

SENSITIZATION OF JUDGES DEALING WITH POCSO ACT

CASES

- **INTRODUCTION**

Historically, child sexual abuse (CSA) has been a hidden problem in India, largely ignored in public discourse. In the absence of specific legislation, a range of offensive behaviors such as child sexual assault (not amounting to rape), harassment, and exploitation for pornography were not legally sanctioned. In the past few years activists, Non-Governmental Organizations (NGOs) and the central government's Ministry of Women and Child Development have actively engaged in helping break 'the conspiracy of silence' and have generated substantial political and popular momentum to address the issue. The movement, spearheaded by the Ministry of Women and Child Development, led to the enactment of new legislation called the Protection of Children from Sexual Offences (POCSO) 2012. The Act was formulated in order to effectively address sexual abuse and sexual exploitation of children. It provides for protection of children from offences of sexual assault, sexual harassment and pornography. This act has some special features, which incorporates child friendly procedures, recording of evidences, establishment of special court and speedy trial for cases falls under this Act. Before this Act, most of the sexual offences are covered under IPC, 1860. But IPC does not provide for all types of sexual offences against children and it is general legislation, it does not distinguish between adult and child victims.

- **CHILD RIGHTS**

- i. **General Perspective**

Children's rights are the human rights of children with particular attention to the rights of special protection and care afforded to minors, including their right to association with both parents, human identity as well as the basic needs for food, universal state-paid education, health care and criminal laws appropriate for the age and development of the child, equal protection of the child's civil rights and freedom from discrimination on the basis of the child's race, gender, sexual orientation, gender identity, national origin, religion, disability, colour, ethnicity, or other characteristics. Interpretations of children's rights range from allowing children the capacity for autonomous action to the enforcement of children being physically, mentally and emotionally free from abuse, though what constitutes "abuse" is a matter of debate. Other definitions include the rights to care and nurturing.

- ii. **International Scenario**

The Universal Declaration of Human Rights, 1948 is seen as a basis for all international legal standards for children's rights today. There are several conventions and laws that address children's rights around the world. A number of current and historical documents affect those rights, including the 1923 Declaration of the Rights of the Child, endorsed by the League of Nations and adopted by the United Nations in 1946. It later served as the basis for the Convention on the Rights of the Child.

- 1. **Convention on the Rights of the Child**

The United Nations' 1989 Convention on the Rights of the Child, or CRC, is the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights. The CRC is based on four core principles, namely the principle of non discrimination, the best interests of the child, the right to life, survival and development, and considering the views of the child in decisions which affect them (according to their age and maturity).

- 2. **Vienna Declaration and Programme of Action**

Vienna Declaration and Programme of Action, 1993 urges at Section II para 47, all nations to undertake measures to the maximum extent of their available resources, with the support of international cooperation, to achieve the goals in the World Summit Plan of Action and calls on States to integrate the Convention on the Rights of the Child into their national action plans. Effective measures are required against female infanticide, harmful child labour, sale of children

and organs, child prostitution, child pornography, as well as other forms of sexual abuse. This gave an influence to adoptions of Optional Protocol on the Involvement of Children in Armed Conflict and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

iii. Scenario in India

In India, children's vulnerabilities and exposure to violations of their protection rights remain wide spread and multiple in nature. The manifestations of these violations are various, ranging from child labour, child trafficking, to commercial sexual exploitation and many other forms of violence and abuse. Although poverty is often cited as the cause underlying child labour, other factors such as discrimination, social exclusion, as well as the lack of quality education or existing parents' attitudes and perceptions about child labour and the role and value of education need also to be considered. In states like Bihar, Mizoram, Rajasthan and Uttar Pradesh, 60 per cent or more girls dropped out before completing their five years primary education.

Trafficking of children also continues to be a serious problem in India. The nature and scope of trafficking range from industrial and domestic labour, to forced early marriages and commercial sexual exploitation. Existing studies show that over 40 per cent of women sex workers enter into prostitution before the age of 18 years. Moreover, for children who have been trafficked and rescued, opportunities for rehabilitation remains scarce and reintegration process arduous.

While systematic data and information on child protection issues are still not always available, evidence suggests that children in need of special protection belong to communities suffering disadvantage and social exclusion such as scheduled castes and tribes, and the poor. The lack of available services, as well as the gaps persisting in law enforcement and in rehabilitation schemes also constitute a major cause of concern. Article 15 of the Constitution, inter-alia, confers upon the State powers to make special provision for children. Further, Article 39, inter-alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

• LONG TERM EFFECTS OF CHILD SEXUAL ABUSE

Childhood sexual abuse has been correlated with higher levels of depression, guilt, shame, self-blame, eating disorders, somatic concerns, anxiety, dissociative patterns, repression, denial, sexual problems, and relationship problems. Depression has been found to be the most common long-term symptom among survivors. Survivors may have difficulty in externalizing the abuse, thus thinking negatively about themselves. After years of negative selfthoughts, survivors have feelings of worthlessness and avoid others because they believe they have nothing to offer describes the symptoms of child sexual abuse survivors' depression to be feeling down much of the time, having suicidal ideation, having disturbed sleeping patterns, and having disturbed eating patterns. Survivors often experience guilt, shame, and self-blame. It has been shown that survivors frequently take personal responsibility for the abuse. When the sexual abuse is done by an esteemed trusted adult it may be hard for the children to view the perpetrator in a negative light, thus leaving them incapable of seeing what happened as not their fault. Survivors often blame themselves and internalize negative messages about themselves. Survivors tend to display more self-destructive behaviors and experience more suicidal ideation than those who have not been abused.

Body issues and eating disorders have also been cited as a long-term effect of childhood sexual abuse. Symptoms of child sexual abuse survivors' body image problems to be related to feeling dirty or ugly, dissatisfaction with body or appearance, eating disorders, and obesity. Survivors' distress may also result in somatic concerns. A study found that women survivors reported significantly more medical concerns than did people who have not experienced sexual abuse. The most frequent medial complaint was pelvic pain. Somatization symptoms among survivors are often related to pelvic pain, gastrointestinal problems, headaches, and difficulty swallowing.

Stress and anxiety are often long-term effects of childhood sexual abuse. Childhood sexual abuse can be frightening and cause stress long after the experience or experiences have ceased. Many times survivors experience chronic anxiety, tension, anxiety attacks, and phobias.

Some survivors may have dissociated to protect themselves from experiencing the sexual abuse. As adults they may still use this coping mechanism when they feel unsafe or threatened. Dissociation for survivors of childhood sexual abuse may include feelings of confusion, feelings of disorientation, nightmares, flashbacks, and difficulty experiencing feelings.

Denial and repression of sexual abuse is believed by some to be a long-term effect of childhood sexual abuse. Symptoms may include experiencing amnesia concerning parts of their childhood, negating the effects and impact of sexual abuse, and feeling that they should forget about the abuse. Whether or not survivors can forget past childhood sexual abuse experiences and later recover those memories is a controversial topic. Some therapists believe that sexual abuse can cause enough trauma that the victim forgets or represses the experience as a coping mechanism. Others believe that recovered memories are false or that the client is led to create them.

