

# WE TRUST YOU: To Wipe Away Tears Of Teddy & Ors.



A PUBLICATION OF  
TAMIL NADU STATE JUDICIAL ACADEMY

**POCSO ACT 2012  
STUDY MATERIAL 2.0**

**OCTOBER 2021**

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## Director's Note

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This Study Material is prepared by the Tamil Nadu State Judicial Academy [TNSJA], as per the guidance and directions of the Hon'ble Patron-in-Chief, TNSJA / Hon'ble the Chief Justice of the Madras High Court; the Hon'ble President and Hon'ble Members of the Board of Governors, TNSJA.

This publication is brought out on the occasion of *Experience Sharing and Review Meeting*, in association with UNICEF, for POCSO Judges, JJB Magistrates along with Special Public Prosecutors, Police Officials and Legal-cum-Probation Officers by engaging in a collective knowledge-building exercise, and collaboratively enhance the knowledge of the various stakeholders and participants dealing with POCSO Act, through an experience-sharing and skill-strengthening sessions.

This publication is aimed at converging the best practices and experiences of various Presiding Officers of POCSO Court, Principal Magistrates of Juvenile Justice Board, Police Officers, & Probation Officers. This programme would result in a consolidation of preventive measures and action plans. The programme intends to manifest to collaboratively enhance the skill and understanding of POCSO cases succinctly, pertaining to the areas of effective and speedy disbursement of compensation fund, proper investigation, importance of study of socio-economic background of the victim and accused, for proper sentencing.

TNSJA records its appreciation and heartfelt gratitude to UNICEF for sponsoring and extending its support in organising the *Experience Sharing and Review Meeting* Programme.

Let us join hands and ensure that the companions of Teddy and others stay together.

3<sup>rd</sup> October 2021  
Chennai – 600028

D. Lingeswaran,  
Director  
Tamil Nadu State Judicial Academy



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# **Chapter I**

## **Introduction**





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## Chapter I - Introduction

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Protection of Children from Sexual Offences Act, 2012 was enacted to curb the sexual offences committed against children and paved way for more stringent punishments to the perpetrators. Previously there was a belief that only girl children are prone to sexual abuse or assault and all the legislations prior to the enactment of POCSO Act were pro female and against male. This new legislation has changed the perspective by including male children as victims of child sexual abuse. Prior to 2012, there was no specific enactment to deal with either Child Sexual Abuse or Child rape. The punishments for these offences were prescribed under Indian Penal Code, 1860 mainly under the Sections 354, 375, 377, 509.

The United Nations Convention on the Rights of the Child, 1992, to which India is signatory, one of its main aims was to provide for safety of children including protection of children from all forms of sexual exploitation and sexual abuse. Though India had ratified the convention, it took almost 20 years to realize the density of the situation and act accordingly.

Although, the Indian Penal Code did provide for punishments to certain offences like rape, unnatural sex, outraging the modesty of women, etc., it primarily focused on women. Thus, there was a need for an exclusive legislation that concentrates on largely on children and to prevent them from being sexually exploited in the tender age.

### **Need for special Legislation to deal with Child Sexual Abuse**

The need for an exclusive and special legislation to deal with child sexual abuse came into play due to rapid increase in children being victims of sexual offences such as harassment, child sexual abuse, child rape, child marriage, child pornography which jeopardized the overall growth of the country. A 2007 study



on 'child abuse' conducted by Ministry of Women and Child Development showcased the fact that 53.22% of children witnessed one or the other form of sexual abuse. Being the second most populous nation of the world, where nearly half of the population is children, it was an utter necessity to protect the interests of the children and safeguard them from being exposed to traumas of sexual abuse.

World Health Organization in 1999 defined Child sexual abuse (CSA) as the involvement of a child in sexual activity that they do not fully comprehend, is unable to give informed consent to, or that violates the laws or social taboos of society.

Child sexual abuse can be committed by any person irrespective of their gender, age, literacy level, socio-economic status. Many studies suggest that in cases of child sexual abuses, generally the perpetrators are known to the children or their parents such as friends of the parents, neighbours, relatives and child sexual abuse by a stranger is often a rare phenomenon. Child grooming and gaining the trust of the child is one of the main ingredients of the perpetrators. Prior to the enactment of this Act, digital penetration was considered as sexual assault.

The POCSO Act is gender-neutral and provides for protection of children from being sexually exploited. This legislation is trying to put an end to the atrocious sexual offences against children. The act also safeguards the interest of children at every stage of judicial process by adopting child friendly methods.

## Highlights of POCSO Act, 2012

- The Act recognizes many types of sexual abuse, such as penetrative and non-penetrative assault, sexual harassment, and pornography, among others.
- It also states that a sexual assault is to be considered "aggravated" in certain circumstances, such as when the abused child is mentally ill, or when the abuse is perpetrated by a member of the armed forces or security forces, a public servant, or a person in a position of trust or authority over the child, such as a family member, police officer, teacher, or doctor, or a person-management official.
- A person who has knowledge that a child has been sexually assaulted has a legal obligation to report the crime; if he or she fails to do so, he or she can also be punished.

### ➤ Trial

According to the Act, the child's testimony must be recorded within thirty days of the Special Court's taking cognizance of the offence, and the Special Court must finish the trial within a year from the date of taking cognizance of the offence, wherever possible.

It further states that cases should be tried in camera.

### ➤ Punishment

The POCSO statute also includes penalties for lodging a false complaint or providing false information.

For aggravated penetrative sexual assault, the Act stipulates severe punishment, which includes rigorous imprisonment for a duration not less than 20 years to life imprisonment with fine or death.

## **TABLE OF OFFENCES AND PUNISHMENT UNDER POCSO ACT, 2012**

As amended in POCSO (Amendment) Act, 2019

<b>Offence</b>	<b>Section</b>	<b>Punishment</b>
Penetrative sexual assault	4(1)	Imprisonment of either description for a term not less than 10 years to imprisonment for life and fine.
Penetrative sexual assault on a child below 16 years	4(2)	Imprisonment of either description for a term not less than 20 years to imprisonment for life and fine.
Aggravated penetrative sexual assault	6(1)	Imprisonment of either description for a term not less than 20 years to imprisonment for life and fine or with death.
Sexual assault	8	Imprisonment of either description ranging from 3 years to 5 years and fine.
Aggravated sexual assault	10	Imprisonment of either description ranging from 5 years to 7 years and fine.
Sexual harassment	12	Imprisonment upto 3 years and fine.
Using child/children for pornographic purpose	14(1)	Imprisonment not less than 5 years and fine. Second or subsequent conviction imprisonment not less than 7 years and fine.
Using child/children for pornographic purpose and	14(2)	Punishment as prescribed under sections 4,6,8,10 in addition to

directly participates in such pornographic acts		punishment prescribed in section 14(1)
Stores pornographic material involving child, but fails destroy or delete or report to authority with an intent to transmit or share	15(1)	Fine not less than Rupees 5,000/- and on second or subsequent conviction fine not less than Rupees 10,000/-
Stores pornographic material involving child for transmitting, propagating, distributing or displaying except for the purpose of reporting	15(2)	Imprisonment upto 3 years or with fine or with both.
Storage of pornographic material involving a child for commercial purpose	15(3)	Imprisonment from 3 years to 5 years or fine or with both and on second or subsequent conviction, imprisonment not less than 5 years to 7 years with fine.
Attempt to commit an offence under the Act	18	Imprisonment of either description provided for the offence ranging from one-half of imprisonment for life or one-half of the longest term or with fine or with both.
Punishment for failure to report an offence under section 19(1) or 20 or fails to record under section 19(2)	21(1)	Imprisonment upto 6 month or fine or with both.

Failure to report the commission of an offence under section 19(1) by any person being in charge of any institution or company in respect of subordinate under his control	21(2)	Imprisonment upto 1 year and with fine.
False complaint or false information in respect of offence committed under sections 3,5,7 and 9 to humiliate, extort, threaten or defame	22(1)	Imprisonment upto 6 months or with fine or with both.
False Complaint or false information by child	22(2)	No punishment.
False complaint or false information by a person not being a child against a child thereby victimizing the child	22(3)	Imprisonment upto 1 year or fine or with both.
Contravenes the provisions of Section 23(1) & (2)	23(4)	Imprisonment not less than 6 months upto 1 year or with fine or with both.

## **Factors contributing to Child Sexual Abuse and Victimization**

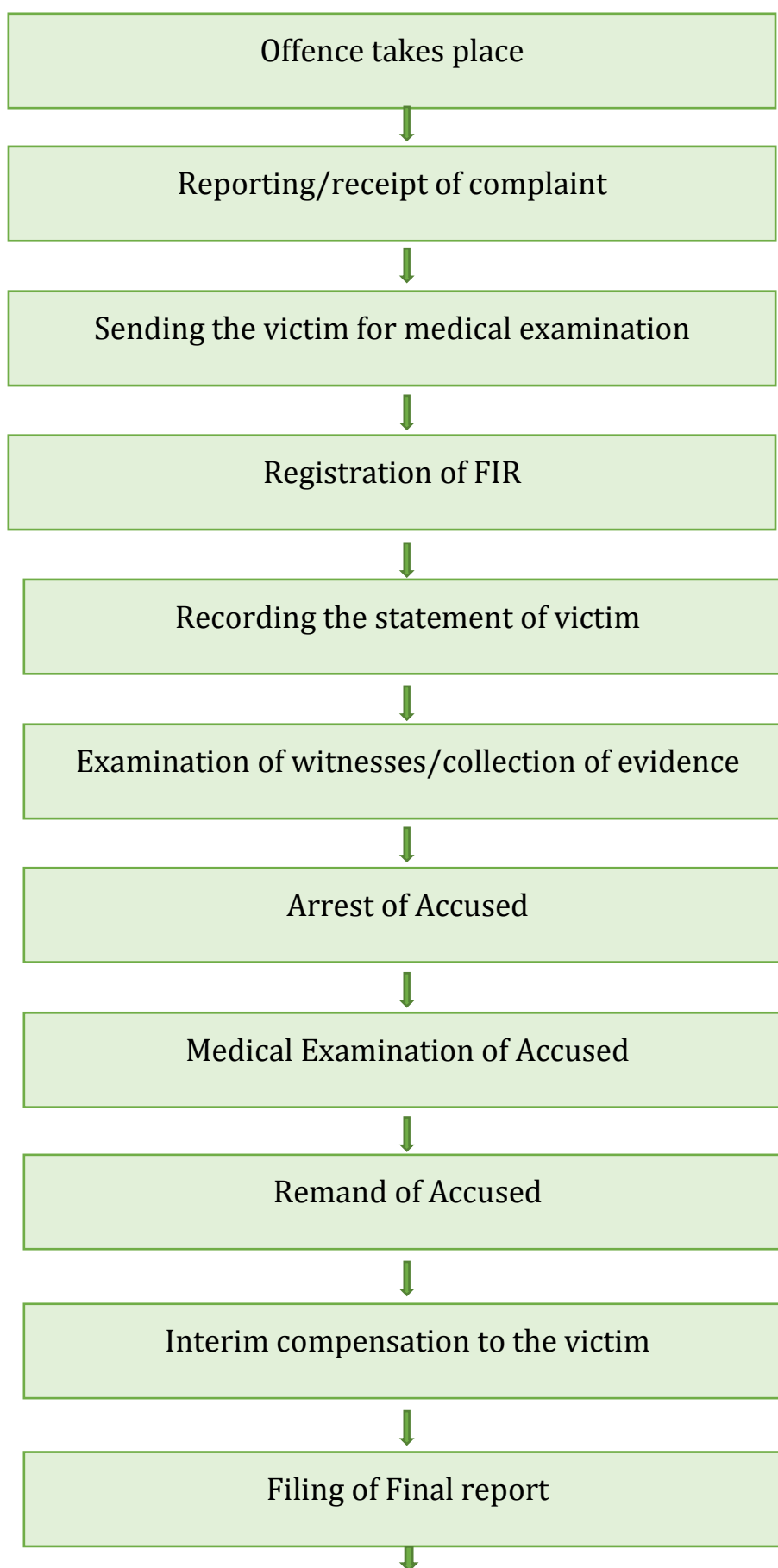
Several factors contribute to child sexual abuse ranging from female infanticide which was practiced until recently to the uncontrollable sexual urge of some people. There is no particular group which may be categorized as perpetrators. The perpetrators can be any person including father, grandfather, aunt, uncle, cousins, blood relatives, friends, acquaintances, teachers, preachers or strangers. The perpetrators can be from any socio-economic strata, they may be rich or poor, educated or uneducated, male or female, individual or group.

