

## PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012



STUDY MATERIAL  
AUGUST 2021



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August 2021



**Prepared by:** D. Lingeswaran, Director,  
Tamil Nadu State Judicial Academy  
Jithin George Jackson K.  
Thejaswini Srikanth  
Indulekha K.  
Research Assistants, Tamil Nadu State Judicial Academy

No.30/95, P.S.K.R. Salai, R.A. Puram, Chennai – 600 028  
Phone Nos. 044– 24958595 / 96 / 97 / 98  
Fax: (044) 24958595  
Website: [www.tnsja.tn.gov.in](http://www.tnsja.tn.gov.in)  
E-Mail: [tnsja.tn@nic.in](mailto:tnsja.tn@nic.in) / [tnsja.tn@gmail.com](mailto:tnsja.tn@gmail.com)

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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 the two-day Training Programme scheduled for 21.08.2021 and 22.08.2021, in association with UNICEF, for the Special Judges manning the POCSO Courts, the Principal Magistrates of the Juvenile Justice Board, the Presiding Officers of Special Court for trial of cases under SC/ST (PoA) Act and District Judges, to sensitize them on the Scope, Object and Special Procedures prescribed in the Protection of Children from Sexual Offences Act, 2012 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

This publication is aimed at ensuring uniformity and certainty in the decision-making process in cases relating to Child Sexual Abuse. We hope that this Study Material would be useful for the Judges who preside over the Special Courts established under the Protection of Children from Sexual Offences Act, 2012 and the Mahila Courts.

TNSJA records its appreciation and heartfelt gratitude to UNICEF for sponsoring and extending its support in organising the two-day Training Programme.

21<sup>st</sup> August, 2021

Director

Chennai – 600028

Tamil Nadu State Judicial Academy

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## 2. Introduction to POCSO Act, 2012

The Protection of Children from Sexual Offences Act, 2012 was brought into force on 14<sup>th</sup> November, 2012 with the objective to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child at every stage of the judicial process. The POCSO Act has become more relevant today, with sexual offences against children still on the rise.

### **Preamble to the POCSO Act, 2012**

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

Whereas clause (3) of Article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

And whereas, the Government of India has acceded on 11-12-1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

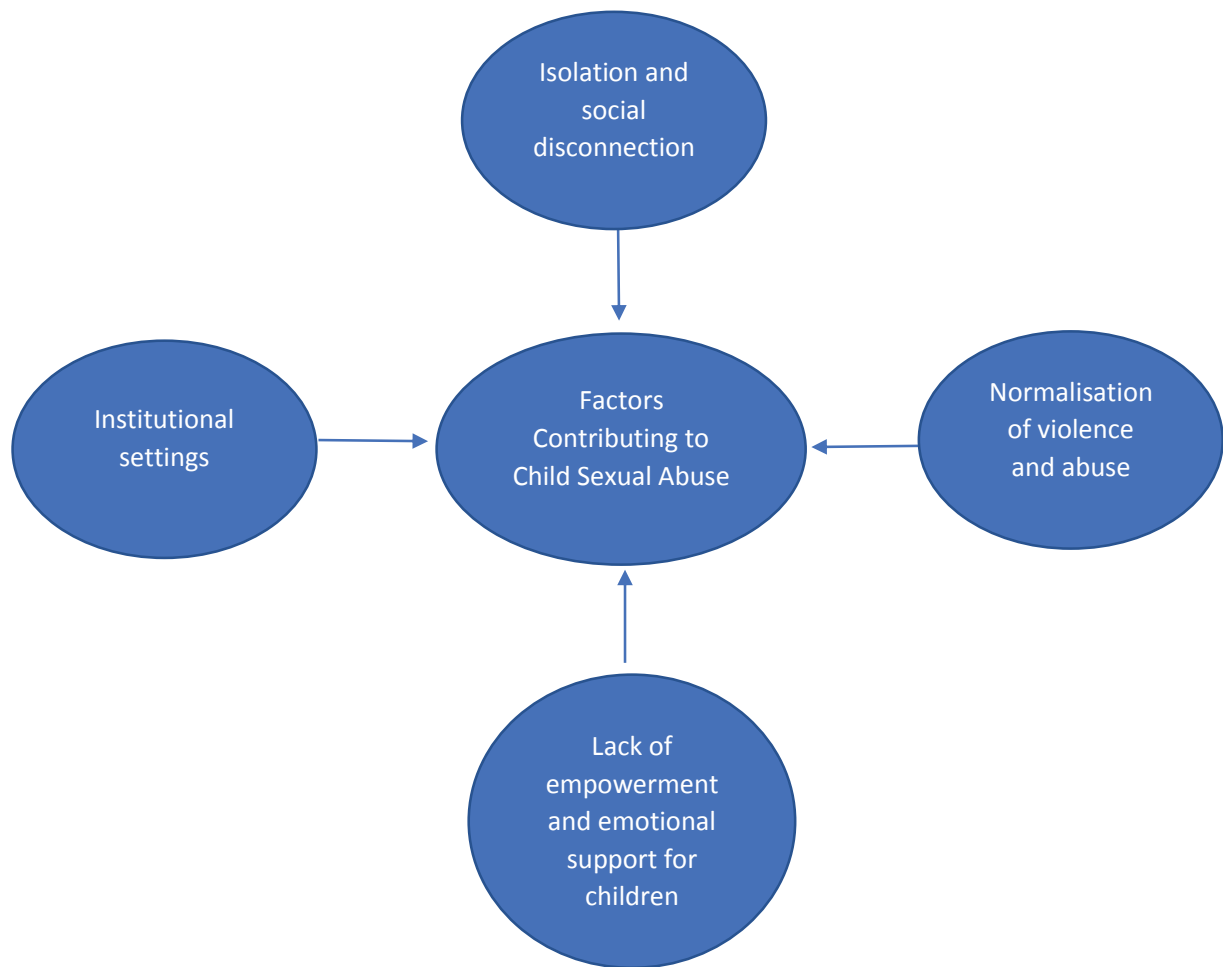
And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