Survivors of sexual abuse may experience difficulty in establishing interpersonal relationships. Symptoms correlated with childhood sexual abuse may hinder the development and growth of relationships. Common relationship difficulties that survivors may experience are difficulties with trust, fear of intimacy, fear of being different or weird, difficulty establishing interpersonal boundaries, passive behaviors, and getting involved in abusive relationships

Sexual abuse often is initiated by someone the child loves and trusts, which breaks trust and may result in the child believing that people they love will hurt them. Although sexual abuse is often viewed as a traumatic experience, there is no single symptom among all survivors and it is important for clinicians to focus on the individual needs of the client.

- **INTEGRATING PSYCHOLOGICAL INTERVENTIONS**

Some children experience more severe mental health problems as a result of sexual abuse and yet, mental health services are limited in humanitarian settings.

The psychosocial interventions are meant to be provided directly to the child (and family members as appropriate) and aim to help child survivors:

1. Understand and manage reactions to the abuse;
2. Develop skills for managing anxiety and stress;
3. Learn new skills for coping with negative reactions, and;
4. Acquire new skills for solving problems

There are many important things for a counselor to consider when helping a survivor overcome long-term effects or symptoms of sexual abuse. Although no specific treatment model is used for counseling survivors, researchers and clinicians have provided suggestions and important implications for counselors to consider. Kessler et al. (2004) identified common treatment decision-making practices of therapists treating adult survivors of childhood sexual abuse. Their study revealed that regardless of the treatment mode, the therapists found it important to assess the client presenting problems, the effects the abuse has on their current functioning, and how the client currently copes. Because clients often have trouble externalizing the abuse, therapists may need to work with client to increase their ability to accurately attribute responsibility. To help decrease levels of depression and anxiety, helpful goals for the survivor may be to increase their sense of control and increase their ability to accurately attribute responsibility. The therapeutic alliance is imperative to help counseling survivors feel safe. Childhood sexual abuse survivors often present with symptomatic problems, feelings, and behaviors that result from the abuse, rather than for the sexual abuse itself. Feelings of fear or vulnerability may hinder the client from disclosing their childhood sexual abuse. Relationship building techniques such as using encouragement, validation, self-disclosure, and boundary setting are encouraged to help build the therapeutic alliance. Accepting the survivor's version of their sexual abuse experience

is often therapeutic and helps strengthen the alliance. It is important for the counselor to allow the client time to build feelings of trust, safety, and openness. Because sexual abuse is abusive in power as nature egalitarianism is stressed as an important factor. Allowing the client to have control in both the pace and direction of the therapeutic process is important. Client empowerment is a technique used with survivors.

Van Velsor and Cox (2001) suggest it is vital to help survivors process, uncover, and express anger because anger can be used to help a client feel empowered, appropriately attribute responsibility, establish boundaries, and promote self-efficacy and power. They recommend that the counselor help the client reframe their anger into an emotion they can use to help define their rights and needs, explore the covert norms for anger expression among women, and help survivors use their anger for productive action and behavior. Assisting the client in gaining skills that will help them find and develop supportive relationships, especially with a partner, is also considered an important goal in helping a survivor overcome some of the long term effects of childhood sexual abuse. Helping the client gain skills that will help them better adjust to, enhance, and develop intimate relationships may be an important step in counseling a survivor of childhood sexual abuse. In a study conducted by Feinauer et al. (1996), it was revealed that the better a survivor was able to adjust to intimate relationships, the lower their depression scores were despite the level of abuse they experienced. It is thus suggested that positive intimate relationships may increase the survivors' feelings of safety, help them gain interpersonal experience, and experience reconnection.

- **JOURNEY OF ENACTMENT OF POCSO ACT**

The Indian Constitution has a framework within which ample provisions exist for the protection, development and welfare of children. The process to enact the legislation that finally became the POCSO Act started in 2009, when the Ministry of Women and Child Development circulated the draft *Offences against Children Bill* among stakeholders. In January 2010, the National Commission for Protection of Child Rights (NCPCR) invited a few NGOs working for children, such as, Tulir – Centre for the Prevention & Healing of Child Sexual Abuse and HAQ: Centre for Child Rights, to discuss the Bill. Around the same time, the Ministry of Law & Justice, Government of India, called upon Tulir to forthwith start a consultative process to recommend contents for a law relating to child sexual offences. Over two decades, women's rights groups in India had been demanding the need for reform of rape laws. This demand reached a crescendo in 2010 in the protests against the injustice in the *Ruchika Girhotra case*. This prompted the Ministry of Home Affairs to come out with the draft Criminal Law (Amendment) Bill 2010, which proposed changes to the IPC, CrPC and IEA in relation to sexual offences. The draft Bill also contained provisions regarding sexual abuse of a minor, which galvanised child rights groups to meet and discuss it. In July 2010, a draft Bill on Sexual Offences against Children was circulated by the Ministry of Law & Justice. Yet another draft Bill, the Protection of Children from Sexual Offences Bill 2010, was prepared by the Ministry of Women and Child Development. The Ministry of Women and Child Development requested the National Commission for Protection of Child Rights (NCPCR) to scrutinise the draft Bill. The Committee rejected the draft Bill and prepared an alternative draft, dealing with substantive and procedural aspects of the proposed law, which was then submitted by the NCPCR to the ministry. Almost simultaneously, three initiatives were on to frame a legislation on sexual offences against children, and child rights activists were responding to this as best they could.

Finally, the Ministry of Women & Child Development introduced the Protection of Children from Sexual Offences Bill 2011 in the Rajya Sabha.

The POCSO Act and the Protection of Children from Sexual Offences Rules 2012 simultaneously came into force on 14 November 2012. Subsequent to the POCSO Act, another initiative of the Ministry of Health & Family Welfare resulted in formulation of *the Guidelines for Medical Examination of Child under the POCSO Act 2012*. The Ministry of Women and

Child Development also initiated and saw through the framing of the Model Guidelines under Section 39 of the POCSO Act 2012. Recently POCSO Rules 2020 has also come into effect.

- **FEATURES OF POCSO ACT**

POCSO is gender neutral, meaning that crimes of this nature committed against children will be handled by this act regardless of the gender of the child. This Act sets a burden of proof of “guilty until proven innocent” rather than the general rule of “innocent until proven guilty.” The flagship Indian legislation that prevents offences against Children has several important clauses to keep our children (both male and female) safe and secure. The Act defines Penetrative Sexual Assault (Section 3), Aggravated penetrative sexual assault (Section 5), Sexual Assault (Section 7), Punishment for penetrative Sexual Assault being not less than 7-years (Section 4), Punishment for Sexual Assault (Section 8), Sexual Harassment (Section 11), Child Pornographic (Section 13), Mandatory reporting of Child Abuse cases (Section 19(1)), the burden of proof on Accused (section 29), A Special Public Prosecutor being appointed (Section 31) and many more clauses that would deter anyone from committing such offences.