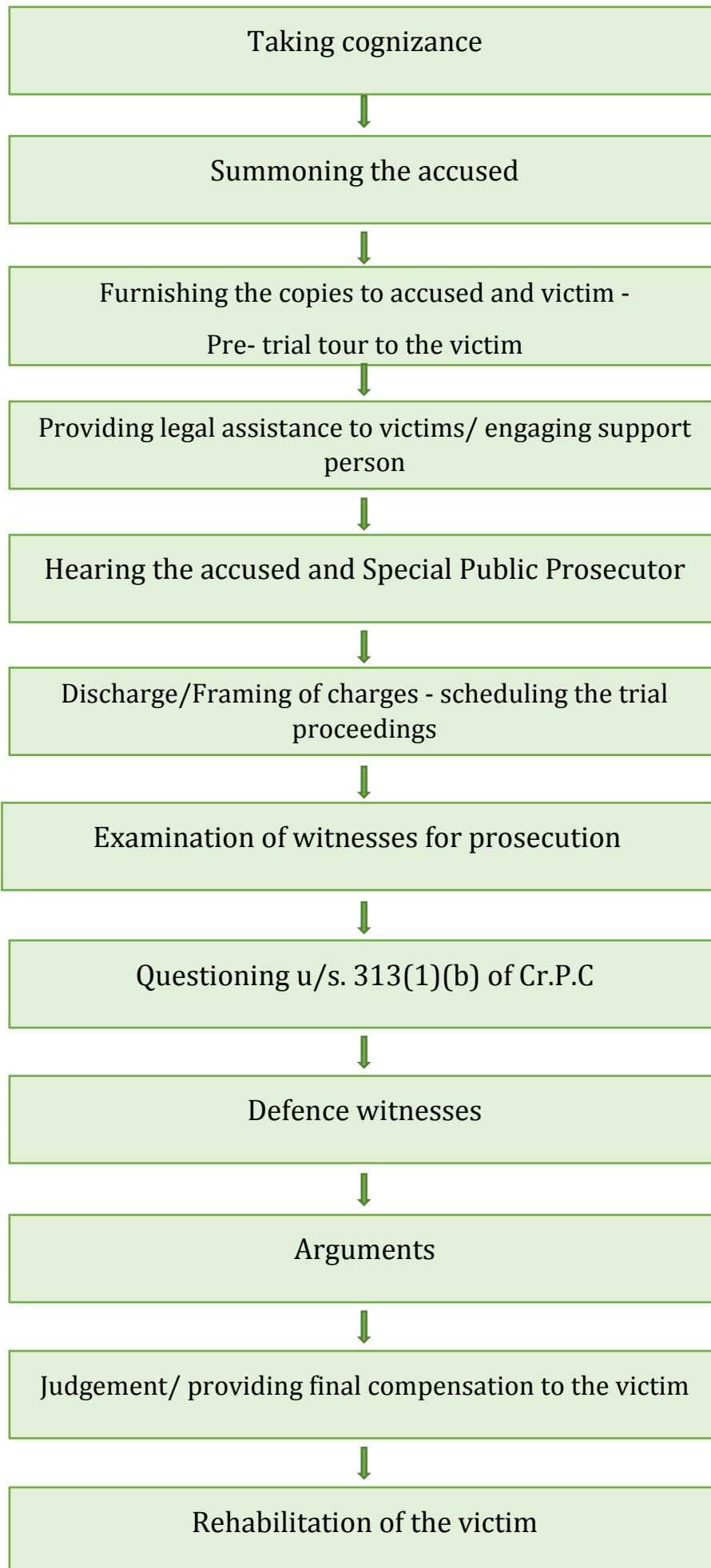
Child Sexual Abuse involves many sorts of abusive acts on children, such as sexual assault, rape, fondling, inviting a child to touch or be touched sexually, incest, exhibitionism, and the commercial sexual exploitation of children.

In India, young children are prone to sexual abuse as many a times parents do not give proper heed to their children and when a child is sexually abused it is mostly hushed as there is social stigma attached to it. Both girls and boys are exposed to sexual abuses. A myth revolves in the society that boys do not get sexually abused unlike girls. Perpetrators target vulnerable children irrespective of their gender.

The topic 'sex' in itself is a taboo in the Indian society, it is generally not discussed about and there is lack of proper understanding. Children especially female children are considered as objects and looked down upon in many societies which makes them more prone to be sexually abused.

## Steps involved in a case under the POCSO Act, 2012







## **Role of stakeholders in effective implementation of the POCSO Act**

To every problem there is a solution and the solution has to be effective. Child Sexual abuse is a social evil which destroys the growth of a future generation. When all the stakeholders work in unison, the Act can be implemented effectively and pave way for speedy trial. Every stakeholder under the Act has a very crucial to play as cases under POCSO Act are different in nature and procedure compared to other crimes.

### **Stakeholders under the POCSO, Act**

There are seven major stake holders under the Act, they are;

- i. Police/ Special Juvenile Police Unit
- ii. Child Welfare Committee
- iii. District Child Protection Unit
- iv. Magistrate
- v. Special Court and Judge
- vi. Special Public prosecutors
- vii. Support Persons

### **Police/ Special Juvenile Police Unit:**

The police must record the information relating to the offence committed or apprehension of an offence that is likely to occur. Primarily the police shall assess whether the child requires care and protection and wherever required have to ensure the protection of such child. It is the duty of the police to report such a case to the Special Court and Child Welfare Committee within 24 hours of receiving information/report. If the child is at risk of further abuse or if the child is without parental support, the police have to produce the child before the child welfare committee within 24 hours. It is also the duty of the police to take the child for medical examination to a medical practitioner in a government hospital

or to a medical practitioner in a private hospital, if medical practitioner is not available in the government hospital. It is the duty of the police to provide information about the procedures and other related aspects to the parents/guardian.

### **Child Welfare Committee:**

Child Welfare committee is an authority that exercises powers and discharge duties in relation to child in need of care and protection as per the POCSO Act, 2012 and Juvenile Justice (Care and Protection of Children) Act, 2015. The Child Welfare committee has to provide a suitable place for the victim child, if the child is facing threat of abuse in his/her place of residence within 3 days. The committee has to provide for a support person for assisting the child during investigation and trial with the consent of the child and his/her parents.

### **District Child Protection Unit:**

District Child Protection Unit functions under the Integrated Child Protection Scheme, it comprises of District magistrate/District Collector, District Child Protection Officer, Legal cum probation officer, social workers etc., to institutionalize essential services and strengthen structures for emergency outreach, institutional care, family and community-based care, counselling and support services at the national, regional, state and district levels. A register has to be maintained by the district child protection unit containing the names, addresses, contact details of interpreters, translators and special educators. This register should be made available to the special juvenile police unit, police, magistrates or Judge of the special Courts.

**Magistrate:**

The magistrate plays a very important role in the pre- trial stage. The magistrate in a child friendly manner has to record the statement of the child under Sec. 164 CrPC by audio-video electronic means with the assistance of experts, translators, special educators or interpreters wherever necessary.

**Special Court Judge:**

The judge of the special court should conduct trial *in camera* of the offences under the Act. The judge has to ensure that at all times child friendly atmosphere is maintained and the dignity, interest, and identity of the child be protected. The judge must record the evidence of the child within 30 days and the trial should be completed within a year of taking up the matter. The judge can order for an interim compensation.

**Special Public Prosecutor:**

The special public prosecutor will handle cases exclusively under the POCSO, Act. The Special Public Prosecutors who conducts the proceedings of the POCSO matters shall act with sensitivity to respect right to privacy and confidentiality of the child, and to respect and protect rights, interests and privacy of the survivors and witness.

**Support Person:**

The support person at all times should maintain confidentiality of all information relating to the child. The support person aids in keeping the child, parents/guardian/ person who the child trusts informed about the proceedings, other available assistance, judicial process, etc. If the child has any concerns regarding the safety in respect of the accused and the manner in which testimony is provided are to be conveyed to the appropriate authorities.

## **TEDDY BEAR THINKING**

The POCSO Act 2012 is seen from a different perspective in the following case laws. The importance of interpretation of this special law is very much explained and discussed by these case laws. The court's interpretation of a statute cannot be with eyes closed to practical realities and have to be construed in proper perspective, keeping in view the objects and reasons of the Act. The stated object of the Act is to protect children from offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Courts for trial of such offences for matters connected therewith or incidental thereto. As such, while construing the expression 'child' in appropriate perspective, the age, maturity and other circumstances also becomes relevant to clinch a case on the ground of penetrative sexual assault.

*Teddy Bear Clinic v. Minister of Justice [2013] ZACC 35*

The Constitutional Court of South Africa while dealing with the issue whether it is constitutionally permissible for children to be subjected to criminal sanctions in order to deter early sexual intimacy and combat the risks associated observed that "Children enjoy fundamental rights guaranteed to "everyone" under the Constitution.... If any rights should be limited, the limitation ought to be reasonable and justifiable...children reach maturity between the ages of 12 and 16, and during this time their experiences have long lasting impacts on their adult lives... Adolescents engage in sexual exploration including kissing, masturbation, and sexual intercourse which in circumstances where it is consensual is potentially a normal and healthy experience... At this age, they need guidance and support from adults and caregivers to avoid the negative consequences of sexual behaviour... criminalizing such behaviour negatively impacted children, as being charged under the impugned provisions would bring shame, embarrassment, anger, and regret. It could further drive adolescent

sexuality underground and make it difficult for adolescents to seek help, and equally challenging for adults and caregivers to support children on sexual matters...considering on the best interests' principle by subjecting adolescents to harm and risk, for instance by driving adolescent sexual behaviour underground and undermining the guidance they need from adults and caregivers in matters of sexuality..." The Court therefore held Sections 15 and 16 of Criminal Law (Sexual Offences and Related Matters) Amendment Act unconstitutional to the extent that they criminalise the consensual sexual conduct among adolescents between the ages of 12 and 16, and declared them invalid.

*Ranjit Rajbanshi Vs. The State of West Bengal C.R.A. No.458 of 2018 IA No: CRAN 2 of 2020, 17<sup>th</sup> September 2021*

The Hon'ble Calcutta High Court while deciding a criminal appeal preferred against a conviction under Section 376(1) of the Indian Penal Code, 1860 (for short "the IPC") and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act") and sentence awarded under Section 376(1) of the IPC, observed that, "the consent of a minor is not a good consent in law, and cannot be taken into account as 'consent' as such, the expression 'penetration' as envisaged in the POCSO Act has to be taken to mean a positive, unilateral act on the part of the accused. Consensual participatory intercourse, in view of the passion involved, need not always make penetration, by itself, an unilateral positive act of the accused but might also be a union between two persons out of their own volition.... If the union is participatory in nature, there is no reason to indict only the male just because of the peculiar nature of anatomy of the sexual organs of different genders. The psyche of the parties and the maturity level of the victim are also relevant factors to be taken into consideration to decide whether the penetration was a unilateral and positive act on the part of the male. Hence, seen

in proper perspective, the act alleged, even if proved, could not tantamount to penetration sufficient to attract Section 3 of the POCSO Act, keeping in view the admitted several prior occasions of physical union between the accused and the victim and the maturity of the victim.... it cannot be said that the accused was guilty of penetrative sexual assault, as such, since here the act of penetration, even if true, would have to be taken not as an unilateral act of the accused but a participatory moment of passion involving the participation of both the victim and the accused... the question of consent does not arise in case of a minor, in order to attract Section 376(1) of the IPC, it had to be established that the alleged offence was committed against the will of the victim. Read in conjunction, the provisions of Section 376 of the IPC and Section 3 of the POCSO Act ought to be construed on a similar footing and cannot incriminate the accused for a voluntary joint act of sexual union..." thus allowed the appeal.

*Sabari @ Sabarinathan @ Sabarivasan Vs. The Inspector of Police & Anr Criminal Appeal No.490 of 2018 26<sup>th</sup> April 2019*

The Hon'ble High Court while deciding a criminal appeal on the issue of conviction under Protection of Children from Sexual Offences Act, 2012 and quantum of punishment awarded held that, "In the absence of evidence by crucial witnesses, mere existence of some evidence, cannot give rise to valid presumption... in favour of the prosecution. Any presumption could be drawn by the Court in favour of the prosecution must be sound, reasonable and concrete and such presumption cannot be allowed to hang over a baseless premise...." Thus allowed the criminal appeal reiterating that, "...When this case was taken up for hearing, this Court became concerned about the growing incidence of offences under the POCSO Act on one side and also the Rigorous Imprisonment envisaged in the Act. 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. The Act itself under Sections 43 and 44 provide for wide publicity to its provisions to spread awareness among the people about the scope, import and object and the ramification on its implementation. The spreading of awareness is to curb the abominable menace of POCSO offences and also warn the potential offenders that in case, they run afoul of the Legislation they would face a minimum of seven- or ten-years Rigorous Imprisonment.... (Paras 21, 26, 27, 29)”

The Madras High Court held that, “...on a profound consideration of the ground realities, the definition of 'Child' under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18. Any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the provisions of the POCSO Act and such sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself and in order to distinguish the cases of teen age relationship after 16 years, from the cases of sexual assault on children below 16 years.” (Para 29)

*Vijayalakshmi Vs. State Rep. By The Inspector of Police Crl.O.P.No.232 of 2021 Crl.M.P.No.109 of 2021, 27<sup>th</sup> January 2021*

The Hon’ble High Court while deciding a Criminal Original Petition on the issue of whether this Court can quash the criminal proceedings involving non-compoundable offences, reiterated the case of Sabari v. Inspector of Police reported in 2019 (3) MLJ Crl 110, where it was discussed about the “about the cases in which persons of the age group of 16 to 18 years are involved in love affairs and how in some cases ultimately end up in a criminal case booked for an offence under the POSCO Act. (Para 21, 26, 27, 29)” and held after a long deliberation in (Para 11, 13, 14, 15) that, “while exercising its jurisdiction under Section 482 of Cr.P.C, to quash non-compoundable offences. One very important test that has been laid down is that the Court must necessarily examine if the

crime in question is purely individual in nature or a crime against the society with overriding public interest.<sup>1</sup> The Hon'ble Supreme Court has held that offences against the society with overriding public interest even if it gets settled between the parties, cannot be quashed by this Court.”, thus quashed the proceedings by allowing the criminal original petition.

The Madras High Court held that, “Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life. 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. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act.”

On the lines of the thinking deduced from the landmark teddy bear case (supra) and considering the Indian municipal law on POCSO, the State of Tamil Nadu vide notification II(2)HO: 927(a-2)/2019 amended on 21<sup>st</sup> May 2021 (20<sup>th</sup> November 2019) establishing three additional special courts under POCSO Act to deal with cases of elopement involving girls ages 16-18 years at Tiruvannamalai, Salem, and Madurai.

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<sup>1</sup> Parbathbhai Aahir @ Parbathbhai Vs. State of Gujrat, 2017 9 SCC 641; The State of Madhya Pradesh Vs. Dhruv Gurjar and Another (2019) 2 MLJ CrI 10





## Chapter II

### Investigation





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## Chapter II – Investigation

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### Mandatory Reporting of Offences

Owing to the grave nature of the crime which often goes unnoticed, and acknowledging the difficulties of the victim who is a child, Chapter V of the POCSO Act prescribes the procedure for reporting of cases. Sections 19 and 20 entrusts all persons including media personnel with the responsibility to report cases even if they have a mere apprehension of knowledge regarding the commission of an offence. Failure to report or record cases attracts punishment under Section 21.

The Supreme Court in *Shankar Kisanrao Khade Vs. State of Maharashtra (2013) 5 SCC 546*, took up the issue of non-reporting of sexual offences by by-standers and other witnesses. The Court held that it must be the duty of every citizen in the country to report a crime that has taken place in front of them. The Court further noted that non-reporting is most prevalent within the family, whereby adult members of the family, including the parents of the victim, do not report such crimes in order to protect children from social stigma, which causes even more psychological and emotional harm to the child. The Court also issued several directions to stakeholders of such offences.

#### POCSO Act, 2012

**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 subsection (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 (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, 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.

(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 and with fine.

