 of POCSO
Section 376(2)(i) IPC	10 Years (Minimum) (Repealed)	
Section 376(3) IPC	20 Years (Minimum) (RI) / LI (Remainder of life) (RI)	
Section 4(2) POCSO	20 Years (Minimum) / LI (Remainder of Life) (RI)	

(B) An accused namely Umesh committed rape upon 'A' aged about 11 years, on 18.12.19 at Bank More, Dhanbad. What will be appropriate charge ?

- Section 4 POCSO (Wrong)
- Section 6 POCSO, Section 376(2)(i) IPC (Wrong)
- Section 6 POCSO, Section 376AB IPC * (Correct)
- **Date of Enforcement - 21.04.18**

Section 6 POCSO	20 Years (Minimum) / LI (RI)	Alternative Punishment Section 42 of POCSO
Section 376(2)(i) IPC	10 Years (Minimum) (Repealed)	
Section 376AB IPC	20 Years (Minimum)(RI)/ LI (Remainder) (RI) / Death	

(C) 'A' has committed forcible sexual intercourse upon her wife 'X' aged about 15.5 years, on 11.08.20 against will. At the instance of X, Dhurwa PS Case No -118/20 was registered and after due investigation CS was submitted under Section 376 IPC. After commitment the case record is transferred in your court. A discharge petition is filed by accused stating that victim is his wife and in view of Explanation II of Proviso of Section 375 IPC, no case is made out. What will be your order

Independent Thought Vs UOI, AIR (SC) 2017 4904

11.10.2017

(D) What will happen in above case, if accused person is represented by a lawyer provided by DLSA, having experience of 5 years.

Anokhilal Vs State of MP, AIR (SC) 2020 232

(E) 'A' has committed carnal intercourse against the order of nature with B, aged about 17 years, against his will on 10.12.18. At the instance of B, Dhurwa PS Case No -118/20 was registered and after due investigation CS was submitted under Section 377 IPC and Section 4 POCSO Act. A discharge petition is filed by accused stating that in view of judgment of Hon'ble Apex Court given in case of **Navtej Singh Johar vs Union of India** reported in **AIR (SC) 2018 4321**, no prosecution is sustainable. What will be your order ?

Question No.1

The age of the victim in cases of sexual assault plays an important role in determining the guilt of the accused. Generally, various certificates as mentioned in Sec. 94 of the JJ Act are used in order to determine the age of the victim. But due to lack of such documents help of ossification test or any other latest medical age determination test is taken. The problem with such a medical test is that it does not provide an exact age but a range in which the victim's age can lie. It has been observed in several decisions that the margin of error in age ascertained by radiological examination is two years on either side. If the bone ossification test report has estimated the victim's age as 15 to 17 years. Then, applying the margin of error principle, of two years on either side, the age could be between 13 to 19 years.

If the range lies below 18 years then there is no difficulty in deciding the case. But the difficulty arises when the range lies ± 1 or ± 2 years of the valid age of giving consent. In such a situation, the issue arises whether the upper limit or the lower limit of the range should be considered. In other words, who should be given the benefit of the doubt in such cases- the victim or the accused?

Whether Principal of Margin of Error applicable in POCSO Act in determining age of victim through ossification test?

Yes

In case of victim- To be on higher side

In case of Accused - To be on the lower side

Why - it is settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused.

Shweta Gulati Vs State (NCT of Delhi), 2018 SCC OnLine Del 10448,
Court on its Own Motion v. State (NCT of Delhi), 2024 SCC OnLine Del 4484
Rajak Mohammad v. State of Himachal Pradesh 2018 SCC OnLine SC 1222

Question No. 2

What should be the approach of the court (District Court) deciding the bail application filed by the accused against whom there is an allegation of kidnapping the girl, aged about 17 years, who voluntarily eloped with the accused for marriage and established physical relationship with her after their marriage?

Answer 2

The Karnataka High Court in **Sayed Sahbaz vs. State of Karnataka (CRIMINAL PETITION NO. 3422/2022)** has granted bail to an accused arrested under the Protection of Children from Sexual Offences Act and Child Marriage Act while noting that the accused had subjected the minor girl to sexual act "after" they had got married, following elopement.

Question 3

If a minor had crossed the border and entered into territory of the India and against her no any case lodged against him/her under foreign Act but a POCSO case has been lodged by CWC to protect the interest of the minor Victim. At what stage she will be deported to her own country?

Answer 3

The issue in hand will be covered under the Juvenile Justice Act, 2015 wherein CWC can step in, further as this minor has not committed any offence, such minor child can be declared child in need of care and protection and necessary steps could be taken to deport such child to his nation. Further, no Pocso offence case can be registered against such minor victim.

Relevant Provisions of JJ Act, 2015:-

Sec. 2(14) Child in need of care and protection;

Sec. 3(xiii) Principle of repatriation and restoration:

Sec. 31 Production before Committee;

Sec. 40 Restoration of child in need of care and protection.

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