In addition to above punitive section, the legislation also prescribes processes that are specially meant to deal with sensitivity of victims. The POCSO Act and rules stipulate Child friendly processes. It mandates respect for the dignity and autonomy of the child at every stage of the legal process. It provides for child-friendly procedures for medical examination, recording the statement of the child by the Police and Magistrate, as well as during the examination of the child in court. Cases reported by a child must be recorded by the police/Special Juvenile Police Unit (SJPU) in simple language so that the child understands what is being recorded. A qualified translator/interpreter must be provided to the child if the statement is recorded other than the preferred language of the child. The child must be accompanied by a parent, guardian, or any other person whom the child trusts or has confidence in, during procedures involving medical examination, recording statements, or giving testimonies in court. Before any medical examination is conducted, consent by or on behalf of the child must be obtained. Medical examination can be conducted irrespective of whether a First Information Report/Complaint has been filed. Where the victim is a girl, examination must be done by a woman doctor. Also, the child must not be brought face to face with the accused while giving his/her statement to the police or magistrate, or while testifying in court. If necessary, a support person must also be provided to a child to assist him/her during the investigation and trial. Under no circumstances can the child be asked to remain in the police station at night. Child victims who are found to be in need of urgent medical attention are entitled to receive emergency medical care within 24 hours of the Police/ SJPU receiving information about the crime. A child victim may receive interim compensation for immediate needs for relief of rehabilitation and final compensation for the loss or injury caused to her/him. The State Government must pay the compensation to the victim within 30 days from the date of the order of the Special Court.

- **ISSUES UNDER POCSO ACT**

1. **Charges and Sentencing Pattern under POCSO Act**

- i. Charge Framing

The framing of charge is the first judicial process in a criminal trial. Charges under the POCSO Act were found, across the Studies, to have been framed most commonly under Sections 4, 6, 8, 10, and 12, meaning that charges for other offences such as using a child for pornography, or the failure to report an offence under the POCSO Act, were rarely framed. Charges framed under the IPC appear to have mirrored the charges under the POCSO Act, the most common offences being under Sections 376 (rape), 363 (kidnapping), 366-A (procurement of a minor girl), 354 (outraging the modesty of a woman), 354-A (sexual harassment), and 506 (criminal intimidation). Additionally, charges were also framed under the Information Technology Act, 2000 (hereinafter, IT Act), the Immoral Traffic Prevention Act, 1986 (hereinafter ITPA) and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter,

Atrocities Act). It must be noted however, that charges under these legislations were framed, across states, in a very small percentage of cases. This indicates that, in all likelihood, charges under the POCSO Act are, likewise, not being framed in cases which are primarily seen as “trafficking” or “pornography” cases. This pigeon-hole approach might be attributable to a desire in the police and the prosecution to present only their strongest case before the Court. The unwillingness to frame charges under legislations such as the IT Act, particularly, may suggest that the police are incapable or ill-equipped to deal with electronic devices and media as tools for committing crimes. However, it is worth examining whether it might not be more prudent to cast the net wider, not only because the digital world is increasingly becoming a space for criminal activity, but also because until the police and the prosecution get in the habit of investigating and prosecuting such crimes, they will be unable to plug the loopholes in their methods or equip themselves to deal with digitally sophisticated criminals.

ii. Sentencing Pattern

The IPC, prior to its amendment in 2013, gave discretion to the judge to impose sentences below the statutory minimum by giving adequate reasons. While the purpose of this provision was undoubtedly to account for disparity in the circumstances and the guilt of accused persons, its exercise was often steeped in patriarchal notions and undue sympathy for rapists. For instance, in *State of M.P v. Munna Choubey & Anr.*(2005)2SCC710, the Supreme Court, reversing the decision of the High Court, noted that the High Court had used its discretion under the IPC to reduce the sentence of both the accused persons to time served, solely on the ground that they belonged to rural areas. Similarly, in *State of M.P. v. Babbu Barkare @ Dalap Singh*, AIR 2005 SC 2846 the High Court had reduced the sentence of the accused to time served (11 months) on the ground that the accused was an illiterate labourer aged 20 years. In cases such as *State of A.P. v. Polamala Raju @ Rajarao*, 2000(7) SCC 75 and *State of Rajasthan v. Gajendra Singh*, 2008 (12) SCC 720 the sentences of persons convicted of rape were reduced below the statutory minimum without providing *any* reason, let alone ‘special and adequate’ reasons. In *Bhinyaram Vs. State of Rajasthan* 2019(3) RLW2521 the Rajasthan High Court considering the tender age of the accused at the time of the incident reduced the sentence of imprisonment awarded by the trial court to the accused for offence under Section 4 of the POCSO Act to a term of 10 years R.I. The experience of disparate and unreasonable use of discretion by judges, and the need to deter sexual offences through certain and proportionate punishment, led to the introduction of mandatory minimum sentences, first under the POCSO Act, and subsequently under the Criminal Law (Amendment) Act, 2013.

2. Recording of child Testimony

Children who are victims of sexual crimes carry a huge burden of guilt, shame and humiliation, which gets aggravated when required to recount the violation to strangers in formal surroundings. The trauma of a child victim is only multiplied as he or she is required to repeatedly recapitulate her ordeal to the investigating agencies, prosecutors and then in court. A child witness is to be treated with special care not only on point of reliability but also on the need for a special procedure when a child witness is testifying. Provisions under the POCSO Act, which lay down the procedure of conducting a child’s testimony take into consideration the special needs of a child. To smoothen the child’s experience and journey through the criminal justice system, Sections 24, 25, 26, 33, 36 and 37 POCSO Act gain significance while dealing with child witnesses. The Supreme Court and High Courts have consistently laid down guidelines to ensure that during criminal trial the child’s rights and interests are safeguarded and protected. Lack of proper implementation of such guidelines, and absence of adequate safeguards during proceedings, have continued to create impediments for children and their families during their testimony in court.

On the question of competency of a child to testify as a witness, the Delhi High Court in *Virender v. The State of NCT of Delhi*, CrI. A. No. 121/2008 stated that the courts in India have

relied on the proposition formulated by Justice Brewer in *Wheeler v. United States*, 159 US 523 (1895). In the said case, it was opined that the evidence of a child witness cannot be rejected per se, but the courts, as a rule of prudence, should consider such evidence with close scrutiny and only on being convinced about the reliability and quality thereof can record the said child's statement. Further, referring to the Supreme Court case of *Panchhi v. State of U.P.*, AIR 1998 SC 2726, the court in *Virender v. The State of NCT of Delhi* (supra) stated that 'the reservation expressed with regard to evaluating the testimony of a witness is based on apprehensions that children may be vulnerable and susceptible to be swayed by what others say and the child witness is an easy prey to tutoring, and therefore, their evidence must be evaluated carefully and with greater circumspection'. In *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.

In *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. In *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. In *State of Himachal Pradesh v. Sanjay Kumar*, (2017) 2 SCC 51, the Supreme Court 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.

3. Victim Compensation

The compensation jurisprudence in India has significantly evolved to recognize the role of the State in providing reparation to victims for its failure to protect them from violence, even if the perpetrators are private citizens. Under Section 357(1)(b), Code of Criminal Procedure, 1973 (Cr.P.C), a court can direct that whole or part of the fine imposed as part of a sentence, if recovered, be paid towards compensation for any loss or injury caused by the offence, if such compensation could be recoverable in a Civil Court. When the Cr.P.C was recast in 1973, subsection (3) was added to ensure that a court could direct the accused to pay compensation to the person who has suffered any loss or injury because of the act for which the accused was sentenced, even if fine was not a part of the sentence. In *Hari Singh v. Sukhbir Singh*, 1998 (4) SCC 551 the Supreme Court observed that the power to order compensation under Section 357(3), which is an additional and not ancillary, sentence, "was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system" and reflected a "constructive approach to crime". Further, Section 5(1)(a) of the Probation of Offenders Act, 1958 gives the court releasing an offender after admonition or on probation of good conduct, discretion to direct the offender to pay reasonable compensation for loss or injury caused to any person by the commission of the offence. In *Ankush Shivaji Gaikwad v. State of Maharashtra*, 2013 (6) SCC 770 the Supreme Court mapped international standards and laws in other countries that led to the recognition of a victim's right to reparation within the criminal justice system. It held that given the reasons for its introduction, Section 357 "confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation in every criminal case." Unless a mandatory duty is cast on the court to consider compensation, in every case, the object of the provision would be defeated. In *Nipun Saxena v. Union of India*, 2019 (13) SCC 719 the Supreme Court took note of the absence of an integrated system for disbursal, management, and payment of compensation and directed the National Legal Services Authority to constitute a Committee to prepare Model Rules for Victim Compensation for sexual offences and acid attacks.