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

In *Dr. Sr. Tessy Joe Vs. State of Kerala (2019) 3 SCC CrL 164*, the Supreme Court held that the Section 19(1) of POCSO Act puts a legal obligation on a person to inform the relevant authorities if he/she has knowledge that an offence under POCSO has been committed. The Court noted that, “the expression used under the section is knowledge, which meant that information was received by such person of the offence being committed, but does not extend to an obligation to conduct an investigation in order to gather such knowledge” .

### **Role of Special Juvenile Police Unit/ Local Police**

The first stakeholder to come in contact with a child, who has faced sexual abuse, is the Police. The responsibilities and duties of the Police in the pre-trial stage of a POCSO case, with respect to reporting of the offence, examination of the child and recording of the child's statement, goes a long way in avoiding secondary victimisation and trauma during trial. The POCSO Act, 2012, along with the Juvenile Justice (Care and Protection of Children) Act, 2015, envisages the stepping in of the Special Juvenile Police Unit [SJPU], for handling cases involving child victims and child offenders. When the SJPU or the police receive information relating to an offence that has been or is likely to be committed, they should take the following steps:

Firstly, the information is to be recorded as a complaint in writing. Where the information is provided by the child, the complaint must be recorded in simple language such that the child understands it. After recording the information in writing, the police must assign an entry number to the information, and read it

over to the complainant. In case the child does not understand the language in which the complaint is recorded, then the police must arrange for a qualified interpreter or translator for the child, as per Sections 19(4) and 26(2) & (3), POCSO Act, 2012.

Secondly, the concerned child must be assessed to see if they are in need of care and protection. Upon assessment of the child, if the police believes that the child needs to be relocated as they are in need of care and protection, the police has to record the same in writing and make the necessary arrangements, which includes admitting the child to a hospital (whether government or private one) in case they need immediate emergency medical care, or a Shelter Home within 24 hours. If the child is without parental support, or are living with the abuser or potential abuser, the police must produce the child before the Child Welfare Committee within 24 hours of the information, as per Rule 4(3), POCSO Rules, 2020.

Thirdly, as per Rule 4(2)(c), POCSO Rules, 2020, the police must facilitate the medical examination of the child, by taking them to the hospital for medical examination within 24 hours of the information, and also ensure that the forensic samples are sent to the Forensic Laboratory at the earliest, as per Rule 4(2)(d), POCSO Rules, 2020.

Fourthly, the police must submit a report to the Child Welfare Committee and the Special Court (or in its absence, a Sessions Court), about the details of the case and the steps taken to ensure care and protection to the child, within 24 hours of receipt of the information.

Fifthly, as per Rule 4(1), POCSO Rules, 2020, the police must provide their name, designation, address, telephone number and the contact details of their supervisor, to the informant. Importantly, the child must be informed of their

right to free legal aid and legal representation, and give them information on contacting the District Legal Services Authority.

The police further have the duty to inform the child and their parent/guardian or the informant about the availability of:

- emergency health services, support services- and connect the child and their parent/guardian to such service providers if necessary
- procedures and stages involved in a criminal case, status of arrest of accused and investigation- to the extent that it does not interfere with the investigation, developments in the case including applications filed and court proceedings; status of bail application of the accused; filing of charges against the accused; filing of chargesheet; schedule of court proceedings
- availability of victim compensation
- outcome of the trial, sentence imposed on the offender, details of the judgment and its implications

Timely updates on the above should also be provided by the police to the child or their parent/guardian or the person the child trusts.

Chapter VI of the POCSO Act, 2012 prescribes the procedures to be followed when recording the statement of the child.

### **POCSO Act, 2012**

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.

The Police, when recording the statement of a child, must do so at a place preferred by the child, whether it is the child's home or place of residence, or any other place in cases of child sexual abuse within the home or place of residence.

As far as possible and practicable, the statement of the child must be recorded by a woman police officer not below the rank of a Sub-Inspector. The officer recording the statement must be plain clothes and not in police uniform, as per Section 24(2), POCSO Act, 2012.

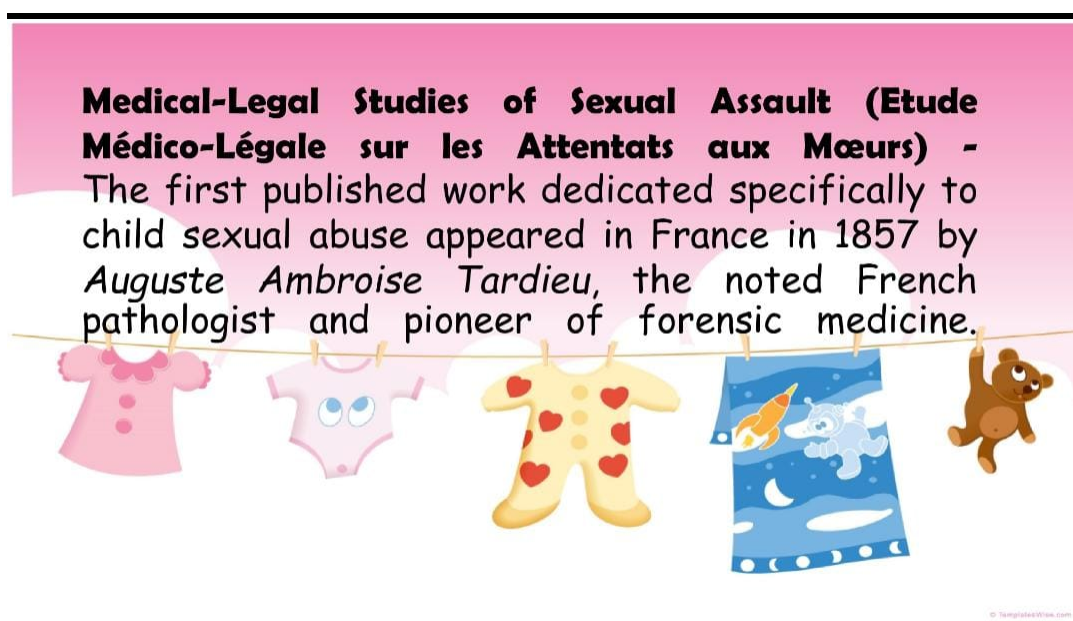
As per Section 26(1), POCSO Act, 2012, the police must record the statement of the child in presence of the child's parent or the person in whom the child has confidence and trust. Care must be taken to ensure that in cases where the suspected offender is a parent/guardian, they do not accompany the child or be present when the statement is being recorded.

The police recording the statement of the child must also see to that the child is not exposed to the accused, as per Section 24(3), POCSO Act, 2012 and that the child's identity is protected from the public and the media. The statement must be recorded using audio-video electronic means, as far as possible, and with the help of interpreters and translators if necessary. As per Section 24(4), POCSO Act, 2012, under no circumstances can the child be asked to remain in the police station at night.

In *NCT of Delhi Vs. Laxmi Kant Tiwari CRL. L. P. 469/2014*, dated 19<sup>th</sup> August 2015 the Delhi High Court held that, "...statement of the victim was not recorded in the police station but on an isolated road at the place where the incident had occurred. At the cost of repetition the purpose of engrafting the POCSO was to protect children from sexual assault and sexual harassment and as far as may be

to facilitate investigations of such offences so that the victim is more comfortable in getting her/his version recorded. Sections 24 and 25 of the said Act provide that as far as practicable the police officer should not be in a police uniform at the time when he records the statement of the victim. However, it does not mean that if the statement of the victim is recorded by a police officer when he was in uniform that the statement would be a ground for rejection from the otherwise cogent and coherent testimony of the victim. The Sessions Judge holding this as a ground to grant an acquittal to the respondent has committed a grave illegality....” (Para 14)

In essence the police are mandated to complete the investigation within 2 months from the date on which the information was recorded by the officer in charge at the police station. Every case registered under the POCSO Act, 2012 has to be reported to the Child Welfare Committee, which has the power to appoint a support person to assist the child and their parent/guardian during the legal proceedings. The CWC keeps a record of all the POCSO and the steps taken by the SJPU or local police taken to ensure care and protection of the child. The CWC can also determine if the child needs to be relocated from their place of living, to ensure their safety.



## Medical Treatment And Examination

According to Section 357C of the CrPC, private hospitals have a duty to provide first aid or medical treatment to female victims of rape or acid attack. This service has to be provided at free of cost. Failure to do so is a punishable offence under Section 166B of the IPC. It is pertinent to note that medical practitioners are mandated to conduct medical evaluation of victim who go to them out of their own will, and are not referred to them by the police. Rule 6, POCSO Rules, 2020 prescribes the steps to be followed while providing medical treatment to the child.

### POCSO Rules, 2020

**Rule 6. Medical aid and care.**— (1) Where an officer of the SJPU, or the local police receives information under section 19 of the Act that an offence under the Act has been committed, and is satisfied that the child against whom an offence has been committed is in need of urgent medical care and protection, such officer, or as the case may be, the local police shall, within 24 hours of receiving such information, arrange to take such child to the nearest hospital or medical care facility center for emergency medical care:

Provided that where an offence has been committed under sections 3, 5, 7 or 9 of the Act, the victim shall be referred to emergency medical care.

(2) Emergency medical care shall be rendered in such a manner as to protect the privacy of the child, and in the presence of the parent or guardian or any other person in whom the child has trust and confidence.

(3) No medical practitioner, hospital or other medical facility center rendering emergency medical care to a child shall demand any legal or magisterial requisition or other documentation as a pre-requisite to rendering such care.

(4) The registered medical practitioner rendering medical care shall attend to the needs of the child, including:

- (a) treatment for cuts, bruises, and other injuries including genital injuries, if any;
- (b) treatment for exposure to sexually transmitted diseases (STDs) including prophylaxis for identified STDs;
- (c) treatment for exposure to Human Immunodeficiency Virus (HIV), including prophylaxis for HIV after necessary consultation with infectious disease experts;

(d) possible pregnancy and emergency contraceptives should be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence; and,

(e) wherever necessary, a referral or consultation for mental or psychological health needs, or other counseling, or drug de-addiction services and programmes should be made.

(5) The registered medical practitioner shall submit the report on the condition of the child within 24 hrs to the SJPU or Local Police.

(6) Any forensic evidence collected in the course of rendering emergency medical care must be collected in accordance with section 27 of the Act.

(7) If the child is found to be pregnant, then the registered medical practitioner shall counsel the child, and her parents or guardians, or support person, regarding the various lawful options available to the child as per the Medical Termination of Pregnancy Act 1971 and the Juvenile Justice (Care and Protection of Children) Act 2015 (2 of 2016).

(8) If the child is found to have been administered any drugs or other intoxicating substances, access to drug deaddiction programme shall be ensured.

(9) If the Child is a divyang (person with disability), suitable measure and care shall be taken as per the provisions of The Rights of Persons with Disabilities Act, 2016 (49 of 2016).

Section 27, POCSO Act, 2012 prescribes the manner of conducting medical examination of a child victim of sexual offence.

### **POCSO Act, 2012**

**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.

The medical examination has to be conducted by a Registered Medical Practitioner of a government hospital. A Registered Medical Practitioner is one who possesses any medical qualification listed in the Indian Medical Council Act and whose name is in the State Medical Register. In case the Registered Medical Practitioner at a government hospital is not available, the medical examination can be conducted by a doctor at a private hospital. As per Section 27(2), POCSO Act, 2012, if the child victim is a girl, then the medical examination must be conducted only by a woman doctor. As per Section 27(1), POCSO Act, 2012, there is no need for and FIR or even a complaint for conducting medical examination of a child victim of sexual offence. As per Section 27(3), the medical examination has to be conducted in presence of the child's parent, or any other person in whom the child has trust or confidence. In cases where such a person is unable to be present, the medical examination shall be conducted in the presence of a woman nominated by the head of the institution, as per Section 27(4).

Informed consent of the child must be obtained before conducting medical examination. Informed consent implies that the child is made aware of the procedure of medical examination, what samples would be collected, and how would they be used during the legal proceedings. The child is to be explained the importance of the medical examination. The child cannot be forced or compelled to undergo the medical examination. The child is entitled to refuse to undergo the medical examination. In such a situation, the Registered Medical Practitioner must record that no medical examination was conducted as there was no consent of the child. Where a child is unable to provide consent, the consent must be obtained from the parent/guardian on behalf of the child.

This principle is reinforced in the guidelines issued by the Ministry for Women and Child Welfare in 2013, wherein it is provided in Para 3.3 that:

...Where a child is brought to a doctor for a medical examination to confirm sexual abuse, the doctor must:

- i)** Take the written consent of the child. ...the child and/or his or her parent/guardian should agree to the examination voluntarily, without feeling pressurised to do so. In some situations, it may be appropriate to spend time with the child/adolescent alone, without the parent/guardian present. This may make it easier for the child to ask questions and not feel coerced by a parent/guardian.
- ii)** Where the child is too young or otherwise incapable of giving consent, consent should be obtained from the child's parent, guardian or other person in whom the child has trust and confidence.
- iii)** The right to informed consent implies the right to informed refusal.

The Delhi High Court in *Virender Vs. The State of NCT of Delhi* CrI. A. No. 121/2008, dated 18<sup>th</sup> September 2009 deriving from the directions issued by the Supreme Court in *Sakshi* case and *State of Punjab Vs. Gurmit Singh* 1996 Cr. L J 1728 SC, issued the following guidelines to be followed while conducting the medical examination of the child:

- i)** Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts. (Ref: Mahender Singh Chhabra Vs. State of N.C.T. Of Delhi and Ors.)
- ii)** While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

- iii)** In case of a girl child victim the medical examination shall be conducted preferably by a female doctor. (Ref: Court On Its Own Motion v. State and Anr.)
- iv)** In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.
- v)** The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.
- vi)** In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.
- vii)** The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.
- viii)** Emergency medical treatment wherever necessary should be provided to the child victim.
- ix)** The child victim shall be afforded prophylactic medical treatment against STDs.
- x)** In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.



**Online Child abuse survey finds third of  
viewers attempt contact with children.**

## Recording Of Statement by Magistrate

Section 25, POCSO Act, 2012, prescribes the safeguards to be followed while recording the statement of a child by the Magistrate, under Section 164, CrPC. Section 26, POCSO Act, 2012 provides for the additional safeguards.