And whereas it is imperative that the law operates in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

And whereas the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent—

- (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) the exploitative use of children in prostitution or other unlawful sexual practices;
- (c) the exploitative use of children in pornographic performances and materials;

And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.



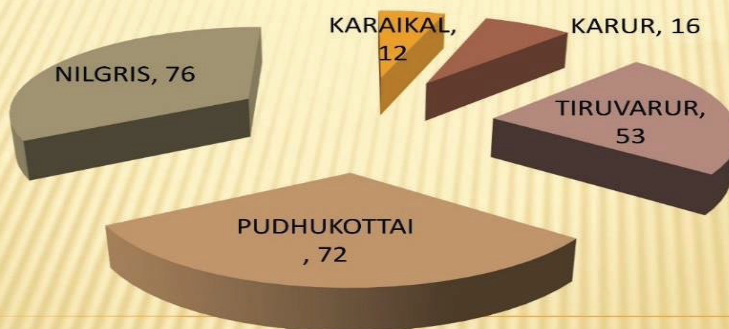
**SAY NO TO BAD TOUCH**



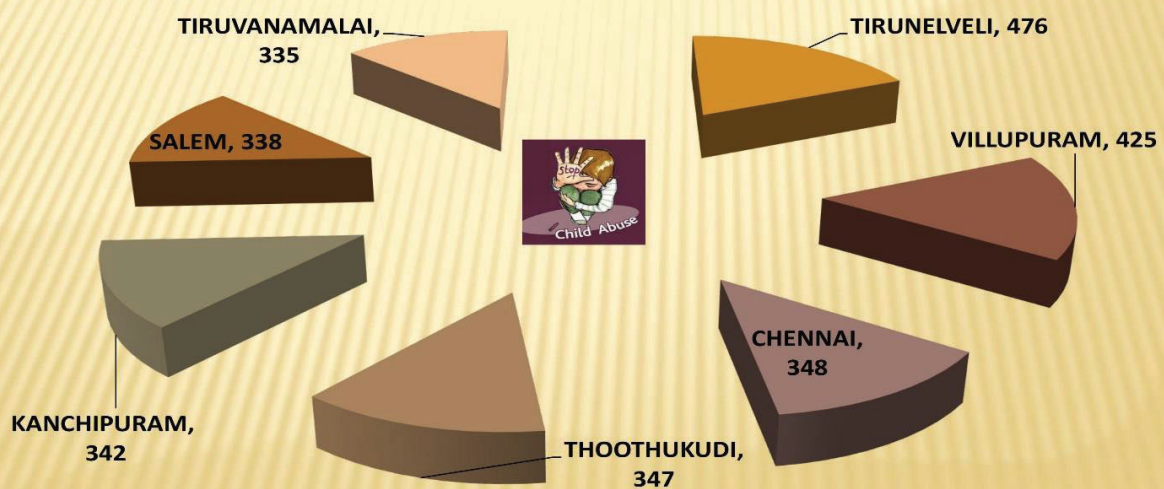
### 3. Statistics on POCSO Cases

#### 3.1. Data from Special POCSO Courts, as on 10.08.2021

##### DISTRICTS WITH LEAST NO. OF POCSO CASES PENDING IN COURT



##### DISTRICTS WITH HIGHEST NO. OF POCSO CASES PENDING IN COURT

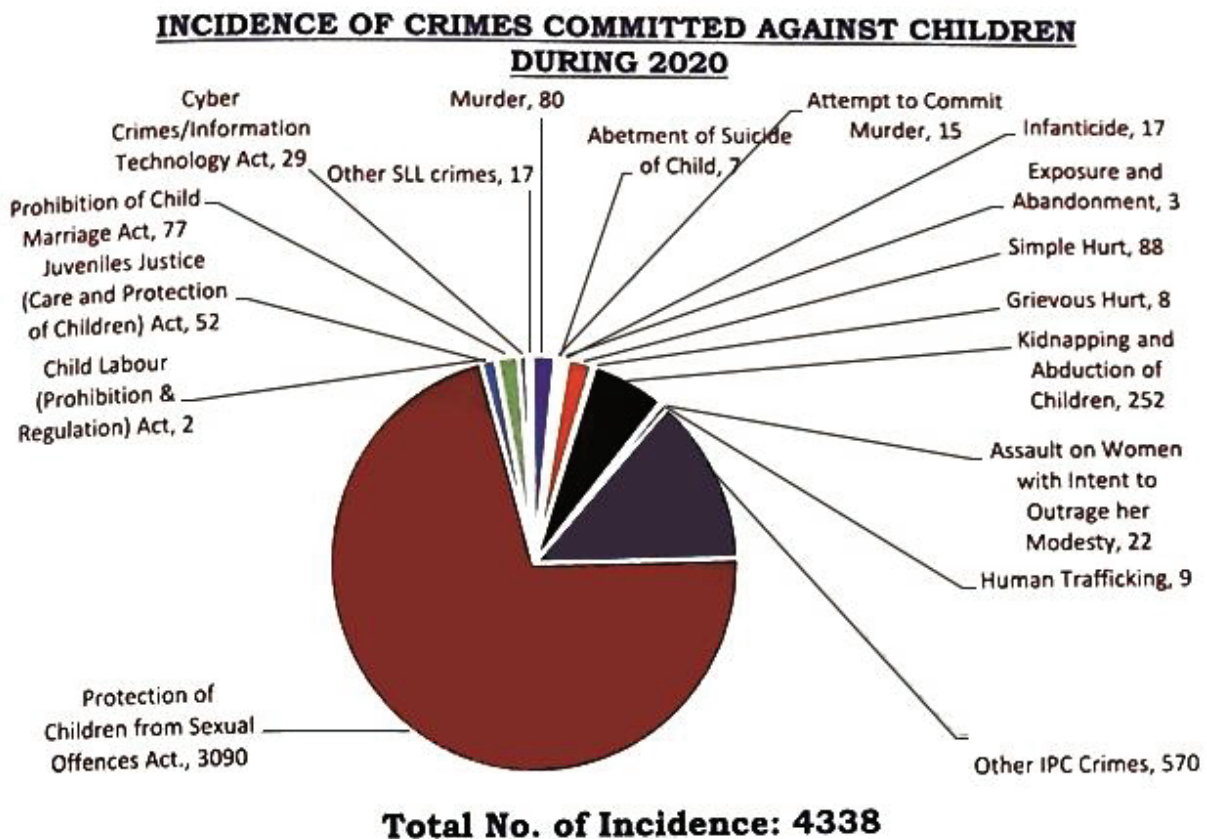


Total number of POCSO cases pending in Tamil Nadu: 6770

Total number of POCSO cases pending at FIR stage: 3483

### 3.2. Data from Tamil Nadu Crime Review 2020

POCSO cases are the most significant part of Crimes against Children, with an 17.5% increase in number of cases. This accounted for 3,090 cases (71.2%). Highest number of cases were reported in Chennai City (236) followed by Thoothukudi (125) and Madurai (123).



2,229 cases were reported under the head of POCSO Rape, contributing thereby, 51.4% of the total incidence of Crimes against Children. Highest incidence was reported in Thoothukudi (155 cases) followed by Kallakurichi (92 cases), Theni and Perambalur (each 81 cases), Cuddalore (79 cases) and Chengalpattu (75 cases). No case was reported in Salem City, Tiruppur City and Ranipet.