Based on the Law Commission's recommendations, the Code of Criminal Procedure (Amendment) Act, 2008 introduced Section 357-A, recognizing the State's duty to compensate victims. Pursuant to Section 357-A(1), State Governments should prepare a Victim Compensation Scheme (VCS) in coordination with the Central Government to provide compensation funds for victims or their dependents who have suffered loss or injury because of a crime and require rehabilitation. In such cases, the victim or the victim's dependents can apply to the State or District Legal Services Authority (SLSA/DLSA) for compensation.

Pursuant to Section 357-A(1), VCS have been framed by 29 States and seven Union Territories. The offences under the POCSO Act are not included in the Schedule of Offences attached to the State VCS in any State or Union Territory, except Rajasthan. The Rajasthan VCS also states that the compensation limits specified in the Schedule "shall not apply in case of compensation awarded by the Special Court under the [POCSO] Act." A victim under the POCSO Act, her/his parents or guardian or person whom the child trusts are not prevented from seeking relief under other rules or schemes even if they have received compensation already. The Schemes of Rajasthan thus recognize the authority of the Special Court to determine compensation.

While the trial court is expected to make "recommendations" under Section 357-A, the Special Court can "direct payment" of compensation under Section 33(8). This distinction points to a crucial difference between compensation under the POCSO Act and that under the Cr.P.C. Bearing in mind, the description of the POCSO Act as a "self-contained comprehensive legislation", its emphasis on ensuring the well-being of the child at every stage, and the establishment of Special Courts for trial of offences, it can be argued that the POCSO Act empowers Special Courts to determine the quantum of compensation. While it is not clear under Section 33(8) whether the State can be directed to pay compensation, the Rules suggest that the State Government can be ordered to pay compensation. Rule 7(5), POCSO Rules, states that the compensation awarded should be paid from the Victim Compensation Fund or any other government scheme for compensating and rehabilitating victims under Section 357-A and be paid by the State Government within 30 days of the receipt of the order.

Under Rule 7(1), POCSO Rules, interim compensation can be awarded by the Special Court in appropriate cases, on its own, or based on an application by or on behalf of the child, at any time after the FIR has been registered. A literal interpretation of Section 33(8) may suggest that compensation can be ordered only if the accused is convicted under the POCSO Act. However, such a narrow interpretation may not be sustainable based on a reading of Rule 7(2), POCSO Rules, Section 357-A, Cr.P.C, and an appreciation of the objectives of the POCSO Act. Under Rule 7(2) compensation can be awarded if the accused is convicted, acquitted, or discharged and the Special Court's opinion is that the child suffered loss or injury. Compensation can be paid even if the accused was not traced or identified or untraceable, if according to the Special Court, the child suffered loss or injury.

Rule 7(3), POCSO Rules, specifies 12 factors related to the loss or injury caused to the victim, that the Special Court should consider before making "a direction for the award of compensation to the victim" under Section 33(8) read with Section 357-A (2 & 3). Rule 7(6), POCSO Rules, clarifies that a child or a child's parent or guardian or a person whom the child trusts or has confidence in, is not prevented from seeking relief under other rules or Government schemes. This is another point of distinction between the Rules and the VCS of most States, as per which a victim who has received assistance or relief from the State Government or any other source, is ineligible to receive compensation under the scheme, or the amounts must be adjusted.

4. Age Determination of Victim

The procedure for age-determination was first provided in Rule 12(3) of the Juvenile Justice (Care and Protection of Children), Rules, 2007 (JJ Model Rules, 2007). In *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.

Section 94(1), JJ Act, 2015 states that the Child Welfare Committee (CWC) or Juvenile Justice Board (JJB) should treat a person as a child, if, based on appearance it is obvious that the person is a child, without waiting for further confirmation of age. Section 94(2), JJ Act, 2015 specifies the procedure that should be followed when the person's age is doubtful. In such situations, the CWC or JJB should determine age "by seeking evidence by obtaining" the birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination board. If these are not available, then the birth certificate by a corporation, municipal authority, or panchayat can be considered. If none of the above-mentioned documents are available, then the JJB should order an ossification test or any other latest medical age determination test. The JJ Act, 2015 does not make any express reference to a Medical Board or specify that the benefit of the margin of error should be given to the child victim or child in conflict with the law. However, in earlier decisions of *Omprakash v. State of Rajasthan*, 2012 (5)SCC 201 and *Birad Mal Singhvi v. Anand Purohit* AIR 1988 SC 1796 it has been held that where the school records are ambiguous and do not conclusively prove majority, a medical opinion cannot be overlooked. In *Manaram v. State of Rajasthan* MANU /RH/0676/2019 the court relied upon the date of victim as recorded the admission form as it was duly corroborated from the statement of associated witnesses. In *Jabru Ram v. State of Rajasthan* MANU/RH/1456/2019 the Rajasthan High Court confirmed the finding recorded by the trial court that the victim was below 18 years of age on the date of incident and was a child within the meaning of POCSO Act. The Court observed that the victim clearly stated that she was 12 years of age. If at all, the defence was desirous of disputing this aspect then, questions were required to be put to her in cross-examination to controvert this assertion made by her. Failure of the defence to put any question to the victim on this aspect, is a strong reason to presume that the defence never intended to question the prosecution case that the age of the victim was about 12 years on the date of the incident. In addition thereto, it is noteworthy that the defence did not apply to the trial court for determination of the victim's age.

The question that arises is whether Special Courts under the POCSO Act need to follow the procedure prescribed under Section 94, JJ Act, 2015. It may be argued that since Section 94, JJ Act, 2015 does not refer to a "court", a Special Court under the POCSO Act is not bound to adhere to the age-determination procedure prescribed under the JJ Act, 2015 and that Section 34(2), POCSO Act leaves it to the Special Court as to how age should be determined. Judgments of the Delhi and Madras High Court are instructive in this regard. In *State (Govt. of N.C.T. of Delhi) v. Kishan*, 2017 (4) JCC 2291 the Special Court had relied on Section 94, JJ Act, 2015 and held that the victim was a child based on the records from the first attended school and no infirmity was found with respect to this aspect of the decision by the Delhi High Court. More specifically, in *Rajendran v. State*, (CrI. A.No. 483 of 2016 decided on 23.12.16) a division bench of the Madras High Court relied on Section 94(2), JJ Act, 2015 to conclude that the victim under POCSO Act was a child. In *Tulachha Ram v State of Rajasthan* 2019(2)WLN 371(Raj.) while relying upon the school certificate the trial court referred to the principles laid down under section 35 of the Evidence Act and raised a presumption regarding genuineness of the official document produced by the prosecution. The Hon'ble High Court observed that the approach of the trial court was not appropriate in view of the fact that the complete mechanism

for age determination of juvenile is laid down under Section 94 of the JJ Act. The Court held as below:

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

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

Application of Section 94 JJ Act thus differs widely depending upon the factual matrix of the case.