### POCSO Act, 2012

**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.



When the statement of the child is recorded by the Magistrate, it must be done so in the presence of the child's parent or the person in whom the child has trust and confidence. The statement must be recorded as spoken by the child. If necessary, the Magistrate can take the help of a qualified translator, interpreter or special educator. The statement must be recorded using audio-visual electronic means, as far as possible. This is done to avoid making a child repeat details of sexual abuse they faced, to the concerned officials, which forces the child to relieve the trauma repeatedly, causing emotional stress over and above the trauma of the abuse. Recording of child's statement through audio-visual means enable it to be replayed and prevent secondary victimisation. The advocate of the accused must not be present when the statement of the child is being recorded by the Magistrate. On that light Section 164(5A), Code of Criminal Procedure, 1973, comes of relevance.

Section 164(5A) was inserted vide Section 16 of the Criminal Law (Amendment) Act, 2013.

(5A) (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, 3[section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB,] section 376E or section 509 of the Indian Penal Code (45 of 1860), the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 (1

of 1872) such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

Thus, the provision makes it mandatory for the Judicial Magistrate to record statement of the victim immediately after the police are informed in case of acid attack, rape, sexual harassment, disrobing, voyeurism etc. In case the victim is differently abled, the assistance of interpreters has to be taken and has to be video graphed. The statement recorded by the Judicial Magistrate will be treated as the evidence of the victim presented by the prosecutor, and the right to be cross-examined is protected. A parallel amendment to Section 154, Cr.P.C., requires that the police officer shall get the statement of the person recorded by a Judicial Magistrate under Section 164(5A)(a), Cr.P.C. as soon as possible. As per Section 119, Indian Evidence Act, 1872, the Court is to use the assistance of interpreters to take evidence of differently abled persons and such statement is to be video recorded. Under some special circumstances mentioned in Section 164 (5A) (b) such statements can be used in lieu of examination in chief of that particular child.

The Supreme Court in *Delhi Commission for Women Vs. Delhi Police 2009 SCC OnLine Del 1057*, provided the guidelines to enable authorities to effectively tackle sexual offences

“ ...

(a) The Magistrate unless there are compelling reasons shall record the statement of the victim under Section 164, Cr.P.C. on the day on which the application is moved by the Investigating Officer. The Magistrate before proceeding to record the statement shall ensure that the child is made comfortable and she is free from the extraneous pressure.

...

(d) That as far as possible chief examination and cross-examination of the victim must be conducted on the same day;

(e) The Additional Sessions Judge/ District Judge shall maintain a panel of psychiatrists, Psychologists and experts in sign language, etc. who would assist in recording the statement of witnesses as and when requested by the Sessions Courts.”

In *Patan Jamal Vali Vs. The State of Andhra Pradesh 2021 SCC OnLine SC 343*, the Supreme Court deliberated on the interaction of disabled survivors of sexual violence with the criminal justice system and the judiciary.

“41. In the wake of the Nirbhaya rape incident that shocked the conscience of the nation, Indian criminal law underwent a series of changes. The Justice J.S. Verma Committee, set up to suggest amendments to the law, attached special emphasis to creating an enabling environment to enable women with disabilities to report cases of sexual violence and to obtain suitable redress. As the Committee noted:

“6. A special procedure for protecting persons with disabilities from rape, and requisite procedures for access to justice for such persons is also an urgent need. Amendments to the Code of Criminal Procedure, which are necessary, have been suggested.”

42. The Committee's suggestions translated into changes in the Penal Code, 1860 and the Criminal Procedure Code. Some key changes were as follows:

(i) When the victim of the offences specified in the provision is either permanently or temporarily mentally or physically disabled, the FIR shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the

presence of a special educator or an interpreter, as the case may be. Such information may also be video-graphed.

(ii) The same accommodations, as outlined above, have also been made as regards the recording of confessions and statements. [CrPC, Section 164 (5A) (a), provisos 1 and 2] Further, as regards those who are physically and mentally disabled, such a statement shall be considered a statement in lieu of examination-in-chief, obviating the need for it to be recorded at the time of trial.

(iii) The amendments also sought to put in place a framework to enable victims with disabilities to participate in a test identification parade. In such cases, a judicial magistrate will oversee the procedure to ensure the witness is supported in identifying the accused with a means they find comfortable. This process must be video-graphed.”

The Supreme Court in *In Re: Assessment of The Criminal Justice System in Response to Sexual Offences, 2019 SCC OnLine SC 1654* held as follows,

“Sub-Section (5A) of Section 164, Cr.P.C. provides for recording of statement of the victim by the Court. Other than recording of statements under Section 164, for the purpose of recording of statements during the trial, Section 119 of Evidence Act provides for assistance of an interpreter or a special educator in recording the statement of the witness unable to speak but capable to give evidence in any other manner. It further provides that such statement shall be video graphed.” (Para 23)

In *Lada Devi Vs. State of Rajasthan 2020 SCC OnLine Raj 1809*, the Supreme Court held that:

“In *Jogendra Nahak Vs. State of Orissa (2000) 1 SCC 272*, the Supreme Court has observed that the statement of a person can be recorded under Section

164(1) Cr.P.C. on an application moved by the investigating agency and the same cannot be recorded otherwise. By adding Section 164(5A) Cr.P.C, it has become binding on the Judicial Magistrate to record statement of such person against whom such offence has been committed as soon as commission of offence is brought to the notice of the Police. In the opinion of this Court, however, if the investigating agency wants a fresh statement to be recorded of the prosecutrix or any witness, it has a right to get the statement recorded under Section 164(1) by moving appropriate application. The power of the IO thus still continues even after the statement has been recorded of the victim under Section 164(5A) Cr.P.C. by the Judicial Magistrate.” (Para 17)

In the case of *State of Karnataka Vs. Manjanna AIR 2000 SC 2231*, the Supreme Court observed that the testimony of the prosecution witness was consistent with the medical evidence in the present case. An important point, which was discussed in the said case, was of voluntary medical examination and not by way of reference of the police. It held that the refusal of certain government hospital doctors to conduct any medical examination of a victim of rape, unless referred to by the police, would be detrimental to her case as there would be delay in the final examination of the victim and any evidence proving her case may be lost or washed away. Every State has been given the responsibility to ensure such a case does not recur in the future.

The Madras High Court in *Murugasamy Vs. State 2017 SCC OnLine Mad 37658*, observed that,

“Indubitably, Section 164(5-A), Cr.P.C. is of far-reaching significance in relation to trial of a rape case. Section 164(5-A) Cr.P.C. states that if the maker of the statement is temporarily or permanently, mentally or physically disabled, the statement made by such a person shall be

considered as substantive evidence by the Trial Court and the maker need not be examined-in-chief, but, can be subjected to cross-examination on the basis of the statement recorded under Section 164(5-A) Cr.P.C. This is to save the victim from the embarrassment of explaining to the trial Court, repeatedly, as to how she was sexually assaulted.” (Para 33)

Further, the Court in this case held that,

“Section 33 of the POCSO Act empowers the Special Court to take cognizance of any offence under the Act either on a complaint or on a police report under Section 173 Cr.P.C. This means that in a district in which a special court has been constituted, the police are required to file the final report under Section 173 Cr.P.C. in the Special Court and not to the Magistrate. Therefore, the Magistrate will not be in a position to provide to the child and his parents, the documents specified under Section 207 of the Code and comply with the mandates of Section 25(2) of the POCSO Act. Hence, the expression “Magistrate” under Section 25 of the POCSO Act should perforce include the Special Judge designated under Section 28 of the POCSO Act also and only then, these two sections can be harmoniously blended.”

### **Powers of Judicial Officers to Supervise Investigation**

Although the Judge has a limited role to play in the conduct of an investigation, the Cr.P.C provides for circumstances where the Judge can direct further investigation in a case.


The Supreme Court in *Sakiri Vasu Vs. State of UP (2008) 2 SCC 409* held as follows,

“The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the investigating officer to further investigate the case even after submissions

of his report vide Section 173(8). Hence the Magistrate can order reopening of the investigation even after the police submits the final report, vide *State of Bihar Vs. J.A.C. Saldanha, (1980) 1 SCC 554.*” (Para 16)

In *Vinubhai Haribhai Malaviya & Ors. Vs. State of Gujarat 2019 SCC Online 1346*, the Supreme Court observed that,

“...the Magistrate's power under Section 156(3) CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a “proper investigation” takes place in the sense of a fair and just investigation by the police—which such Magistrate is to supervise—Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the “investigation” referred to in Section 156(1) CrPC would, as per the definition of “investigation” under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8) CrPC.” (Para 25)



India tops the global compilation of reports of child sexual abuse material (CSAM) with 11.7% of the total reports

## **Chapter III**

### **Effective Prosecution**







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## Chapter III - Effective Prosecution

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The Southern Regional Conference on Protection of Children from Sexual Offences Act, 2012, (2013) 5 LW (JS) 29 at page 35 highlighted the importance of effective prosecution in POCSO Cases.

- The POCSO Act enumerates numerous initiatives, but as we acknowledge, there will be a difference only if they are actually put in motion. While good laws and policies can be enacted by legislatures and executives, their implementation is often taxing. Experience in India reveals that implementation issues hinders improvement in protection of children.
- Child sexual abuse is one of the least prosecuted crimes in India. The secretive natures of child sexual abuse, the fact that children are often the only eyewitnesses to the crime, concerns about the reliability of child testimony are few of the causes for breakdown of prosecution case. It is despite these impairments, the Court has the duty to strike a balance between the effective prosecution of child sexual abuse and safeguarding the constitutional rights of the accused.

The responsibilities of a prosecutor are summarized as follows,

- ❖ Prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
- ❖ Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
- ❖ The office of prosecutors shall be strictly separated from judicial functions.
- ❖ Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.

- ❖ In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

## **Role of Directorate of Prosecution & Public Prosecutors**

- ❖ Directorate of Prosecution with independent powers for effectively supervising the working of Public Prosecutors (PP) & Assistant Public Prosecutors (APP).
- ❖ Although Section 24(4) of Cr.P.C. requires the District Magistrate to prepare a panel of names fit to be appointed as PPs/Addl. PPs for the district in consultation with the Sessions Judge, many states have opted to delete or amend this provision, in favour of the State Government exercising its sovereign prerogative to appoint PPs and Addl. PPs of their choice.
- ❖ The Code of Criminal Procedure envisages the constitution of Directorate of Prosecution and the Director is required to function under the administrative control of the Home Secretary vide Section 25A(3), CrPC. The Director and Deputy Director exercise peripheral supervision over the PPs/APPs and are not functionally independent.

Earlier, the prosecution was the part of police department and coming under the control of the Superintendent of Police of the District which affected the functional independence of the PPs. So in the new Code of Criminal Procedure, the prosecution wing has been detached from the department of police and made independent. The Code was further amended in 2005 on the recommendation of the Malimath Committee and a new section 25A was added in the Code. This amendment has facilitated the establishment of Directorate of Prosecution (DoP) in every State by the respective State Government. DoP has a Director and as many Deputy Directors of Prosecution as it thinks fit which functions under the Head of the Home Department of the State.

Section 25A(2) CrPC further provides that, all the Deputy Directors of Prosecution function under the Director of Prosecution. “A person is eligible to be appointed as a Director of Prosecution or a Deputy Director of Prosecution, only if he has been in practice as an advocate for not less than ten years and such appointment is made with the concurrence of the Chief Justice of the High Court”

According to Sections 25A (5) & (6), CrPC, the Director of Prosecution exercises control over the PP, Addl. PP and Spl. PP appointed by the State Government under Section 24(1) & (8), CrPC, to conduct cases in the High Courts, and under Section 24(3) and (8), CrPC to conduct cases in the District Courts.

The Deputy Director exercises control over the Asst. Public Prosecutor appointed under Section 25(1), CrPC, to conduct cases in the Magistrate Court.

Directorate of Prosecution as an independent department is accountable for prosecution of criminal cases investigated by the police. Section 25A (7) of the Code provides for the powers and functions of the Director and the Deputy Directors of Prosecution. It also provides the State Government may, by notification, specify the areas for which each of the Deputy Directors of Prosecution will function. Generally, DoP has the following responsibilities—

- (i) Advising the police on cases for possible prosecution;
- (ii) Reviewing cases and evidences submitted by the Police;
- (iii) Framing and filing of charges in the Court;
- (iv) Preparation of the Cases;
- (v) Presentation of the cases in the Court; and
- (vi) Exercising close supervision and scrutiny of the works of Prosecutors;

The role of the PPs has been criticized by the Supreme Court in *Zahira Habibulla H. Sheikh Vs. State of Gujarat (2004) 4 SCC 158*, popularly known as ‘BEST BAKERY’ case. In this case, the Supreme Court ordered retrial of the matter in the High Court of Maharashtra, and observed that, “The Public Prosecutor appears to

have acted more as a defense counsel than one whose duty was to present the truth before the Court”.

In *Azeez Vs. State of Kerala 1984 SCC OnLine Ker 46*, the High Court of Kerala has equated the role of PP with any other counsel and viewed that “Every counsel appearing in a case before the court is expected to be fair and truthful. He must, of course, be champion of the cause of his client as efficiently and effectively as possible, but fairly truthfully”.

In *Vineet Narain Vs. Union of India (1996) 2 SCC 199* the Supreme Court focused that the CBI has failed to investigate properly the offences involving high political dignitaries. The Supreme Court emphasized the need to ensure that “there are no arbitrary restrictions to the initiation of Investigations or launching of prosecutions”.

In *Jitendera Kumar Vs. State (NCT of Delhi) 1999 SCC OnLine Del 910*, Delhi High Court has observed that the PP plays important role in maintaining purity and impartiality in the field of administration of Criminal Justice on behalf of the State. So they are also known as “Minister of Justice”.

The Supreme Court has observed in *S.B. Shahane Vs. State of Maharashtra 1995 Supp (3) SCC 37* that “irrespective of the executive or judicial nature of the office of the public prosecutor, it is certain that one expects impartiality and fairness from it in criminal prosecution”.

In *Mukul Dalal Vs. Union of India (1988) 3 SCC 144* the Supreme Court has categorically held that “the office of the public prosecutor is a public office and the primacy given to him under the scheme of the Code has a social purpose. But the malpractice of some public prosecutors has eroded this value and purpose”.

## Role of Special Public Prosecutor

Section 32 of the POCSO Act, 2012 provides for the appointment of a Special Public Prosecutor to exclusively deal with POCSO cases, and whose powers shall be equivalent to that of the Public Prosecutor under Section 2(u) of the CrPC, 1973.