861 cases were reported under the head of 'POCSO Others', contributing thereby 19.8% of the total incidence of crime against children. Highest incidence was reported in Chennai (81) followed by Madurai (50), Ramanathapuram (41), Kanniyakumari (40), Erode (36), Thoothukudi (33), Theni (31), Madurai City (29), Cuddalore and Dindigul (each 28), Thirunelveli and Thenkasi (each 25), Coimbatore City (23), Coimbatore (21), Nagapattinam (20), Salem City and Tiruppur (each 19), Nilgiris, Pudukottai and Thiruvallur (each 18), Salem (16), Thiruvarur, Trichy and Thirupattur (each 15) and Chengalpattu (14).



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## 4. POCSO Act, 2012 and Other Legislations

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The POCSO Act interplays with other legislations which pertain to the overall well-being of the child. It is pertinent to note that POCSO Act is a special legislation enacted with the objective to protect children from sexual abuse. Therefore, by virtue of Section 42-A, the provisions of the POCSO Act shall be construed as being in addition to and not in derogation of any other law.

### 4.1. Overriding Effect of POCSO Act, 2012

The Special Court designated under the POCSO Act will have jurisdiction to try offences under the POCSO Act and other offences under other Acts with which the accused may be charged, at the same trial.

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

The Supreme Court in this case, read down Section 375, Exception 2, IPC, to resolve the anomaly between Section 375, IPC and POCSO Act, 2012 (Sections 5 and 41, 42). Marriage with victim does not absolve the accused of his crime. "There is no real or material difference between the definition of "rape" in the terms of Section 375 IPC and "penetrative sexual assault" in the terms of Section 3 of the POCSO Act. ... Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of IPC—the end result is the same and only the forum of trial changes. The consequence of this amendment [insertion of Section 42-A vide 2013 Amendment] is that the provisions of the POCSO Act will override the provisions of any other law (including IPC) to the extent of any inconsistency. (paras 48 & 49)

#### **4.2. POCSO Act, 2012 and Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**

Where the accused has been charged under the SC/ST (PoA) Act along with the POCSO Act, the matter will be tried by the Special Court under the POCSO Act and not the Special Court under the SC/ST (PoA) Act.

In the matter of: Registrar (Judicial), High Court, (2017) 4 CTC 371

If the act of the accused is an offence under the POCSO Act and also an offence under the SC & ST Act, the Special Court under the POCSO Act alone shall have jurisdiction to exercise all the powers including the power to remand the accused under Section 167 of the Code, to take cognizance of the offences either on a police report or on a private complaint and to try the offender. The said Special Court shall have jurisdiction to grant all the reliefs to the victim for which the victim is entitled to under the SC & ST Act. (para 55)

Sunita Gandharva v. State of MP, 2020 SCC OnLine MP 2193

The Patna High Court in the case of Guddu Kumar Yadav v. State of Bihar in Criminal Miscellaneous Case No. 52792/2019 after consideration held that in case of order of grant or refusal of bail to an accused booked under both the provisions of POCSO Act as well as Atrocities Act will be tried by Special Judge, POCSO Act and no appeal would lie against the order of grant or refusal of bail under Section 14-A (2) of Atrocities Act. Bail in terms of Section 439 of Cr.P.C. will be maintainable.

#### **4.3. POCSO Act, 2012 and Juvenile Justice (Care and Protection of Children) Act, 2015**

Both the POCSO Act, 2012 and the Juvenile Justice Act, 2015 [JJ Act] ensures the protection of children and their rights in India. While the POCSO Act shields children from various acts of sexual abuse, the JJ Act provides for the care and protection of children including those who are in conflict with the law. This segment focuses on

the method of determination of the age of a child who can either be a victim or an accused.

### **POCSO Act**

**Section 34. Procedure in case of commission of offence by child and determination of age by Special Court.**— 1) Where any offence under this act is committed by a child, such child shall be dealt with under the provisions of Juvenile Justice (Care & Protection) Act, 2015

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

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

### **Juvenile Justice (Care and Protection of Children) Act, 2015**

**Section 94. Presumption and determination of age—**

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.



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

The Supreme Court held that this process should be applied to determine the age of a child victim as well. Jurisdiction of Special Court turns on the age of victim child. It does not matter whether victim belongs to SC or ST category and the offence also comes under The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, if he or she is a child under 18 years of age. The power of age determination has therefore been vested in the Special Court under Section 34 of the Act. Section 34(3), POCSO Act, clarifies that the Special Court's order will not be rendered invalid, if subsequent proof emerges that the age was not correct.

Ashwani Kumar Saxena v. State of M.P., (2012) 9 SCC 750

The Supreme Court held that, "Once the court, following the above-mentioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination. (para 33)

But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.