Issues surrounding age determination

- a. Absence of birth certificate and poor maintenance of records
- b. Application of JJ Act
- c. Inconsistent appreciation of school records
- d. Benefit of margin of error seldom given to the victim
- e. Investigation lapses

5. Bail

According to the Black's Law legal dictionary, the term 'bail' has been defined as – 'an order of the competent court or a magistrate court that a person accused of committing an offence be released from the judicial custody on the discretion of the Court on certain terms and conditions as the Court deems fit'. The CrPC under Section 437, 438 and 439 details the provisions related to bail. While Section 437 provides for grant of bail from magistrate court, Section 438 talks about grant of bail to a person apprehending his/her arrest for commission of alleged offence. Section 439 of the CrPC confers special powers of High Court or Court of Sessions regarding bail.

It is pertinent to note that POCSO Act is a special act enacted with the objective to protect children from sexual assault. Section 30 of the POCSO Act states that there is presumption of culpable mental state unless rebutted in accordance with law. In *Anwari Begum v. Sher Mohammad*, 2005 AIR SC 3530 the Supreme Court observed that as a general rule the court has to consider following factors while granting bail:

- (i) The nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence;
- (ii) Reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant and;
- (iii) Prima facie satisfaction of the court in support of the charge.

In *Sunil Mahadev Patil v. State of Maharashtra*, 2016 (3) BomCR(Cri) 435, the petitioner sought regular bail under Section 439 CrPC for offences punishable under Section 376, 363,

366A of IPC and under Section 3, 4, 5 and 6 of POCSO Act. The Court held that in cases similar to the present, where the minor prosecutrix is between the age group of 15 to 18 years, and the consent of the prosecutrix is obvious, then the fact that the prosecutrix consented to elope with the applicant/accused should be a mitigating factor while determining the bail of the applicant. On the contrary, the Kerala High Court in *Sujit v. State of Kerala*, 2018 (3) KHC 641 while considering the anticipatory bail application under Section 438 of the CrPC held that ‘consent’ of a minor girl is not a valid consent in law. The court also held that the consent of a minor victim is immaterial for the purposes of ascertaining the culpability of the accused.

Regarding the jurisdiction of the court to entertain bail application in *Ramu Ram v State of Rajasthan & Ors.* RLW 2014(2)Raj 987 the court observed that where the police had already added the offence under the POCSO Act then only the Special Court under the POCSO Act could have entertained the bail application filed by the accused and not the CJM and the Additional Session Judge.

6. Mandatory Reporting

The POCSO Act is the first child-rights legislation that places a mandatory duty on all bystanders and other witnesses of child abuse or rape, to report the same to the police. Under the Act, any person who has the knowledge of commission of an offence against a child, and fails to report such offence to the police is penalised with incarceration or a fine, or with both.

To take precautionary and remedial measure against underreporting of abuses, ‘Mandatory Reporting’ is resorted to which casts a burden of reporting suspected cases of child abuse. Justice Verma committee recommended the amendments in criminal procedure code and POCSO was brought into force to tackle the child sexual abuse cases in a more refined manner. The issue of mandatory reporting in the act is mentioned in section 19, 20 and 21 of the Act. In India, A mandate upon the individuals to report compulsorily exists. Since failure to report is attracts civil and criminal obligations, so making of report is always preferred by the individuals. In the case of *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 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 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. In *Dr. Sr. Tessy Joe v. State of Kerala*, CRL.No. 3712 of 2018, 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.

7. Permissibility of Compromise in Rape Cases

The courts have time and again held that compromise is impermissible at any stage of the investigation and trial. In the case of *Shimbhu v. State of Haryana*, (2013)10 SCALE 595 the Supreme Court held that a compromise between the accused and victim in rape cases to reduce the sentence of the accused convicted is impermissible. The court held that rape is a non-compoundable offence against the society and thus, there cannot be a compromise between parties when the offence has been committed. The Court further held that it is difficult to ascertain whether the victim gave her free consent for such settlement, as it is possible that she was coerced or forced by the convicts. By accepting such a settlement, the Court might set a dangerous precedent and will put an additional burden on the victim in future rape cases by making her susceptible to the coercion or threats of convicts to make her reach a compromise.

In *Ankush Kumar v. State*, CRL.M.C. 4046/2015, the Delhi High Court held that a compromise between the accused and the victim's family to quash the FIR against the accused is impermissible. In the present case, the Petitioner filed the petition under Sections 482 and 483 of CrPC for quashing the FIR filed under Sections 377 of IPC by the respondent against him. He filed the petition on the basis of a compromise between him and the respondent's (victim's) father.

8. Medical Evidence

In the case of *Hemraj v. State of Haryana*, (2014) 2 SCC 395, the appellant had allegedly raped the prosecutrix. The testimony of the prosecutrix and her brother, who was the eyewitness, did not support the case. Further, as per the FSL report human semen was detected on the salwar of the prosecutrix and on the underwear of the accused appellant. The Supreme Court, upon going through the testimony of the prosecutrix and her brother, found the same unreliable. Despite the MLC and FSL report supporting the case of prosecution, the court set aside the order of conviction and sentence. Additionally, in the case of *Manoj Kumar and Ors v. State (GNCT of Delhi) and Ors.*, CrI. A. 1393 and 1348/2013 the prosecutrix was raped by the accused and later became pregnant. The alleged incident of rape was reported to the mother after a lapse of 55 clear days. It is to be noted that the MLC report did not match the DNA of the fetus with the accused. The High Court did not find the testimony of the prosecutrix reliable and set aside the order of conviction and sentence.

In *Raju v. State of Haryana*, AIR 2001 SC 2043 an 11 year old prosecutrix was murdered by the accused after raping her. There were two last seen witnesses. There was another witness to whom the accused had made extra judicial confession about the commission of the offence. Relying on the evidence given by the said witnesses as well as other incriminating evidence the Supreme Court convicted the accused for the offence of rape and murder and observed that: "Further, FSL report establishes that the pant put on by the accused was stained with numerous small dark brown stains/streaks especially on the front. Similarly, the multi coloured printed terry cot shirt of the accused was also stained with numerous darkish stains specially on his sleeves and contained human blood as per the FSL report. On the underwear worn by the accused, blood and semen was found. There is no explanation given by the accused how the blood was there on the shirt put on by him and that how there were blood stains on the pant and underwear."

In *Lillu and Ors. v. State of Haryana*, AIR 2013 SC 1784, the accused were charged under Section 376 and 506 of the IPC Basis the medical examination (two-finger test) report and the statement of the concerned doctor in court, it was stated that the victim was habitual in sexual activities. The defence counsel alleged consent as the victim was habitual to sex. The Supreme Court held that the comment with respect to the victim's sexual history is immaterial and/or her consent is inconsequential as the victim in the said case is a minor. Further, the court deliberated upon the constitutionality of the controversial 'two finger test' used to conduct and interpret forensic examination of rape survivors. Citing various other Supreme Court judgments, the court held that the two-finger test is violates the right to dignity and privacy and even if the result is affirmative, the reading of the test must not ipso-facto be used as a way of valid consent.