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 subsection (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 and provision of that Code shall have effect accordingly.

Regarding the eligibility criteria for appointment as Special Public Prosecutor, the Madras High Court in *S. Jemesha Vs. Secretary to Government, Home Department & Ors.* 2019 SCC OnLine Mad 35185 held that “It is the absolute discretion of the State to fix eligibility criteria for the appointment of Public Prosecutor or Additional Public Prosecutor who will be conducting POCSO cases. In Section 24 of CrPC and Section 32(2) of POCSO Act, only the minimum eligibility criteria for such appointment has been mentioned, that does not mean only the said criteria should be fixed.”

The Special Public Prosecutor plays a crucial role in representing the best interests of the child before the Court. The child needs to be handled with utmost care and sensitivity so as to avoid secondary victimisation and further trauma to the child. It is for this reason that the POCSO Act in Section 32(1) expressly states that the Special Public Prosecutor appointed under this legislation shall deal only

with cases pertaining to the POCSO Act. This rationale was held by the Supreme Court *In Re: Alarming Rise in the Number of Reported Child Rape Incidents (2020) 7 SCC 130*, wherein it was stated as follows:

“The language of the Act leaves no manner of doubt that the Special Public Prosecutor under the Act should not deal with other cases.

... 8. There is a salutary reason for appointing Public Prosecutors exclusively for POCSO cases. Public Prosecutors must be trained to deal with child victims and child witnesses. They need to understand the psychology of children. They need to empathise with children. They need to know how to bring out the truth from children who are victims of sexual abuse and have to undergo the trauma again while recounting the traumatic experience.

9. The job assigned to the Public Prosecutor for POCSO cases is a very onerous one which must be carried out with great care and sensitivity. Therefore, not only is there a need to have exclusive Public Prosecutors but there is also a need to develop a training programme where these Special Public Prosecutors should be trained to deal with issues which will arise in their courts. These issues may not be confined to legal issues which otherwise Public Prosecutors may be trained to deal with. The issues may be psychological, health and other related issues.”

The Allahabad High Court in *Kusehrideen and Another Vs. State of U.P. Criminal Appeal No. 335 of 2006*, dealt with a case wherein the Public Prosecutor allegedly tutored the child victim. The Court found that no part of the child’s statement diminishes its evidentiary value, and held that, “Had she not been a child witness it might have mattered but due to her tender age the public prosecutor had a right to ensure that the witness he was going to examine had sufficient understanding or not, whether she had seen the occurrence or not. A child may

not understand the technicalities of law. Whatever she was asked she replied that before the Court. Her statement reveals that she had actually seen the occurrence. We found her to be a truthful witness.”

The Delhi High Court in *Sudesh Jhaku Vs. K.C.J. & Ors.*, (1996) 39 DLT 563 observed that the prosecutors need to be cautious of undervaluing a child’s feelings.

“I hope that while the child is in the witness box every effort will be made by the learned trial Judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. The Prosecutor in his zeal might undervalue the child’s feelings. There is need to keep a check on it. The defense counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and harassment of the witness. If the court notices any departure from this course of conduct, it should rise to the occasion promptly and effectively. Child sexual abuse being one of the most serious and damaging criminal offences, the trial Judge shall handle the proceedings with considerable sensitivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may be of the court room itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of trial Judge to notice it.” (Para 38)



The Court in this case also made a reference to the Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada Reaching for Solutions, 1991 and observed as follows:

“In fact that the guidelines delineated above have drawn inspiration from the said Report and as regards the child support this is what it states: "There are situations in which it is desirable to have a social worker or other friendly but "neutral" adult visible to the child, or even sitting beside a young child who is testifying. While some judges have permitted this, others have not. There have been cases where the Judge has ordered supportive persons to leave the court room, along with other members of "the public." I am leaving the matter to the good sense of the learned trial Judge. However, one thing is certain. The proceedings have to be in camera.” (Para 38)

## **Role of Lawyers in POCSO Cases**

The Right to Free Legal Aid is essential to achieve Access to Justice. Section 12(c) of the Legal Services Authorities Act, 1987 entitles every child who has to file or defend a case, to legal services. This right to free legal aid and legal assistance is reiterated in the *Proviso* to Section 40, POCSO Act, 2012 and Rule 7, POCSO Rules, 2020.

### **POCSO Act, 2012**

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.

## **POCSO Rules, 2020**

Rule 7. Legal aid and assistance.– (1) The CWC shall make a recommendation to District Legal Services Authority (hereafter referred to as “DLSA”) for legal aid and assistance.

(2) The legal aid and assistance shall be provided to the child in accordance with the provisions of the Legal Services Authorities Act, 1987 (39 of 1987)

Apart from the Special Public Prosecutor, the lawyer engaged by the Legal Services Authorities or the private lawyer engaged by the child or their family plays a critical role. The lawyer’s role encompasses not only representing the concerns of the child during trial, but also building a good rapport with the Special Public Prosecutor, who will be in charge of the trial in the Special Court.

In dealing with cases under the POCSO Act, the lawyer needs to be mindful while representing the case of children. The lawyer must provide independent representation and advice to the child, as independent from the parent/guardian, particularly in cases where the parents, family member or caregiver is the alleged offender. The lawyer must identify the relevant issues to be decided in terms of the best interests of the child and ensure that the Court has all the necessary and relevant information to determine these issues. For this purpose, the lawyer shall call for evidence wherever appropriate, including from expert witnesses, and also conduct cross-examination to ensure that the issues are explored to the fullest extent.

While the lawyer has the responsibility to put forth the views of the child before the Court, care must be taken to ensure that the information shared by the child in confidence is not revealed. The lawyer must meet with the concerned child and ensure that the views of the child are up to date before presenting them before the Court. The lawyer must also see to that the views of the child are presented through direct evidence as far possible.

During the course of trial, there may arise a situation where there is a conflict between the child's view and what is considered to be the welfare and best interests of the child. In such a situation, the lawyer must attempt to resolve the conflict by discussing the issue with the child. The lawyer may accord more weightage to child's views if the child is older. In case the conflict is unable to be resolved, the Court must be informed of the same.

Although Rule 9, POCSO Rules, 2020, provides that the Court on its own may award compensation to the child, the lawyer must not wait for the Court to take up the matter and should file the requisite applications to ensure the timely disbursal of the interim and final compensation.

At the conclusion of the trial, the lawyer must communicate and explain the judgment and its implications to the child in the manner that they understand. The lawyer must also provide information on the available recourse of appeal, if necessary, and the required steps to be taken to ensure timely implementation of the decision and disbursal of the compensation amount. The lawyer must also provide guidance to the child on the availability of additional relief under Rule 9(6), POCSO Rules, 2020, which provides that the child or their parent/guardian, or can apply for relief under any scheme of the Central or State Government.

## Pre-trial Procedures [Pre-trial Tour, Pre-trial Meeting, Trial Schedule]

The law on Pre-trial Procedures especially in those cases where children are involved is at a nascent stage in India. There is a need to carry out and incorporate principles from other criminal justice systems across the world. The pre-trial procedures necessarily revolve around the following: Trial timetable, special measures, arrangements, directions to both the advocates, question monitoring, explaining etc to be carried out by stakeholders.

It is important to note the following points as measures that can be taken to help safeguard children in the course of criminal proceedings with **Expedition, Sensitivity and Fairness**<sup>2</sup>:

- Priority fixed listing of cases involving children.
- Ground rules for monitoring questions are to be set in place according to *R v. Wills [2011] EWCA Crim 1938*
  - Tenor, tone, language and duration developmentally appropriate to child.
  - Prevent questioning that lacks relevance or is repetitive, oppressive or intimidating.
  - Be alert to possible difficulties in understanding.
- A judge is expected to be aware of the arrangements for familiarisation visit(s) to the court and memory refreshing before trial, protected access to court building, waiting room, link room or screens in courtroom, and escorts during breaks and separation arrangements when relatives are also witnesses.

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<sup>2</sup> Achieving Best Evidence in Criminal Proceedings: guidance on interviewing victims and witnesses, and guidance on using special measures: Legal Guidance, Sexual offences: <https://www.cps.gov.uk/legal-guidance/achieving-best-evidence-criminal-proceedings-guidance-interviewing-victims-and> (Accessed on 27th September 2021)

- It is important to explain to the child the need to tell the truth, and assure that, the child will not get into trouble if the child does not know the answer.
- It is important to work a formula that further encourages the child to understand the questions properly by planning frequent breaks in the session. The bonding should be created such that the faith of the child is won.

In *R. Vs. B. (G). (1990) 2 SCR 3*, the Supreme Court of Canada has observed that, “since children may see the world differently from adults, some details which may appear to be important to adults like time and place may be missing from their recollection. The court suggested that judiciary should take a common sense approach when dealing with the testimony of young children and not expect the same standards from young children as they expect from adults.”

In *Director of Public Prosecutions, Transwal Vs. Minister of Justice and Constitutional Development (2009) 4 SA 222 (CC)* it was held that, “Valuable light is shed on the impact of a court appearance on a child and the duty of the court towards child witness by a pronouncement of the Constitutional Court of South Africa. In South Africa, protection is to be given to the child complainants in giving evidence in criminal proceedings involving sexual offences to ensure the foundational constitutional values of human dignity, achievement of equality and advancement of human rights and freedoms under Section 28 (2) of the Constitution which requires that in all matters concerning a child's best interests must be of paramount importance. Further, the Criminal Law (Sexual Offences and Related Matters) Amendment Act [which effectuated the amendment to the Criminal Procedure Act (CPA)] was introduced so that protection is given to the complainants when their evidence is being recorded in criminal cases involving sexual offences.”

In *S Vs. Mokoena (563/08) [2009] ZASCA 14*, it was held that, “the child complainant was allowed to give evidence with the aid of an intermediary. The Court found emphasis on consideration of the best interests of the child ... placing reliance on the UN Guidelines when he wrote thus: “The Economic and Social Council of the United Nations has developed Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (Guidelines)...It is apparent from the CRC and the Guidelines that courts are required to apply the principle of best interests by considering how the child's rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere. [Para 30(d) and 31(b) of the Guidelines] This means that, where necessary, child witnesses should be assisted by professionals in giving their testimony in court. However, each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected. [Para 11 of the Guidelines] Children must be treated with dignity and compassion. [Para 10 of the Guidelines] In my view, these considerations should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in section 28(2) of the Constitution...Section 170A(1) was introduced into the Criminal Procedure Act to prevent a child from undergoing ‘undue mental stress or suffering’ by permitting the child to testify through an intermediary; to give evidence shielded from the accused by testifying in another room, electronic devices via CCTV or sitting behind a screen that blocks the child's view of the accused but allows the child to be seen; creating an atmosphere conducive for a child to speak freely about the events relating to the offence. It was reiterated that the statutory provision must be construed to give

effect to its object to protect child complainants from exposure to undue mental stress or suffering when they give evidence.”

### **United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005**

The United Nations Guidelines on Justice involving Child Victims and Witnesses of Crime 2005 was elaborately discussed in various cases by the Supreme Court of India. Such judge made laws are considered to be applicable at all the stages of a trial. Therefore, it is important to keep in mind these guidelines at the pre-trial procedures as well.

The main objective of this Guideline is to ‘set forth good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles’. These Guidelines aid in the understanding of the rights of the child to have his or her best interests given primary consideration in all matters concerning the child. They provide that child complainants and witnesses should receive special protection and assistance that they need in order to prevent hardship and trauma that may arise from their participation in the criminal Justice system.

The Guidelines include the right to protection and to a chance for harmonious development:

(i) **Protection** Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;

(ii) **Harmonious development** Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been

traumatized, every step should be taken to enable the child to enjoy healthy development.

In *Prem Shankar Sachhan Vs. State (1981) DLT 55 (DB) 20*, [Para 22], the court observed that, the testimony of a child witness can be “spontaneous and unsparing, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion, and given confidence to come out with what was seen...The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. Courts should also while permitting full scope for cross-examination of such witnesses is careful to see that they are not subjected to unnecessary confusion, harassment or unduly made conscious of the awe of formal court atmosphere and the public gaze.”

In *State Vs. Rahul, 2013 SCC OnLine Del 1459* the Delhi High Court, while discussing Section 118 of the Indian Evidence Act as to who may testify and the competency of a young witness to testify held as follows,

- The competency inquiry means the witness ability and willingness to tell the truth and the capacity to perceive, to recollect and to communicate the evidence.
- A common sense approach should be taken when dealing with the testimony of young children and same standards as expected from adults should not be expected from young children.
- Children have been accorded special treatment by the legislature and courts because of their special needs. The court room environment is unfamiliar and would definitely be intimidating to a child who is required to testify as a witness. The trauma if the child witness is a victim is only further aggravated.
- The first and the foremost guideline on the subject of competency testing which is mandated in every binding judicial pronouncement on the subject, is to maintain anonymity of the identity of the victim. This is the



prime requirement in ensuring the best interests of the child under all circumstances.

- The questions that the trial Judge would be required to put to the witness have to meet the requirements of law as well as the binding principles laid down in several judicial pronouncements and the authoritative texts having special regard to the age and circumstances of the person who is required to depose.
- The Judges and magistrates should always record their opinion that the child understands the duty of speaking truth.
- Not having taken oath only goes to the creditability and not the competency of the witness.
- While evaluating the testimony of a child (who is a victim as well), the circumstances which would be considered would be the tender age of the child; its demeanor; possibility of tutoring, etc.
- The court appearances impact children more drastically than they do for adults and may bring alive the trauma the child has seen, or may have experienced, of a victim, which may reduce the child into a state of terrified silence. The Judge has to step in to ensure removal of the fear and apprehensions being nursed by the child in the court.
- The guidelines laid down in judicial precedents know no exceptions and adherence is mandatory. Their application at every stage of the proceedings is essential so as to get the best evidence from the child witness.
- It is the fundamental responsibility of every court to ensure the welfare and best interest of the child which has to remain the paramount consideration under all circumstances.
- The questions which put to the child witness ought to be sensitively framed keeping in mind the socio-economic background of the child, the age as well as

the capacity of the child which the trial Judge would evaluate when the child is produced before him.

- The trial courts to carefully evaluate the questions which they put to child witnesses as well as compliance with the guidelines to minimize the secondary traumatisation of a child witness by the courtroom experience.