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

The Supreme Court held that, Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same

yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.

State (NCT of Delhi) Vs. Pankaj Choudhary, (2019) 11 SCC 575

Age of consent, as per law, is the age at which a girl may be legally considered mature enough to give consent for sexual activity, especially sexual intercourse. It is presumed that a person is incapable of consenting to sexual activity below the age of consent. Therefore, any sexual activity before this age is equated to statutory rape. All sexual activity under the age of consent is sexual assault.

Sabari v. Inspector of Police, 2019 (3) MLJ CrI 110

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 v. State, CrI.O.P.No.232 of 2021, Madras High Court, dated 27.01.2021

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."

## 5. Procedure and Powers of Special Courts

Chapter VIII of the POCSO Act deals with the procedure and powers of the Special Courts and the procedure for recording evidence of the child victim. Section 33 falling under Chapter VIII provides for various safeguards at the trial stage and ensures that the interests of the child are protected. This segment discusses the various procedural aspects such as the impact of delay in registration of FIR, power to grant bail including anticipatory bail, and the powers of the Presiding Officer to supervise the investigation in a POCSO case.

**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.

Alakh Alok Srivastava v. Union of India, (2018) 5 SCC 651

The Constitution Bench of the Hon'ble Supreme Court of India issued following directions for overcoming the existing pitfalls.

- (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.

### **5.1. Delay in Registration of FIR**

Ramdas v. State of Maharashtra, (2007) 2 SCC 170

"...mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact."

Tulshidas Kanolkar v. State of Goa, (2003) 8 SCC 590

Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. (para 5)

State of H.P. v. Gian Chand, (2001) 6 SCC 71

Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case. (para 12)

## 5.2. Grant of Bail and Anticipatory Bail

The provisions under Cr.P.C. pertaining to grant of bail would apply even to cases under the POCSO Act, 2012, vide Section 31 therein.

The Additional Registrar General, Madurai Bench of Madras High Court, Madurai Criminal Reference (MD). No.2 of 2020, dated 30.09.2020

"(i) The Special Court designated under Section 28 of the POCSO Act alone is empowered to exercise power under Section 438 of Cr.P.C., in view of Section 31 of the POCSO Act, and the Sessions Court cannot entertain any application seeking pre-arrest bail in respect of offences under the POCSO Act.

(ii) Even in cases where pre-arrest bail is sought before registering the First Information Report, only the Special Court designated under the POCSO Act can entertain the application and the regular Sessions Court cannot exercise its power under Section 438 of Cr.P.C."

Aparna Bhat v. State of Madhya Pradesh, 2021 SCC OnLine SC 230

Following directions were laid down to be followed while granting bail.

(a) Bail conditions should not mandate, require or permit contact between the accused and the victim. Such conditions should seek to protect the complainant from any further harassment by the accused;

(b) Where circumstances exist for the court to believe that there might be a potential threat of harassment of the victim, or upon apprehension expressed, after calling for reports from the police, the nature of protection shall be separately considered and appropriate order made, in addition to a direction to the accused not to make any contact with the victim;

(c) In all cases where bail is granted, the complainant should immediately be informed that the accused has been granted bail and copy of the bail order made over to him/her within two days;

(d) Bail conditions and orders should avoid reflecting stereotypical or patriarchal notions about women and their place in society, and must strictly be in accordance with the requirements of the Cr.P.C. In other words, discussion about the dress, behavior, or past “conduct” or “morals” of the prosecutrix, should not enter the verdict granting bail;

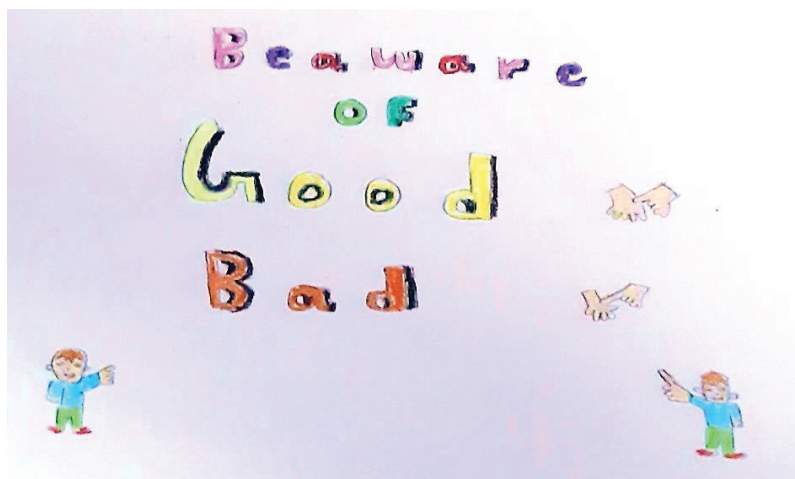
(e) The courts while adjudicating cases involving gender related crimes, should not suggest or entertain any notions (or encourage any steps) towards compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;

(f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and

(g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court.