In *The State Govt of NCT of Delhi v. Khursheed*, CRL.A. 510/2018, the trial court acquitted the accused of the charges under Sections 376 IPC and Section 4 of the POCSO Act on the basis that the statement given by the prosecutrix and other witnesses was untrustworthy and that the FSL report did not point towards incriminating the accused. In the said case, DNA profile generated from the semen found on the underwear of the prosecutrix did not match the DNA profile generated from the blood sample of the accused. In appeal, the High Court of Delhi noticed that there was something amiss in the FSL report as contrary to the said report the statements of the prosecutrix, other witnesses and medical evidence pointed towards the guilt of the accused. Based on the fresh examination of the samples, the Court concluded that the DNA found on the underwear of the prosecutrix matched that of the accused. This lead to the

possibility that the earlier DNA report had been compromised (as the seal of the samples collected was broken).

9. Presumption of Guilt

There is a statutory presumption of guilt under Section 29 of the POCSO Act when 'a person is prosecuted for committing or abetting or attempting to commit offence under Sections 3, 5, 7 and section 9 of this Act'. Under this statutory presumption of guilt, the Special Court shall presume, that 'such person has committed or abetted or attempted to commit the offence, as case may be unless the contrary is proved'. Further, Section 30 of the POCSO Act provide for presumption as to culpable mental state of the accused . In *Federation of Obstetrics and Gynecological Societies of India (FOGSI) vs. Union of India (UOI) and Ors.* AIR 2019 SC 2214 the Apex Court observed that

"These provisions are a clear indication of the seriousness with which crimes against women and children have been viewed by the Legislature. It is also evident from these provisions that due to the pervasive nature of these crimes, the Legislature has deemed it fit to employ a reversed burden of proof in these cases".

Section 29 of the POCSO is, therefore, a species of such exception to the ordinary rule of presumption of innocence and must be borne in mind while appreciating the evidence of prosecution witnesses in a trial under the POCSO Act. The expressions "shall presume" and "unless contrary is proved" in the aforesaid provision creates a reverse burden on an accused to prove his innocence to earn an order of acquittal and absolves the burden of the prosecution to prove his guilt beyond reasonable doubt. The provisions of Section 29 of the POCSO Act have to be strictly construed inasmuch as the penal consequences are involved. The Section does not say that it is an irrebuttal presumption and in this context it can be safely concluded that the presumption to be drawn under the provision is a rebuttal presumption as held by the Calcutta High Court in this regard in the case of *Shahid Hossain Biswas v. State of West Bengal*: 2017 (3) Calcutta Law Times, 243.

But in *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.

• CHALLENGES AND CONTROVERSIES

Child sexual abuse is a multidimensional problem having legal, social, medical and psychological implications. There are certain drawbacks in the law around the following issues:

(a) Consent: If the child/adolescent refuses to undergo medical examination but the family member or investigating officer is insisting for the medical examination, the POCSO Act is silent and does not give clear direction. There is an urgent need to clarify the issue of consent in such cases. However, it would be prudent to take informed consent from parent when the survivor is a child (below 12 yr) and consent from both parent and the victim, if the survivor is an adolescent (age group from 12 -18 yr). However, emergency treatment needs to be initiated without getting into this consent issues or legality to protect the life of the child.

(b) Medical examination: The POCSO Act, Section 27(2) mandates that in case of a female child/adolescent victim, the medical examination should be done by a female doctor. However, the law mandates the available medical officer to provide emergency medical care. On the other hand, the Criminal Law amendment Act, Section 166A of Indian Penal Code mandates the Government medical officer on duty to examine the rape victim without fail. This conflicting legal position arises when female doctor is not available.

(c) Treatment cost: The law has casted legal obligation on the medical fraternity and establishment to provide free medical care to the survivors. If there are no proper facilities or costly procedure is required, the State should take responsibility of reimbursing the cost, otherwise hospital may provide substandard medical treatment procedure or may deprive the survivor from comprehensive treatment.

(d) Consented sexual intimacy: Sexual contact between two adolescents or between an adolescent and an adult are considered illegal under the POCSO Act 2012, because no exception has been granted in the Act under which an act of sexual encounter with a person under 18 is an offence irrespective of consent or the gender or marriage or age of the victim/the accused. However, it is proposed that any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two consenting adolescents, otherwise both the adolescents will be charged under the POCSO Act, 2012. On the other hand, the latest amendment of the Indian Penal Code concerning rape laws in 2013 clearly reports that the age of consent for sex has been fixed to 18 yr, hence, anyone who has consensual sex with a child below 18 yr can be charged with rape, which may increase the number of rape cases. One more serious repercussion is that obstetric and gynaecologists need to report all the MTP (medical termination of pregnancy) cases performed on children (below 18 yr).

(e) Child marriage: Child marriage and consummation of child marriage are considered illegal under the POCSO Act, 2012. In India even though child marriage is prohibited under secular law, it enjoys sanction under certain Personal Law thus complicating matters. These issues need to be addressed when the law is open for amendment.

(f) Training: There is an urgent need to train the medical, teachers, judicial, advocates and law enforcing agencies in the POCSO Act, 2012. Research, information, monitoring and sensitizing the public are the biggest challenges. Training all the stakeholders is one of the important variables in providing comprehensive care and justice. There is also an urgent need to train all the medical undergraduates and primary health care doctors in providing child friendly interview, structured assessment, collecting evidence, prophylaxis for sexually transmitted diseases and HIV, family counselling and regular follow up.

(g) Role of mental health professional: The definitive signs of genital trauma are seldom seen in cases of child sexual abuse. Hence, the evaluation of child sexual abuse victim requires special skills and techniques in history taking, forensic interviewing and medical examination. The role of mental health professional is crucial in interviewing the child in the court of law. Child sexual abuse can result in both short-term and long-term harmful mental health impact. Mental health professionals need to be involved in follow up care of the victim with regard to emergence of psychiatric disorders, by providing individual counselling, family therapy and rehabilitation.

(h) Reporting: It is well known that the cases of child sexual abuse are usually not reported. Further, knowing and reporting child sexual offence is highly difficult and highly personal decision for many family members and also for survivors. Both survivors and family members feel embarrassed and ashamed bearing the guilt, anger, frustration and emotional turmoil of the act. The fear of re-victimization because of medical examination, criminal justice system and poorly informed society members keeps them silent and undergo torture for long duration.

A golden rule to all the medical professionals working with children is to report all reasonable degree of suspicion in child sexual abuse to the legal authorities. Hence, professionals need to keep watch on sexual abuse, explore and assess the child thoroughly. Though the POCSO Act, 2012 is an excellent piece of legislation and it recognizes almost every known form of sexual abuse against children as punishable offence, a few challenges remain to be answered. A multi-dimensional, multi-agency team and multi-tier approach including access to psychosocial support is to be made available to deliver holistic comprehensive care under one roof for victims of child sexual abuse.

- **LOOPHOLES IN THE ACT**

Upon a preliminary reading the POCSO Act may qualify as the ideal legislation to protect children from sexual offences. However, there are certain conceptual problems in it.