In *Baljeet Singh Vs. State of Delhi in Crl. A. Nos. 386, 486, 487 & 1080 of 2011*, dated 26<sup>th</sup> September 2014 it was held that, "...Section 118 of the Evidence Act aptly transpire that the evidence of a child witness has to be subjected to the closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the questions put to him and he is capable of giving rational answers...Children are the most vulnerable faction of the society and by reason of their tender age definitely are considered to be a pliable witnesses. There is no denying the fact that each child is different and possesses varied level of interests and intellect. In today's fast paced world, where children are exposed to media, one cannot doubt their cognition levels. Not every child possesses sufficient understanding of nature and the consequences of his acts, but the same cannot negate the intellect capabilities of those who can, very well grasp the state of affairs and maintain a vision of the same in their minds....One of the issues marring the growth of our country is the evil of child sexual abuse which we hear very often. The POCSO Act, 2013 was therefore formulated in order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children. There lies no iota of doubt that it takes great amount of grit and courage to distinctly explain the horrendous incident that a child is made to go through because of certain ruthless section of the society. A child however even at a tender age does possess the ability to answer the questions put to her/him spontaneously if she/he was present at the site of crime or if he/she has been a victim herself. It is even the courts duty to be sensitive towards the child as the courtroom proceedings are alien to him and it may have a more stressful and

terrifying effect which may create a fear in his mind rendering him unable to speak about the incident. It is for the court to adjudge the grasping abilities of children, their tendency to fantasise and their susceptibility to coaching, which are certain factors that need careful examination on case to case basis. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Careful evaluation of the evidence of a child witness in the background of facts of each case in context of other evidence on record is inescapable before the court decides to rely upon it.”

*Nivrutti Pandurang Kokate Vs. State of Maharashtra (2008) 12 SCC 565* categorically observes that, “...the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. ...Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

## **Interim Compensation, Rehabilitation/Relocation**

Section 33(8) of the POCSO Act, while talking about powers and procedures of the Special Court, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child. Section 40(2)(c) provides the Central Government shall make rules carrying out the purpose of the Act without prejudice to the generality of the foregoing powers to pay compensation. The preamble of the POCSO Act sets the platform for worthy standards to be followed for securing the best interest of the child.

The words 'rehabilitation' is used only three times in the POCSO Act under Sections. 33(8), 4(3) and 6(2). The word 'relocation' is not used in the POCSO Act. The POCSO Rules 2020, in Rule 4 envisage 'procedure regarding care and protection of child'. The POCSO Act is built in a fashion that 'care and protection' incorporates 'rehabilitation' and 'relocation' that is in the 'best interest of the child'.

The phrase 'best interest of the child' is a subjective phrase and is always at the mercy of the discretionary powers of the Special Court Judge. Therefore, it is important for each and every judge to consider the aspect of compensation, rehabilitation and relocation seriously.

## **Duties of a Special Judge**

- ❖ Safeguarding the 'best interest of the child'.
  - Ensure effective and speedy disposal of interim compensation.
  - Assessment regarding care and protection of child
  - Prevent Media Outrage.
  - Keeping Confidentiality of the identity of the Child.

- Ensure that child is not repeatedly called to court unnecessarily or dragged in the proceedings.

## **Disbursal of interim compensation**

The disbursal of compensation has a significant impact over the outcome of each and every case. Therefore it is important that there is no unnecessary delay in the disbursal of compensation caused as it may adversely affect the outcome of the case.

POCSO Rule 9(1) states that, the Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

POCSO Rule 9(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

The POCSO Rules also prescribes certain relevant factors relating to the loss or injury caused to the victim under Rule 9(3).

- 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 his 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;
- loss of employment as a result of the offence, including absence from place of employment 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;
- whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;
- whether the child became pregnant as a result of the offence;
- whether the child contracted a sexually transmitted disease (STD) as a result of the offence;
- whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;
- any disability suffered by the child as a result of the offence;
- financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;
- Any other factor that the Special Court may consider to be relevant.

The POCSO Rule 9(4) states that, the compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

The POCSO Rule 9(5) states that, The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

In *Bijoy Vs. State of West Bengal 2017 Cril. J. 3893* the Supreme Court held as follows, "Compensation envisaged under the aforesaid provision of law may be awarded by the Special Court at the interim stage also for immediate relief and rehabilitation of a child victim in light of the parameters laid down under Sub-Rule (3) of Rule 7 of the aforesaid Rules. Such compensation payable by the State is independent of the compensation which may be directed to be paid by the convict upon conviction in terms of Section 357(2) and (3) of the Code. The philosophy of awarding compensation by the State is in the nature of reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime. I am informed that a Victim Compensation Fund has been notified by the State under Section 357A CrPC, which, inter alia, prescribes the minimum amount of compensation that may be awarded for various offences/injuries in the following manner as set in the schedule of the notifications."

In *Delhi Domestic Working Women Forum Vs. Union of India (1995) 1 SCC 14* the Supreme Court held as follows, "Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not conviction has taken place."

In *Ankush Shivaji Gaikwad Vs. State of Maharashtra AIR 2013 SC 2454* the Supreme Court held as follows, "...unless Section 357 is read to confer an obligation on Courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision." The apex Court further held that, "...compensation is not ancillary to other sentences but is in addition to other sentences".

In *Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014 (2014) 4 SCC 786* the Supreme Court held as follows "There is a statutory duty upon the State, under Section 357A of

CrPC, to award compensation to victims of crime. A new Section 357A was introduced to the Criminal Procedure Code in order to cast a responsibility on the State Governments to formulate Schemes for compensation to the victims of crime in coordination with the Central Government. Unlike Section 357, the onus was not simply on the offender to pay the compensation, but had been put on the District Legal Service Authority or State Legal Service Authority to determine the quantum of compensation in each case.”

In *Suresh & Anr. Vs. State of Haryana (Crl) No. 420 of 2012, dated 28<sup>th</sup> November 2014* the Supreme Court held as follows “The object and purpose of the provision of Section 357A CrPC is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated.”

In *The Minor Through Guardian Zareen Vs. State (Govt of NCT of Delhi) W.P. (CRL) 798/2015, dated 21<sup>st</sup> March 2016* the Delhi High Court held that, “The definition under Section 357 (A) is very wide and would in fact even cover cases which are covered under The Protection of Children from Sexual Offences Act, 2012 but then the reading of Section 33 of the Act would show that the power has been given to the Special Court to grant compensation and there is no outer limit which has been fixed while granting the compensation.”

In *Ankush Shivaji Gaikwad Vs. State Of Maharashtra, (2013) 6 SCC 770*, the Supreme Court observed that,

- Award of compensation to victim(s) of crime or their dependants under S. 357 CrPC involves the mandatory duty of criminal court to apply its mind to question of awarding compensation in every case. The exercise of this power is not ancillary to other sentences but in addition.



- Use of word 'may' in Section 357, does not mean that court need not consider applicability of Section 357 in every criminal case.
- Section 357 CrPC confers power coupled with duty on court to mandatorily apply its mind to question of awarding compensation in every criminal case
- Court must also disclose that it has applied its mind to such question by recording reasons for awarding/refusing grant of compensation
- Power given to courts under Section 357 is intended to reassure victim that he/she is not forgotten in criminal justice system
- Very object of Section 357 would be defeated if courts choose to ignore Section 357 and do not apply their mind to question of compensation - Hence, Section 357 is to be read as imposing a mandatory duty on court to apply its mind to question of awarding compensation in every case
- Courts directed to remain careful in future as to their mandatory duty under Section 357 CrPC
- Copy of order directed to be forwarded to Registrars General of all High Courts for its circulation amongst Judges handling criminal trials and hearing criminal appeals.

In *Shri Bodhisattwa Gautam Vs. Ms. Subhra Chakraborty* 1996 AIR 922, the Supreme Court held that, "the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme. On the basis of principles set out in the aforesaid decision in Delhi Domestic Working Women's Forum, the jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape which, as pointed out above is an offence against basic human rights as also the Fundamental Right of Personal Liberty and Life."

In *State of M.P Vs. Mehtaab* (2015) 5 SCC 197, the Supreme Court held that, "the Court ought to direct grant of interim compensation, subject to final

compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the Court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.”

In *X Vs. State*, 2021 SCC OnLine Del 2061 (Para 33) the Delhi High Court held that, “to understand the legal concept of ‘compensation’ and thereby of ‘interim compensation’ by referring to the words of the Hon’ble Supreme Court in *Yadava Kumar v. National Insurance Co. Ltd.* (2010) 10 SCC 341 where, in the context of a motor accident claim, the Hon’ble Supreme Court has very pithily explained the concept of ‘compensation’ in the following words: “The High Court and the Tribunal must realise that there is a distinction between compensation and damages. The expression compensation may include a claim for damages but **compensation is more comprehensive**. Normally damages are given for an injury which is suffered, whereas **compensation stands on a slightly higher footing**. It is given for the **atonement of injury** caused and the intention behind grant of compensation is to put back the injured party as far as possible in the same position, as if the injury has not taken place, by way of grant of pecuniary relief. Thus, in the matter of computation of compensation, the **approach will be slightly more broad based** than what is done in the matter of assessment of damages. At the same time it is true that there cannot be any rigid or mathematical precision in the matter of determination of compensation.”(Emphasis supplied)”.



## Chapter IV

### Fair Trial





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## Chapter IV - Fair Trial

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### Manner of Conducting Trial

Subjecting oneself to trial is a less-than-pleasant experience even for adults, leaving one to wonder its exponential impact on children. The Criminal Procedure to be followed in POCSO cases is devised keeping in mind the sensitivity, vulnerabilities and special needs of the child. It is important that such procedure not only determine the best interests of the child, but must also be child-friendly. The child must be given solid confidence that they will secure justice. It is for this reason that the POCSO Act, 2012, under Section 28(1), provides for the establishment of the Special POCSO Courts. Extreme care and precaution must be exercised by the judicial officers and other stakeholders to ensure that the child is not subjected to any kind of trauma or intimidation, even unintentionally. Chapter VIII of the POCSO Act, 2012, vide Sections 33 to 38 provide for the child-friendly trial procedures.

#### POCSO Act, 2012

**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 Special 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 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.

The Constitution Bench of the Supreme Court in the case of *Alakh Alok Srivastava Vs. Union of India (2018) 5 SCC 651* issued the following directions for conduct of trial in POCSO cases:

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

Guidelines to followed while holding trial of child sexual abuse of rape

The Supreme Court in *Sakshi & Ors. Vs. Union of India & Ors. (2004) 5 SCC 518*, held that in holding trial of child sexual abuse or rape, the courts must comply with the following guidelines:

- i) A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
- ii) The questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
- iii) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

In *State of Punjab Vs. Gurmit Singh 1996 Cr. L J 1728 (SC)* the Supreme Court held that, trial courts should take recourse to the provisions of Section 327 (2) and (3) of CrPC liberally, and *in camera* trial of rape cases should be the rule and open trial should be conducted only in exceptional cases. The Supreme Court disapproved of any approach that casted a stigma on the character of the prosecutrix and held that no stigma should be cast against the prosecutrix for it is the accused and not the victim of the rape who is on trial in court.

“In rape cases, the court shoulders a great responsibility and thus such cases must be dealt with utmost sensitivity. In light of this, the court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the testimony of the prosecutrix. Thus, in the event the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars.



The court must ensure that the cross examination of the prosecutrix is not a means of harassing or humiliating her. The court further held that the victim of rape has already gone through a traumatic experience and if she is made to repeat the incident incessantly, in unfamiliar surroundings, she may be too ashamed/nervous/confused to speak and her silence or a confused stray sentence/remark may be wrongly seen as 'discrepancies or contradictions' in her evidence."

In the case of *Akshay Sarma Vs. State of Assam & Ors., 2016 (5) GLT 579*, it was observed as follows:

- i)** As per the mandate of law that has been pronounced by the aforesaid decisions it can be summed up that the learned trial Court as well as the Magistrate concerned should follow the few guidelines while recording the statement of child witness-
- ii)** A child friendly environment should be created prior to recording of statement of such witnesses and the witness should be at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly;
- iii)** The Court should be satisfied that a victim is not scared and he/she is able to reveal what has happened to her when she is subjected an examination during recording her evidence. The Court must ensure that the child is not concealing any portion of evidence for the reason that she was ashamed of what happened to her;
- iv)** Question should be put to the victim or the child witness which are not connected with the case to make the witness comfortable and to depose without fear and pressure;
- v)** The Trial judge may allow, if desirable, to have a social worker for other friendly independent or neutral adult to whom the child has confidence at the time of such giving testimony;

- vi)** The court should ensure that the victim should not be allowed to put any question in cross examination only to embarrass or confuse such victim of sexual abuse;
- vii)** The examination and cross-examination of the child witness should be carefully monitored by the presiding judge to avoid any such harassment or intimidation to the child witness.;
- viii)** It is the duty of the court to arrive at the truth and court have to take participatory role in the trial but not as a mere spectator in a manner so that something which is not relevant is unnecessarily brought on record. Even if the prosecutor is remiss the court can control the proceeding effectively to elicit the truth;
- ix)** The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposing. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance "bad works " or "any colloquial language" have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that those words mean to her and what is intended to be conveyed are sensitively brought out.
- x)** The court should ensure that there is no use of aggressive, sarcastic language or a grueling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustrations by any of the means offending acts which would traumatise the victim or child witness and affect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings. No humiliation of the

witness should be permitted either in the examination in chief or the cross examination.

**xi)** In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

**xii)** The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

**xiii)** The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.

The High Court of Delhi in the case of *Virender Vs. The State of NCT of Delhi Cr. A No. 121/2008, 18<sup>th</sup> September 2009*, lays down the guidelines on how to examine a child witness/victim of an offence. The judgment observed that trial courts have unrestricted powers to ascertain and discover relevant facts, which neither party can object to. It is pertinent to mention that in *State Vs. Sujeet Kumar Cr. A No. 1190/2014 dated 13<sup>th</sup> October 2014*, overturning the trial court's judgment, the Delhi High Court recognized that assessing the competency of a child witness is not easy and passed detailed guidelines on how to question a child witness. While acknowledging the specific needs of a child providing testimony and developing the guidelines for it, the Court also referred to the fact that this issue has been the focus of the United Nations and legislatures of other countries. Considering the difficulties in assessing the competence of a child witness, the Court listed out the following factors to be taken into consideration:

- the environment of court which is intended to be imposing
- presence of accused
- child's worry about being not believed while testifying
- general public getting to know about the incident
- child worrying about mixing up facts or forgetting things while testifying
- embarrassment in sharing details of the incident
- child worrying about the repercussions and retaliation by or against her/his family
- children may have different understanding from adults as to meaning of a word, lesser accuracy in terms of time, distance etc.