P.G. Sam Infant Jones v. State, 2021 SCC OnLine Mad 2241

In a case where the Petitioner had shared the offending material with his friend through Facebook messenger, the High Court of Madras granted anticipatory bail for for offences under Sec.15(1), POCSO Act, and Sec.67B, Information Technology Act, 2000.



### 5.3. 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.

#### Sakiri Vasu v. State of UP, (2008) 2 SCC 409

"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 submission 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 v. J.A.C. Saldanha, (1980) 1 SCC 554." (para 16)

#### Vinubhai Haribhai Malaviya & Ors. v. State of Gujarat, 2019 SCC Online 1346

"...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)



## 6. Recording and Appreciation of Evidence of Child

### 6.1. Appreciation of Evidence of Child

The Supreme Court in *Dattu Ramrao Sakhare v. 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.

#### Section 118, Indian Evidence Act, 1872

**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.

#### State of Punjab v. 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.

#### Ramdas v. State of Maharashtra, (2007) 2 SCC 170

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)

State of Himachal Pradesh v. 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.

Golla Yelugu Govindu v. 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.

Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195

Relying on *Panchhi v. State of U.P., (1998) 7 SCC 177*, the Supreme Court 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)

State of M.P. v. Ramesh, (2011) 4 SCC 786

"...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)

Hanumant Nargundkar v. State of Madhya Pradesh, 1952 SCR 1091

"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."

Pattu Rajan v. State of T.N., (2019) 4 SCC 771

"...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)

Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793

"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."

Tulshidas Kanolkar v. State of Goa, (2003) 8 SCC 590

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)

Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116

"the following conditions must 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)

In Re: To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials [Suo Motu Writ (Crl.) No.1 Of 2017], dated 30.03.2017

The practice of omnibus marking of S.164 statement of witness deserves to be deprecated. The relevant portion of such prior statements of living persons used for contradiction or corroboration U/s.145/157 of the Evidence Act deserves to be marked separately and specifically.

## **6.2. Medical Evidence of Child Victim**

Medical examination of a child victim is to be conducted in the manner prescribed by Section 27, POCSO Act and Section 164-A, Cr.P.C. However, the child is not to be coerced to undergo such medical examination. The precedents in this segment would reiterate the settled principle of law that mere lack of medical evidence is not fatal to the case of the prosecution.

Moti Lal v. State of U.P., JT 2008 8 SCC 271

The Supreme Court reiterated the well settled principle 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.

Guidelines by Ministry of Women and Child Welfare, 2013 (WCD Guidelines)

3.3. ... "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.

Hazari Paswan v. State (NCT of Delhi), 2016 SCC OnLine Del 4312

"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)

In Re: Assessment of The Criminal Justice System in Response to Sexual Offences, 2019 SCC OnLine SC 1654

With the advancement of the DNA science and its accuracy, the sampling for the purpose of Forensic examination and expeditious reports after due examination are vital to the just adjudication of the case.

## 7. Presumption and Reverse Burden of Proof

The POCSO Act provides for two presumptions, namely, the presumption as to certain offences, (Section 29) and the presumption of culpable mental state (Section 30). Contrary to the general principle in criminal law of 'presumption of innocence' (innocent until proven guilty), the POCSO Act, being a special legislation, provides for a shift towards the 'presumption of guilt'. In *Shahid Hossain Biswas v. State of West Bengal*, (2017) 3 CALLT 243 (HC), it was held that presumption of innocence is a human right but not a fundamental right under Part III of the Constitution of India. Thus, the presumption acts as a reverse burden of proof upon the accused who is to rebut the statutory presumption. The following precedents would explicate the application of the presumption and its operation.

### POCSO Act, 2012

**Section 29. Presumption as to certain offences.**— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

**Section 30. Presumption of culpable mental state.**— (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

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

### State of Bihar v. Rajballav Prasad, (2017) 2 SCC 178

In this case, the Supreme Court held that general presumption of innocence of accused not applicable to cases where there is contrary statutory presumption of his guilt such as when prosecuted under Sections 3, 5, 7 and 9 of POCSO Act, 2012.