The Act does not leave any possibility of consent given by persons under 18. This would mean that if a seventeen year old boy or girl had a nineteen year old sexual partner, the partner would be liable to be booked under the provisions of the POCSO Act. The Act also does not provide any clarity on what happens when two minors engage in any kind of sexual activity. Technically, they are both Children in Need of Care and Protection (CNCP) and Children in Conflict with Law (CCLs). In practice though, the police declare girls to be CNCPs and the boys to be CCLs.

Another problem faced by victims is proving the age of the child. Since the POCSO Act is silent on what documents are to be considered for determining the age of the child victim, the provisions of Rule 12 of the Juvenile Justice Rules have been read by Courts as applying to child victims as well. This rule recognizes only the birth certificate, the school certificate of the child, or the matriculation certificate. However, children who are only able to produce other documents – even a legal document such as a passport – have to undergo a bone ossification test. This test can give a rough estimate of the age of the child at best. There needs to be a clear provision in the POCSO Act that lays down what documents should be considered for proving the age of the child, and whether the benefit of the doubt should be given to the child if the ossification test cannot provide an exact assessment.

Similar to the law of rape under the IPC. The pronoun used for the accused is “he”, thus, again, only a male can be booked for the offences under the relevant provisions of the POCSO Act. Though, unlike rape, a victim under the POCSO Act can be any child irrespective of the gender, the accused still can only be a male and females are again given a protective shield, for reasons unknown. Saying that females do not subject children to forceful sexual assault is untrue.

These are clear examples of the unexplained gender bias in the laws relating to sexual intercourse in India. Also, since the POCSO Act only looks into the age aspect, a teenage girl below the age of 18 who experiences coercive sexual assault may later have the boy booked under the IPC. But, vice-versa won't be true due to the biased definition. A woman who commits a like offence can be booked only for sexual assault under the POCSO Act, the punishment therein being much less compared to sexual assault under the IPC.

The Constitution Bench of the Hon'ble Supreme Court of India in *Alakh Alok Srivastava v. Union of India others*, reported in (2018) 5 SCC 651 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."

Moreso, the interpretation of the POCSO Act adopted by the Bombay High Court in the recent pronouncements of *Satish Ragde Vs. The State of Maharashtra* (Criminal Appeal No. 161 of 2020) and *Libnus Vs State of Maharashtra* (Criminal Appeal No. 445 of 2020) restricts the scope of POCSO Act and impairs effective implementation of it.

- **PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (AMENDMENT) ACT, 2019**

Context

- i. Recently the Protection of Children from Sexual Offences (Amendment) Bill, 2019 was passed by both Houses of Parliament with an objective of stopping the rampant sexual abuse of children.
- ii. It seeks to provide more stringent punishment, including death penalty, for sexual crimes against children.
- iii. The present bill is welcome in certain respects as it specifically defines what 'child pornography' is; 'using a child for pornographic purposes' and for 'possessing or storing pornography involving a child' is punishable. It has also widened the ambit of 'aggravated sexual assault'.

What are the amendments to the Act?

- It increases the minimum punishment from seven years to ten years. It further adds that if a person commits penetrative sexual assault on a child below the age of 16 years, he will be punishable with imprisonment between 20 years to life, with a fine.
- The amendment adds two more grounds to the definition of aggravated penetrative sexual assault. These include: (i) assault resulting in death of child, and (ii) assault committed during a natural calamity, or in any similar situations of violence. Currently, the punishment for aggravated penetrative sexual assault is imprisonment between 10 years to life, and a fine. It also increases the minimum punishment from ten years to 20 years.
- The amendment adds two more offences to the definition of aggravated sexual assault. These include: (i) assault committed during a natural calamity, and (ii) administering or helping in administering any hormone or any chemical substance, to a child for the purpose of attaining early sexual maturity.
- It defines child pornography as any visual depiction of sexually explicit conduct involving a child including photograph, video, digital or computer-generated image indistinguishable from an actual child and adds two other offences for storage of pornographic material involving children. These include: (i) failing to destroy, or delete, or report pornographic material involving a child, and (ii) transmitting, displaying, distributing such material except for the purpose of reporting it. It also enhances the punishments for such offences.

Other Aspects

- The new act defines child pornography as: "any visual depiction of sexually explicit conduct involving a child which includes a photograph, video, digital or computer-generated image (that is) indistinguishable from an actual child."
- Additionally, "an image created, adapted, modified" to depict a child would also be treated as child pornography. This would also include cartoons, animated pictures, etc.
- The Cabinet has also enhanced the fine for possessing child porn but not deleting or reporting it to 5,000 from the earlier proposal of Rs. 1,000. If a person stores such content for distributing it further, except for when presenting it in court as evidence, he could face a punishment of upto three years.

- Henceforth, there will be zero tolerance for child pornography.
- Some of these provisions were also contained in the Protection of Children from Sexual Offences (POCSO) Amendment Act, 2019, but lapsed.

Significance:

- So far, there had been no definition of child pornography in Indian law.
- It was a big lacuna which could be used to evade the law.
- Neither Section 67 of the IT Act nor Section 293 of the Indian Penal Code define child pornography.
- Its definition derived from what constitutes pornography, which is defined as “any material which is lascivious or appeals to the prurient interests or if its effect is such as to tend to deprave or corrupt the minds of those who are likely to see, read and hear the same.”
- “Child porn” has now been redefined to ensure that the punishment can be implemented properly.
- The amended law will also apply to pornographic content where adults or young adults pretending to be children.
- **POCSO RULES 2020**

The Union government has notified the Protection of Children from Sexual Offences Rules, 2020 which enables implementation of recent amendments to the Act under which provisions of punishment for child abuse has been made more stringent. Some of the significant additions in the new rules include the provision of mandatory police verification of staff in schools and care homes, procedures to report sexual abuse material (pornography), imparting age-appropriate child rights education among others. For crackdown on child pornography, the rules state that “any person who has received any pornographic material involving a child or any information regarding such pornographic material being stored, possessed, distributed, circulated, transmitted, facilitated, propagated or displayed, or is likely to be distributed, facilitated or transmitted in any manner shall report the contents to the special juvenile police unit (SJPU) or police, or the cybercrime portal“.

“The report shall include the details of the device in which such pornographic content was noticed and the suspected device from which such content was received including the platform on which the content was displayed,” the rules said.

Under the rules, the State governments have been asked to formulate a child protection policy based on the principle of “zero-tolerance” to violence against children, which shall be adopted by all institutions, organisations, or any other agency working with, or coming in contact with children.

“The Central government and every State government shall provide periodic training including orientation programmes, sensitisation workshops and refresher courses to all persons, whether regular or contractual, coming in contact with the children, to sensitise them about child safety and protection and educate them regarding their responsibility under the Act,” the rules said. The Centre and State governments have been asked to prepare age-appropriate educational material and curriculum for children, informing them about various aspects of personal safety, including measures to protect their physical and virtual identity; and to safeguard their emotional and mental wellbeing, prevention and protection from sexual offences and reporting mechanisms, including Childline helpline services through toll free number - 1098.

“Orientation Programme and intensive courses may also be organised for police personnel and forensic experts for building their capacities in their respective roles on a regular basis,” it said. Under the new rules, any institution housing children or coming in regular contact with children, including schools, creches, sports academies or any other facility for children must ensure a police verification and background check on periodic basis of every staff.