Further Para 50 of the aforesaid judgment states that exhaustive research has been conducted with respect to children's linguistic abilities and understanding and observed as follows:

- Young children are very literal in use of language, so it is essential to find out what they mean when they use words and not to assume that they have the same meaning as an adult would give them.
- It takes children longer to process words, so it is essential to give them time to think and respond to the question; passing during questioning can be very productive.
- Children will not say they do not understand, because they do not realize that they do not understand or because they do not want to show ignorance; they may not be aware that this is an option.
- Use one question for each idea and start the question with the main idea. For example, ask children 'did the bell ring when you were eating?' rather than asking 'when you were eating, did the bell ring?'
- Avoid jumping from one topic to another while questioning the children.
- Do not use word 'any' (anything, anyone, anywhere) as these are not specific and will tend to generate the answer 'no'; a very young child will

not know what 'anyone' means and if asked 'did you see anyone' will answer 'no'. Instead ask 'who did you see?' or 'did you see X?'

- Avoid using 'different' or 'the same' while questioning children: asking a child 'was it same as this?' is confusing for the child; by age five or six, children may be able to distinguish between 'the same' toy - meaning the actual one they played with - and a similar one, but it may take several more years to appreciate that things generally similar are regarded by adults as different.
- The word 'inside' is problematic for children: in sex abuse cases involving suspected penetration, a child may need to be asked if an object was inserted 'inside' an orifice and could also be asked how far; this is fraught with difficulties; it is essential to find out what the child understands by 'inside'. (For example, anything between the legs could be perceived as inside by the child) and the question needs to be asked in an age-appropriate way.
- Avoid using either/or questions: adults recognize that neither choice may be accurate; this is difficult for children to do
- How/why questions: in relation to 'why', this is seen by a child as requiring the child to defend herself to justify why something happened; 'why' also requires a child to be able to look at motivations, reasoning from effect back to cause, which children cannot do until about ages 7 to 10. 'How?' may require memory of concepts; 'how many times did that happen?' may require ability to recognize intention and flow of events; instead of asking 'how did he do that?' ask 'what did he do?' 'Show me what he did?'
- Leading questions are confusing for children and result in children giving incorrect responses.
- Pronouns (he, she, they) confuse children. It is better to name the person being talked about or to ask the child to do so.

The Delhi High Court in *State (NCT of Delhi) Vs. Abbas & Ors. 2019 SCC OnLine Del 11475*, relied on the Supreme Court's decision in *Ghurey Lal Vs. State of Uttar Pradesh (2008) 10 SCC 450*, and held that "It is also settled law that any acquittal order cannot be lightly interfered with by the Appellate Court, though it has wide powers to review the evidence and to come to its own conclusion. The power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused."

The Supreme Court in *State of M.P. Vs. Chaaki lal 2019 (12) SCC 326* observed as follows:

"The trial court had the opportunity of seeing and observing the demeanour of the witnesses and the views of the trial court as to the credibility of the witnesses is entitled to great weight. Unless the appreciation of evidence by the trial court was vitiated by serious error, the findings recorded by the trial court ought not to have been interfered by the High Court." (Para 21)

In the case reported in *2013 (2) SCC (Cri) 427*, the Supreme Court held that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt. This ratio has been relied on in *Anand Ramachandra Chougile Vs. Sridarari Laxman Chougala 2019 (3) SCC (cri) 309*.

## Competency of Child to Testify

### Indian Evidence Act, 1872

**Section 118. Who may testify.** — All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation .— A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

The Supreme Court in *Dattu Ramrao Sakhare Vs. State of Maharashtra (1997) 5 SCC 341*, has held that, a child witness if found competent to depose to the facts and reliable, one such evidence could be the basis of conviction. Even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend on the circumstances of each case.

In *State of Punjab Vs. Gurmit Singh 1996 Cri.LJ 1728 SC*, it was held that a conviction can be founded on the testimony of the victim alone unless there are compelling reasons for seeking corroboration. In *Tulshidas Kanolkar Vs. State of Goa (2003) 8 SCC 590* the Supreme Court held as follows:

“Non-examination of some persons per se does not corrode the vitality of the prosecution version, particularly when the prosecutrix has, notwithstanding her mental deficiencies, withstood incisive cross-examination and pointed to the appellant as the perpetrator of the crime.”  
(Para 6)

Similarly, in *Ramdas Vs. State of Maharashtra (2007) 2 SCC 170* it was observed that:

“It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there

exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony.” (Para 23)

In *Golla Yelugu Govindu Vs. State of Andhra Pradesh AIR 2008 SC 1842*, the Supreme Court held that age was not a determinative factor to adjudge competency of a witness and thus a young child could testify if he/she had the intellectual capacity to answer the questions posed to him/her. In *State of Himachal Pradesh Vs. Sanjay Kumar, (2017) 2 SCC 51*, the Supreme Court held that the deposition of the prosecutrix should be taken as a whole since the victim of rape is not an accomplice to the offence. As a result, her evidence can be acted upon without corroboration as she stands at a higher pedestal than an injured witness does. In light of this, minor contradictions between the testimonies of the prosecutrix and other material witnesses, when other material facts of the incident are in sync, are not relevant and courts should not focus on the same.

Relying on *Panchhi Vs. State of U.P. (1998) 7 SCC 177*, the Supreme Court in *Yogesh Singh Vs. Mahabeer Singh (2017) 11 SCC 195*, held that:

“it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.” (Para 23)

## **Circumstantial Evidence**

The Supreme Court in *State of M.P. Vs. Ramesh, (2011) 4 SCC 786* held that, “...the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the



confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.” (Para 14)

In *Hanumant Nargundkar Vs. State of Madhya Pradesh, 1952 SCR 1091*, the Supreme Court held that, “Where only circumstantial evidence is available against the accused, then the chain of circumstances must in all probability lead towards the guilt of the accused.” In *Shivaji Sahabrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793*, the Supreme Court held that, “Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

The Supreme Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra (1984) 4 SCC 116* listed the following conditions to be fulfilled before a case against an accused can be said to be fully established:

- “(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
- (3) the circumstances should be of a conclusive nature and tendency,
- (4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.” (Paras 153 & 154)

The Madras High Court in *Pattu Rajan Vs. State of T.N. (2019) 4 SCC 771* observed that:

“...the circumstances relied upon by the prosecution should be of a conclusive nature and they should be such as to exclude every other hypothesis except the one to be proved by the prosecution regarding the guilt of the accused. There must be a chain of evidence proving the circumstances so complete so as to not leave any reasonable ground for a conclusion of innocence of the accused.” (Para 31)

## Medical Evidence

In line with the established principle that the child cannot be forced to undergo medical examination, judicial precedents have also reinforced the settled principle of law that mere lack of medical evidence is not fatal to the case of the prosecution. The Supreme Court in *Moti Lal Vs. State of U.P. JT 2008 8 SCC 271* observed that even if the doctor who examined the victim does not find any sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix if it inspires confidence. Similarly, in *Hazari Paswan Vs. State (NCT of Delhi) 2016 SCC OnLine Del 4312*, the Delhi high Court held as follows:

“True, ‘X’ was not medically examined. However, it is inconsequential. Medical evidence was not required in the absence of specific allegations of penetrative sexual assault. Moreover, in ‘Dayal Singh v. State of U.P.’,

(2012) 8 SCC 263, the Supreme Court held that where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusion. Besides it, plausible explanation has been offered for it. Victim's mother was apprehensive about the painful procedure to be adopted at the time of such internal medical examination and she did not like 'X' to undergo the said trauma." (Para 9)

### **POCSO Act, 2012**

**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).

## Sentencing

Sentencing an offender to death and its execution is constitutionally approved in India in the light of the Judgments of the Supreme Court in *Bachan Singh Vs. State of Punjab* (1980) 2 SCC 684 and *Machhi Singh And Others Vs. State Of Punjab* AIR 1983 SC 957 case along with the legislative intent under Sections 354(3) & (5) of CrPC, 1973.

In *Purushottam Dashrath Borate & Anr. Vs. State Of Maharashtra* (2015) 6 SCC 652 the Supreme Court opined that, "...the punishment awarded should mirror public abhorrence of the crime. In imposition of appropriate punishment, views of criminal, victim and the society must be weighed."

In *Mahesh Vs. State of M.P* (1987) 3 SCC 80, it has been held by the Apex Court that, "undue sympathy to impose inadequate sentence would do more harm to the justice system by undermining the public confidence in the efficacy of law."

In *Sevaka Perumal Vs. State of T.N.* (1991) 3 SCC 471, and *Mofil Khan Vs. State of Jharkhand* (2015) 1 SCC 67, held that, "to give the lesser punishment for the accused would be to render the judicial system of the country suspect. If the courts do not protect the injured, the injured would then resort to private vengeance. It is therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

In *Ramnaresh & Ors v. State of Chhattisgarh* AIR 2012 (SC) (Cri) 711, the Supreme Court while determining the questions relatable to sentencing policy found that,

- (1) The Court has to apply the test to determine, if it was the rarest of rare case for imposition of a death sentence.

- (2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.
- (3) Life imprisonment is the rule and death sentence is an exception.
- (4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature, circumstances of the crime and all relevant considerations.
- (5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

In *Vasanta Sampat Dupare Vs. State of Maharashtra (2015)1SCC 253* the Supreme Court held that, “...the aggravating circumstances, namely, the extreme depravity, the barbaric manner in which the crime was committed and the fact that the victim was a helpless child of four years clearly outweigh the mitigating circumstances now brought on record.”

In *California Vs. Ramos 463 U.S. 992*, the California Supreme Court held that, “qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination and in order to ensure that the death penalty is not meted out arbitrarily or capriciously, the Court’s principal concern has to be with the procedure by which the death sentence is imposed than with the substantive factors laid before it”.

In *X Vs. State of Maharashtra, (2019) 7 SCC 1* the Supreme Court held that, “...Sentencing is appropriate allocation of criminal sanctions, which is mostly given by the judicial branch.<sup>3</sup> This process occurring at the end of a trial still has a large impact on the efficacy of a criminal justice system. It is established that

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<sup>3</sup> Nicola Padfield, Rod Morgan and Mike Maguire, “Out of Court, Out of Sight? Criminal Sanctions and No Judicial Decision-making”, *The Oxford Handbook of Criminology* (5th Edn.).

sentencing is a socio-legal process, wherein a Judge finds an appropriate punishment for the accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner.... The trial court is obligated to give reasons for the imposition of sentence, as firstly, it is a fundamental principle of natural justice that the adjudicators must provide reasons for reaching the decision and secondly, the reasons assume more importance as the liberty of the accused is subject to the aforesaid reasoning. Further, the appellate court is better enabled to assess the correctness of the quantum of punishment challenged, if the trial court has justified the same with reasons. The aforesaid principle is fortified not only by the statute under Section 235(2) CrPC but also by judicial interpretation. Any increase or decrease in the quantum of punishment than the usual levels needs to be reasoned by the trial court. However, any reasoning dependent on moral and personal opinion/notion of a Judge about an offence needs to be avoided at all costs....a Judge in India needs to keep in mind broad purposes of punishment, which are deterrence, incapacitation, rehabilitation, retribution and reparation (wherever applicable), unless particularly specified by the legislature as to the choice. The purposes identified above, marks a shift in law from crime-oriented sentencing to a holistic approach wherein the crime, criminal and victim have to be taken into consideration collectively...mitigating factors are associated with the criminal and aggravating factors are relatable to commission of the crime. These mitigating factors include considerations such as the accused's age, socio-economic condition, etc. We note that the ground claimed by accused X is arising after a long time-gap after crime and conviction. Therefore, the justification to include the same as a mitigating factor does not tie in with the equities of the case, rather the normative justification is founded in the Constitution as well as the jurisprudence of the "rarest of the rare" doctrine. It is now settled that the

death penalty can only be imposed in the rarest of the rare case which requires a consideration of the totality of circumstances. In this light, we have to assess the inclusion of post-conviction mental illness as a determining factor to disqualify as a “rarest of the rare” case.

In *State of M.P. Vs. Udham*, (2019) 10 SCC the Supreme Court, held that, “... Sentencing for crimes has to be analysed on the touchstone of three tests viz. crime test, criminal test and comparative proportionality test. Crime test involves factors like extent of planning, choice of weapon, modus of crime, disposal modus (if any), role of the accused, anti-social or abhorrent character of the crime, state of victim. Criminal test involves assessment of factors such as age of the criminal, gender of the criminal, economic conditions or social background of the criminal, motivation for crime, availability of defence, state of mind, instigation by the deceased or any one from the deceased group, adequately represented in the trial, disagreement by a Judge in the appeal process, repentance, possibility of reformation, prior criminal record (not to take pending cases) and any other relevant factor (not an exhaustive list).”

In *Patan Jamal Vali Vs. State of A.P.*, 2021 SCC OnLine SC 343 the Supreme Court held that, “...this Court has consistently laid down that we must of necessity be guided by all the relevant facts and circumstances including,

- (i) The nature and gravity of the crime;
- (ii) The circumstances surrounding the commission of the sexual assault;
- (iii) The position of the person on whom the sexual assault is committed;
- (iv) The role of the accused in relation to the person violated; and
- (v) The possibility of the rehabilitation of the offender.

The above factors are relevant for the determination of the quantum of punishment as held in *Ravji Vs. State of Rajasthan AIR 1996 SC 787*, *State of Karnataka Vs. Krishnappa 2000 Cri. L. J 1793 (SC)*, and *State of Punjab Vs. Prem Sagar (2008) 7 SCC 550*.

In *Rajendra Pralhadrao Wasnik Vs. State of Maharashtra, (2019) 12 SCC 460* the Supreme Court held that, "Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. ...The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible."

In *Union of India Vs. V. Sriharan, (2016) 7 SCC 1* the Supreme Court held that, "...The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate ...When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to



take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.”(Emphasis supplied) ...It cannot also be said that by stating so, the Court has carved out a new punishment. What all it seeks to declare by stating so was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed.”