Prakash v. State, 2016 SCC OnLine Mad 10692

The Madras High Court held that since the fundamental fact required to raise presumption under Section 29 of the Act have been proved, the Court has to necessarily presume that the accused has committed the offence charged. Such presumption is rebuttable, although the rebuttal need not be made with the same vigour with which guilt of a person is required to be proved by the prosecution beyond all reasonable doubts. (para 19)

Joy v. State of Kerala, 2019 (2) KHC 66

The High Court held that the statutory presumption under Section 29 of the Act does not mean that the prosecution version has to be accepted as gospel truth in every case. The presumption does not mean that the court cannot take into consideration the special features of a particular case. Patent absurdities or inherent infirmities or improbabilities in the prosecution version may lead to an irresistible inference of falsehood in the prosecution case. The presumption would come into play only when the prosecution is able to bring on record facts that would form the foundation for the presumption.

Sitaram Das v. State of W.B., 2020 SCC OnLine Cal 522

"It is only on proof of foundational evidence being led, the onus gets shifted to accused to prove the contrary in order to discharge the reverse burden of proof, as contemplated in Section 29 of the POCSO Act.... It has got no direct and automatic application irrespective of the standard of evidence adduced in a particular case. The statutory presumption thus cannot be taken to be absolute. "...mere proof of medical evidence, which is nothing more than a corroborative piece of evidence, would not by itself pave the way for application of presumption available under Section 29 of the POCSO Act." (paras 33-35)

Matiur Rahaman v. State of W.B., 2021 SCC OnLine Cal 2081

The word “is prosecuted” in Section 29 of the POCSO Act does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. ...Such an interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the POCSO Act, the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. (para 20)

Swapan Mondal v. State, 2021 SCC OnLine Cal 2007

There is hardly any scope for direct application of Section 29 of the POCSO Act, even in a case where there is no foundational evidence being led by the prosecution. ... The issue was addressed by the Division Bench of this court in the case of *Subrata Biswas v. The State* reported in (2019) 3 CrI. (Cal) 331, where the ratio decided was that proof of penetrative sexual assault is *sine qua non* prior to making application of the presumption available under Section 29 of the POCSO Act. ... Section 29 has got no direct and automatic application irrespective of the standard of evidence adduced in a particular case. Thus, without proof of foundational evidence in a case under the POCSO Act, the onus to prove the reverse burden of proof does not come into operation. The statutory presumption therefore cannot be taken to be absolute. (paras 28-30)



MAJOR ABUSE REPORTED BETWEEN  
THE AGE GROUP OF 5 TO 11 YEARS.





## 8. 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.

### 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 sub-section (1).

**Section 20. Obligation of media, studio and photographic facilities to report cases.—**

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

**Section 21. Punishment for failure to report or record a case.—** (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(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.

Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546

The Supreme Court took up the issue of non-reporting of sexual offences by bystanders 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 nonreporting is most prevalent within the family, whereby adult members of the family, including the parents of the victim, don't 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.

Dr. Sr. Tessy Joe v. State of Kerala, (2019) 3 SCC CrI. 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.



**A typical Pedophile will commit  
117 sexual crimes in lifetime**

## 9. Rehabilitation and Compensation for Victims

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

Nipun Saxena v. 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.

Deo Kumar Rai v State of Sikkim, 2017 SCC Online Sikk 152

There is a mandatory duty on the special courts under Section 33(8) of POCSO Act, to apply its mind to the question of awarding compensation. The court further held that Section 7(1) of POCSO Rules, the special court can, 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.

The Minor Through Guardian Zareen v. State (Govt of NCT of Delhi), W.P.(CRL) 798/2015, dated 21.03.2016

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 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."

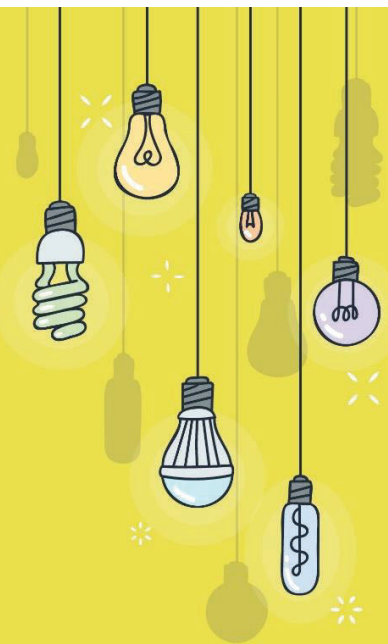
Bijoy v. State of West Bengal, 2017 Cril. J. 3893

Compensation "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." (para 34)

Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014, (2014) 4 SCC 786

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.