The new POCSO rules became effective from March 9, 2020.

- **ROLE OF KEY STAKEHOLDERS UNDER POCSO ACT**

1. Parents

Parents are the child’s first guide and guru and it’s not always easy as some lessons are harder to impart than the others. One of the most important and invaluable lessons one can teach child is to understand their own bodies. This not only includes simple biological fact like knowledge of all the body parts and sexuality but also common sense information about maintaining boundaries and handling relationships.

2. Role of Special Juvenile Police/Local Police

The police play an important role for protection of children. The POCSO Act, 2012 mandates police to adopt child friendly procedures while dealing with cases of child sexual abuse.

3. Role of Medical Professionals

In many cases of sexual offences parents and caregivers prefer to take their children to a nearest hospital or a clinic even before they go to the police. A medical professional and hospitals response is key to the child’s immediate wellbeing and long term recovery. The evidence collected in the course of medical examination of victims of sexual assault is core in most investigations in POCSO cases. Rule 5 of the Protection of Children from Sexual Offences Rules, 2012 states that Emergency Medical Care is to be provided by any medical facility private or public. Sexual Assault is, therefore, a Medical Emergency.

4. Role of Child Welfare Committee

The Child Welfare Committee plays a key role in ensuring that child victims of sexual offences receive necessary care and protection (Section 30 of J Act, 2015).

5. Role of NGO’s and Support Persons

POCSO gives Non- Governmental Organizations (NGO), Social Workers, Special Educators, Counselors and other experts a legitimate role to support victims and families through the entire process starting from registration of a complaint to trial and long-term rehabilitation. NGOs may play the roles of a “support person”, “expert”, “special educator”, [as defined under Rule 2 (c, d, f) & 3 of POCSO Rules, 2012] or as interpreters and translators. A person familiar with the manner of communication of the child or whose presence is conducive to communicating with the child has also been defined under the Rules [Rule 2 (e)].

“Support Persons” have a two-fold role in cases of sexual offences against children -

- Throughout the legal proceedings – from investigation to trial; and
- Ensuring long term rehabilitation and well being of the child.

6. Role of School Authorities and Teachers

As the child grows and develops, they begin spending as much time at school as they do at home. The recent spate of reports of child sexual abuse in school premises or by people

working in schools has been a worrying trend. In almost every case, the trauma of child is aggravated because of the school's unpreparedness in the handling cases of the sexual abuse. The tragedy is not just that the abuse took place because of a lapse in the child protection system but it is doubled by the fact that schools are often trying to silence the incident to wash their hands off it; some schools even blame the child and the parents. As a caregiver or a teacher, children and parents trust school staff unconditionally. In many instances, children open up to them about their issues even before they talk to their parents. Safeguarding this trust is the responsibility of school authorities. It is crucial that the authorities act decisively, quickly and systematically in the face of a complaint of child sexual abuse.

7. Role of Special Court

To facilitate speedy trials, the State Governments have been given the mandate to designate a Sessions Court as a Special Court for trial of offences under POCSO [Section 28 (1)]. When a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7,9,12,13,14 & 15 of POCSO Act, 2012, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence unless the contrary is proved. Therefore onus lies on the accused to prove innocence (Section 29). The Special Court will also presume culpable mental state of the accused unless it is proved contrary (Section 30).

8. Role of Special Public Prosecutor

A Special Public Prosecutor (SPP) shall be appointed to every Special Court for conducting cases only under the provisions of the POCSO [Section 32 (1)].

A Public Prosecutor is believed to represent the public interest, and not to seek conviction of the accused. At the same time he is also expected to ensure that the real culprit should not escape conviction. Public Prosecutor's duty is to assist the court by placing the entire material collected during investigation before the court. A Public Prosecutor has to be impartial, fair and truthful while conducting the prosecution in the court.

• RECOMMENDATIONS FOR CHILD FRIENDLY SPECIAL COURTS

- a. Separate Complex: Special Courts should be located in a separate complex and not within the regular criminal courts complex. This is to ensure that children do not feel intimidated when confronted with the regular criminal court complex where accused are produced in chains and handcuffs.
- b. Separate Entrance: There should be a separate entrance and a separate waiting room to guarantee that the child is not exposed to the accused and his defence lawyers before the trial, hence reducing the chances for the child to feel threatened.
- c. Accessible Structures: The court complexes should be accessible to child victims and all other people with disabilities so that they are not disadvantaged because of their disability. The court complexes should have easily accessible toilets, including toilets for child victims and other people with disabilities.
- d. Seating arrangements: The judge should not sit on a raised dais. This is so that the judge appears friendly and approachable to the child. The arrangement should be informal and should not resemble a court hall. This is so that children do not feel like they are being put on trial, but understands that they are there to give testimony in a supported environment.
- e. Orientation to the child: The child should be oriented to the court hall and the judge before the trial, and the procedure should be explained to the child. This will to some extent allay the child's fears and help prepare the child for the trial.
- f. Privacy: Minimal staff should be allowed in the courtroom, so that the privacy of the child is protected and the child does not feel overwhelmed.

- g. Dedicated Special Public Prosecutor (SPP): There should be a dedicated SPP for every Special Court. This will ensure that the SPP is sensitized and well versed in POCSO matters.
- h. Exposure should be prevented: The Court hall should be designed in such a way that the child cannot see the accused while testifying, whether through the use of a separate room, a screen or partitions. This way the child will not be intimidated by the presence of the accused.
- i. Recording of testimony: The testimony should be recorded quickly and in minimal number of hearings as needed. The case should also be disposed of speedily so that the child is not made to endure the trauma of the judicial process, and can continue the process of recovery.
- j. Support Persons: Support Persons should be made available so that the child is guided through the maze of the legal system and is assisted in the pre-trial processes and trial process.
- k. Involvement of experts: Child psychologists, special educators, interpreters and other experts should be involved as per the needs of the child, particularly in complex cases involving younger children and children with disabilities.
- l. Communicating with children: SPP's should receive training in how to best communicate with the child, and on ways to boost the child's trust and confidence. The child should be questioned in a manner and language that the child understands. Questions should not be aggressive but should be facilitative to the child's testimony. It is important that the child feels that the child's testimony is important and valued.

CONCLUSION

POCSO 2012 has undoubtedly made a significant contribution to tackling the problem of Child Sexual Abuse (CSA) in India. It has identified and criminalized a range of unacceptable sexual behaviors that pose a threat to children. The number of reported cases is increasing rapidly, indicating that the law has made a substantial contribution in educating the public, sensitizing the criminal justice system, and making the reporting of CSA not just acceptable, but also mandatory. The law has some unique features and is very comprehensive. CSA is a particularly reprehensible criminal act. The practice is globally prevalent and occurs in all societies. Pediatricians and other health care professionals are often the first contact for CSA victims and thus need to have the expertise for its adequate clinical evaluation and treatment, and be knowledgeable of the legal aspects. A multidisciplinary response is necessary for comprehensive management that includes psychological support to the victim and the family. The Government of India's Act for Prevention of Children from Sexual offences Act (POCSO, 2012) defines CSA and lays down responsibilities and gives management guidelines and legal procedures. Parents, school teachers and the civil society at large must overcome the traditional inimical attitudes of silence and shame and take appropriate educative measures to prevent CSA.