In *Dattatraya Vs. State of Maharashtra*, 2019 SCC OnLine SC 1181 at page 317 the Supreme Court held that, “Section 235(2) CrPC is not a mere formality. It is obligatory on the part of the learned trial Judge to hear the accused on the question of sentence and deal with it.<sup>4</sup> ... proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances — extenuating or aggravating — of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. ... In *Mohinder Singh Vs. State of Punjab*<sup>5</sup> this Court held ... “The doctrine of “rarest of rare” confines two

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<sup>4</sup> *Santa Singh Vs. State of Punjab*, (1976) 4 SCC 190

<sup>5</sup> *Mohinder Singh Vs. State of Punjab*, (2013) 3 SCC 294

aspects and only when both the aspects are satisfied the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of “rarest of rare” and secondly, when the alternative option is unquestionably foreclosed. *Bachan Singh*<sup>6</sup> suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose. ... Therefore, for satisfying the second aspect to the “rarest of rare” doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.”

### **Disbursal Of Victim Compensation**

The general legal provision relating to payment of compensation to victims of crime is section 357A of CrPC. Since the law refers to Section 357A, CrPC, the Special POCSO Courts and the Juvenile Justice Boards forwarded the applications for interim compensation to the SLSA/DLSA, rather than using their powers under Section 33(8), POCSO Act, 2012 and Rule 9, POCSO Rules, 2020. Further, the Courts tended to limit the quantum of compensation to that prescribed under the State Compensation Schemes. The Delhi High Court clarified on the matter in the case of *The Minor Through Guardian Zareen Vs. State (Government of NCT Delhi)* [W.P. (Crl) 798/2015, dated 21.03.2016] and held that:

“The definition under Section 357 (A) is very wide and would in fact even cover cases which are covered under the POCSO Act, 2012 but then the reading of Section 33 of the Act would show that the power has been given to the Special Court to grant compensation and there is no outer limit which has been fixed while granting the compensation.”

The Calcutta High Court in *Bijoy Vs. State of West Bengal*, 2017 Cril.J. 3893 held as follows:

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<sup>6</sup> Bachan Singh Vs. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580

“Compensation envisaged under the aforesaid provision of law may be awarded by the Special Court at the interim stage also for immediate relief and rehabilitation of a child victim in light of the parameters laid down under Sub-Rule (3) of Rule 7 of the aforesaid Rules. Such compensation payable by the State is independent of the compensation which may be directed to be paid by the convict upon conviction in terms of Section 357(2) and (3) of the Code. The philosophy of awarding compensation by the State is in the nature of reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime. I am informed that a Victim Compensation Fund has been notified by the State under Section 357A CrPC, which, inter alia, prescribes the minimum amount of compensation that may be awarded for various offences/injuries in the following manner as set in the schedule of the notifications.

The Victim Compensation Fund is the vehicle through which the compensation may be paid by the State Government, and in no way limits the powers of the Special Court in determining the amount of compensation. The obligation of the State Government to make such payment is absolute; if no Victim Compensation Fund or other scheme exists, such compensation is payable by the State Government. Payment of compensation under the POCSO Act should not deny the child victim from claiming entitlement under any other scheme.” (Para 34)

The Delhi High Court in *X Vs. State & Ors. 2021 SCC OnLine Del 2061* deliberated on the relevant factors to be considered in determining the compensation amount. The Court referred to Section 357A of CrPC, Section 33(8) of POCSO Act, 2012, Rule 9 of POCSO Rule, 2020, the Order of the Supreme Court in *Nipun Saxena* dated 5<sup>th</sup> September 2018, and the Delhi Victim Compensation Scheme, 2018.

“Insofar as the State of Delhi is concerned, if a victim applies for compensation to the DLSA or DSLSA, the concerned authority is required to assess and pay compensation under and in accordance with the DVC Scheme 2018; however, if a victim applies for compensation under section 33(8) before the special POCSO court, the DVC Scheme 2018 is not binding but serves merely as a ‘guideline’ for the court to assess and pay compensation, whether at the interim or final stage. This position is in conformity with the mandate of the Hon'ble Supreme Court in Nipun Saxena (supra);

Furthermore, under Rule 9(2), the court, on its own or on an application filed by the victim, is also empowered to recommend the award of compensation, whether the accused is convicted or even acquitted or discharged or remains untraced or unidentified, if in the opinion of the court, the victim has suffered loss or injury as a result of the offence;

There should be no confusion that a decision made by the court, whether as a ‘recommendation’, ‘order’ or ‘direction’, would be binding on the legal service authority, subject only to the court leaving the discretion to quantify the compensation payable to the authority or otherwise, depending upon what is said in the decision.”

The POCSO Judge is empowered under Section 33(8) of the Act to direct the payment of interim compensation and final compensation to the child for any physical or mental trauma caused to them or for immediate rehabilitation of the child. Such direction is in addition to the award of punishment. Rules 8 and 9 of the POCSO Rules, 2020 provide for the manner of granting such relief and the relevant criteria to be considered.

## POCSO Rules, 2020

**8. 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 section 105 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.

**9. Compensation.**— (1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

- (i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;
- (ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical or mental health or on both;
- (iii) 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;
- (iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
- (v) the relationship of the child to the offender, if any;
- (vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;
- (vii) whether the child became pregnant as a result of the offence;

- (viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;
- (ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;
- (x) any disability suffered by the child as a result of the offence;
- (xi) financial condition of the child against whom the offence has been committed so as to determine such child's need for rehabilitation;
- (xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure, 1973 or any other law for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government.

*In Nipun Saxena Vs. Union of India, (2019) 13 SCC 715* The Supreme Court held that, "The NALSA's Compensation Scheme should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 until the Rules are finalized by the Central Government...the legislation is gender neutral and, therefore, the Guidelines will be applicable to all children." The scheme and guidelines became operational on October 2, 2018.

It is not essential that the accused be convicted in order to award compensation to the victim. The Special Court can award compensation as long as the child has suffered loss or injury as a result of the offence. Compensation can be granted in cases where the accused is acquitted and even in cases where the accused is not traceable or identifiable.

## Medical Termination Of Pregnancy Of Child Victim

The Madras High Court in *S. Kurshith Vs. Dean, Chengalpattu Medical College Hospital* [2021 SCC OnLine Mad 697], allowed the termination of pregnancy of a 16-year-old victim of offence under Sections 4 and 6 of the POCSO Act, 2012. In this case, the child was seven weeks pregnant at the time of filing the Writ Petition, and was studying in 10<sup>th</sup> standard. A case had already been registered under the POCSO Act as well as under various sections of IPC. The Court sought for a medical report on the feasibility of terminating the pregnancy of the child. The report recommended early termination of pregnancy. Based on the medical report, and considering the fact that continuation of pregnancy would cause physical and mental trauma to the child, the Court permitted the medical termination of pregnancy in accordance with Section 3(2) of the Medical Termination of Pregnancy Act, 1971.

The Court relied on the decision of the Kerala High Court in a similar case *XXX Vs. Union of India*, 2021 SCC OnLine Ker 18, wherein the medical termination of pregnancy of a minor victim of rape was permitted on basis of the medical report, after relying upon the decisions in *ABC Vs. Union of India* (2020) 4 KLT 279, *Ms. X Vs. State of Kerala* (2016) 4 KLT 745, *A Vs. Union of India* (2018) 14 SCC 75, *Murugan Nayakkar Vs. Union of India* 2017 SCC OnLine SC 1092, *Sarmishtha Chakraborty Vs. Union of India* (2018) 13 SCC 339. Reference was also made to the Orders of the Madras High Court in *X v. State of Tamil Nadu* CrI.O.P. 14506 of 2019 dated 19.06.2019 and *Mahalakshmi v. District Collector* W.P.(MD). No. 659 of 2021 dated 19.01.2021 wherein also medical termination of pregnancy was permitted based on the recommendation in the medical report.

In *Marimuthu Vs. Inspector of Police* 2016 SCC OnLine Mad 10175, the Madras High court dealt with a question whether the parents can seek medical termination of pregnancy of their minor daughter against her consent. In this case the minor girl

was aged 17-years, and had testified that the sexual intercourse was consensual and that she was willing to carry the pregnancy to term and did not want to abort it. It was brought to the notice of the Court that the minor girl had entered into marriage with her partner who was also aged 17-years. The Court deliberated on Section 4(2), Medical Termination of Pregnancy Act, 1971, and held as follows- “Whether the foetus carried is a pain or pleasure is the subjective opinion of the minor girl and the girl has formed an opinion that it is the total delight, when India has ratified the conventions on the rights of the Child and when the consent of the victim girl cannot be dispensed with while aborting pregnancy, this Court has no option except to decline permission to terminate pregnancy, leaving it open the question, who is to bear the cost?”

In *R. Parimala Vs. Dean, Thanjavur Medical College and Hospital & Ors.* 2020 SCC OnLine Mad 1504, the Madras High Court dealt with the request of medical termination of pregnancy of a 15-year-old victim of penetrative sexual assault, whose gestation period was at 25 weeks, which was beyond the time limit prescribed under the MTP Act, 1971. The Court referred to the decisions of the Supreme Court in *Z Vs. State of Bihar* (2018) 11 SCC 572, *X Vs. Union of India* (2016) 14 SCC 382 and *X Vs. Union of India* (2017) 3 SCC 458, wherein the Court had allowed the termination of pregnancy- even though the length of pregnancy exceeds the statutory limit- if there are compelling reasons. Based on the medical report and considering that the continuation of pregnancy would affect the child victim’s education, the Court permitted the termination of pregnancy, without any further delay.

The Allahabad High Court in *X Vs. State of U.P. MISC. BENCH No. - 19689 of 2021, dated 14.09.2021*, permitted the medical termination of pregnancy of a 14-year-old victim of rape, whose gestation was at 20 weeks and 3 days. The Court, considering the factor that the child’s father had passed away and that her mother was mentally unsound, directed that the State Government shall bear the



expenses for all the medical facilities required for getting the pregnancy terminated and for any other treatment thereafter. The Court further directed that the doctors performing the termination procedure shall act with utmost sensitivity, and that since it relates to a crime, the tissues from the foetus shall be preserved.

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## **ASIAN CONVENTIONS & DECLARATIONS**

- \* SAARC convention on Preventing and Combating Trafficking in Women and Children for prostitution*
  - \*SAARC convention on Regional Arrangements for the promotion of child welfare in South Asia*
  - \* Declaration on the Commitments for children in ASEAN*
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## **Chapter V**

### **Conclusion**





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## Chapter V - Conclusion

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This material is prepared for the benefit of the stakeholders who are supposed to keep the 'best interest of the child' in mind. The stakeholders have to keep the spirit of the POCSO Act alive in our society. It is imperative that we keep in mind that, children are very important for maintaining the balance of inter-generational equity in India.

As stakeholders from different realms of the society we are also responsible to hold the doctrine of 'Child's Trust' in place. There is an accountable concern of *parens patrie* cast upon us to keep the children close to their toys rather than bringing them close to gray shades of our society.

This material has endeavoured to throw light on laws dealing with Child victims and need for preventive measures and actions plans in the roles played by various stakeholders. The role played by police, by magistrates, and by prosecutors to ensure effective prosecution, trial and compensation is the essence of the POCSO Act.

The 'best interest of the child' has to be served in both letter and spirit by according appropriate care and protection for the child. A proactive stakeholder will coordinate with other stakeholders to ensure protection of the child and secure justice to the child.



## Programme Schedule

### TAMIL NADU STATE JUDICIAL ACADEMY

In association with

**UNICEF**

#### *Experience Sharing and Review Meeting*

*(for POCSO Judges, JJB Magistrates, Special Public Prosecutors, Police Officials and Legal-cum-Probation Officers)*

*On 03.10.2021 at TNSJA, Headquarters, Chennai*

*On 10.10.2021 at TNSJA Regional Centre, Madurai*

*On 17.10.2021 at TNSJA Regional Centre, Coimbatore*

10.00 a.m. – 10.05 a.m.	<b>Welcome Address</b>
10.05 a.m. – 10.15 a.m.	<b>Introductory Address</b>
10.15 a.m. – 11.00 a.m.	<b>Effective and Speedy Disbursal of Victim Compensation Fund</b>
11.00 a.m. – 11.15 a.m.	<b>Tea Break</b>
11.15 a.m. – 01.00 p.m.	<b>Sharing of experiences and best practices</b> <b>Moderator:</b> Mr. D. LINGESWARAN, Director, TNSJA <b>Speakers:</b> <ul style="list-style-type: none"> <li>a) Police Officers in the cadre of ADSP (Crime against Women and Children)</li> <li>b) Special Public Prosecutors</li> <li>c) Presiding Officers of POCSO Court</li> </ul>
01.00 p.m. – 02.00 p.m.	<b>Lunch Break</b>
02.00 p.m. – 03.30 p.m.	<b>Proper Investigation, Effective Prosecution and Fair Trial in cases under POCSO Act, 2012</b> <b>Mr. E.V.CHANDRU @ E. CHANDRASEKARAN</b> , Advocate, High Court of Madras
03.30 p.m. – 03.45 p.m.	<b>Tea Break</b>
03.45 p.m. – 05.00 p.m.	<b>Open House Discussion on “The importance of background study of the Victim and Accused under POCSO cases”</b> <b>Moderators:</b> <b>Mr. D. LINGESWARAN</b> , Director, TNSJA <b>Mr. E.V.CHANDRU @ E. CHANDRASEKARAN</b> , Advocate, High Court of Madras
05.00 p.m.	<b>Vote of Thanks</b>



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## MAKE ME NOT A LINA MEDINA

My Doors are open  
I am out and seeing  
A preying neighbour,  
A Wandering Watchman,  
A Racing Biker and  
A School Van Driver

Tell me God!  
Who Plays Demon today?

The Class is full-but  
I am the one;  
The Teacher's Pet  
He Curls my hair and  
Cuddles me often;  
Is that right?

Tell me God!  
Who do I Trust?

Back on Streets,  
I reached his Shop  
Jumping in joy,  
Paid for a Choco;  
He gave me two and  
A smile too

Tell me God!  
Is he just grooming?  
Returned to the Flat  
Tossed away the Bag,  
Called out Mom,  
Mom is not Home.  
Dad is on Weed,  
Room full of smoke  
I search in fear!

Tell me God!  
Where did you hide?  
The Dancing Demon;  
Is it in my Home?

....Lee



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