“ 95% of Sexual abuse is preventable through Education







# TAMIL NADU STATE JUDICIAL ACADEMY

In association with

**UNICEF**



*Professional Development Programme on  
Protection of Children from Sexual Offences Act  
and  
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*

21.08.2021 and 22.08.2021

**Day 1: 21.08.2021 (Saturday)**

10.00 a.m. – 10.05 a.m.	<b>Welcome Address</b> <b>Mr. D. LINGESWARAN</b> , Director, TNSJA
10.05 a.m. – 10.10 a.m.	<b>Introductory Address</b> <b>Mr. G. KUMARESAN</b> , Social Policy Specialist, UNICEF
10.10 a.m. – 11.15 a.m.	<b>Procedure and Powers of Special Courts and Recording of Evidence</b> <b>Hon'ble Ms. Justice R.N. MANJULA</b> , Judge, High Court of Madras
11.15 a.m. – 11.30 a.m.	<b>Tea Break</b>
11.30 a.m. – 01.00 p.m.	<b>(a) Appreciation of evidence in POCSO Cases</b> <b>(b) Concept of reverse burden and presumption under POCSO Act</b>  <b>Panel Discussion</b> <b>Hon'ble Mr. Justice P. VELMURUGAN</b> <b>Hon'ble Dr. Justice G. JAYACHANDRAN</b> <b>Hon'ble Mr. Justice N. SATHISH KUMAR</b> Judges, High Court of Madras
01.00 p.m. – 02.00 p.m.	<b>Lunch Break</b>
02.00 p.m. – 03.00 p.m.	<b>(a) Challenges faced by the courts when the accused and victim are children</b> <b>(b) Need for trial of the child as an adult – Factors to be looked into after receipt of preliminary assessment report from JJB</b>  <b>Hon'ble Dr. Justice S. VIMALA</b> , Former Judge, High Court of Madras
03.00 p.m. – 03.45 p.m.	<b>Interaction with the participants on the impact of recent amendments (Amendment Act 2021) to Juvenile Justice (Care and Protection of Children) Act, 2015</b>  <b>Hon'ble Dr. Justice S. VIMALA</b> , Former Judge, High Court of Madras <b>Ms. R.S. AKILA</b> , Advocate, High Court of Madras
03.45 p.m. – 04.00 p.m.	<b>Tea Break</b>
04.00 p.m. – 05.00 p.m.	<b>a) Prevention of child marriage and Rehabilitation of child marriage victims</b> <b>b) Rehabilitation and compensation for victims under POCSO Act</b>  <b>Hon'ble Dr. Justice S. VIMALA</b> , Former Judge, High Court of Madras



**Day 2: 22.08.2021 (Sunday)**

10.00 a.m. – 10.05 a.m.	<b>Welcome Address</b>  <b>Mr. D. LINGESWARAN</b> , Director, TNSJA
10.05 a.m. – 10.20 a.m.	<b>Introductory Address</b>  <b>Hon'ble Mr. Justice V. SIVAGNANAM</b> , Judge, High Court of Madras
10.20 a.m. – 11.30 a.m.	<b>Effective Implementation of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989: Constraints and Solutions with special focus on children</b>  <b>Moderator:</b> <b>Mr. B. KARTHIKEYAN</b> , Chief Judge, Court of Small Causes, Chennai  <b>Presentation by participants</b> 1) <b>Mr. A.K. BABULAL</b> , Sessions Judge, Special Court for POCSO Act, Sivagangai 2) <b>Mr. S. UTHAMARAJ</b> , Sessions Judge, Spl. Court for SC/ST (PoA) Act, Cuddalore 3) <b>Dr. R. SATHYA</b> , Family Court, Pudukkottai
11.30 a.m. – 11.45 a.m.	<b>Tea Break</b>
11.45 a.m. – 01.00 p.m.	<b>Defects in Pre-trial Procedures and Investigation : Impact on Adjudication</b>  <b>Mr. SUNDER MOHAN</b> , Advocate, High Court of Madras
01.00 p.m. – 02.00 p.m.	<b>Lunch Break</b>
02.00 p.m. – 03.30 p.m.	<b>Effective trial in cases under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989</b>  <b>Mr. N. SWAMINATHAN</b> , Advocate, Mannargudi
03.30 p.m. – 04.00 p.m.	<b>Interaction</b>
<b>Tea and Departure</b>	



THE POCSO JUDGE RESTORES LIGHT AND JOY IN THE LIFE OF CHILDREN

A PUBLICATION OF  
TAMIL NADU STATE JUDICIAL ACADEMY