

# Study on Position of the Survivors and Victims of Child Sexual Abuse and the Impact of the Crime

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## ABSTRACT

The aim and object of this article is to analyze the position of the survivors and victims of child sexual abuse and the impact of the crime. The paper aims at understanding the effective implementation of the Protection of Children from Sexual Offences Act, 2012. The researcher will divide the research paper into three sections. The first section would be to understand the Child Protection System in India and the proceedings of the Special Courts in effectively implementing the Act. The second section would highlight the position of survivors and victims of child sexual abuse. The third section would focus on the latest Judgments of the Hon'ble Higher Courts with respect to the POCSO Act. This research paper is an attempt to find the major concern that whether the Act has served to deter the rate of sexual offences against the children because there has been no reduction in the number of such crimes. The researcher also tries to identify the factors that have led to the low level of convictions under the POCSO Act and also offers recommendations for strengthening the prosecution and investigation.

**Keywords:** Aggravated Penetrative Sexual Assault, Aggravated Sexual Assault, Sexual Exploitation, Perverse Mind, Gender Neutral, cataclysms.

## INTRODUCTION

The Children are the world's most valuable resource and its best hope for the future. Children's rights aim to take into account the necessity of the development of a child.

Every 15 minutes a child is sexually abused in India. 95% of the Children abused in 2015 were known by a relative.

According to National Crime Records Bureau<sup>1</sup> one in four families don't even come forward to reportsuch cases.

### Constitutional Guarantees That Are Meant Specifically For The Protection Of Children

Article 15(3) - Nothing in this article shall prevent the State from making any special provision for women and children.

Right to being protected from being trafficked and forced into bonded labour (Article 23)

Right of weaker sections of the people to be protected from social injustice and all forms of exploitation (Article 46)

Right to be protected from being abused and forced by economic necessity to enter occupations unsuited to their age or strength (Article 39(e))

Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment (Article 39 (f))

India is also a signatory to the United Nations Convention on the rights of the Child.

Article 19(1)<sup>2</sup>, UNCRC<sup>3</sup> directs State Parties to take all appropriate measures to protect children from violence, including sexual abuse.

Article 34<sup>4</sup>, UNCRC obligates State Parties to ensure that children are protected from all forms of sexual exploitation and sexual abuse, including the inducement and coercion of a child to engage in unlawful sexual activity and the exploitative use of children in prostitution, unlawful sexual activities and pornographic performances and materials. Article 36<sup>5</sup> also prohibits all forms of exploitation prejudicial to any aspect of the child's welfare.

The comprehensive POCSO Act was came into effect on November 14, 2012 on the Children's day. Sec 2 (1) (d) of the Act states "Child" means any person below the age of eighteen years.

The enactment of the POCSO Act, 2012 and the establishment of Special Courts under this Act was really a step forward in addressing the cases of child sexual abuses to meet the needs of children. It is almost a decade on it, is time to analyze whether the criminal justice system has succeeded in giving children access to justice.

### What are the amendments to the Act?

On August 5, 2019, the POCSO was amended and it increases the minimum punishment from 7 years to 10

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. Before the amendment, the punishment for aggravated penetrative sexual assault is imprisonment between 10 years to life, and fine. It also increases the minimum punishment from 10 years to 20 years, and the maximum punishment to death penalty.

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.

A sexual offence of any kind not only harms the child physically, but also causes long term damage to the mental state of the child. The POCSO cases require understanding of the complexities of abuse, the child should feel supported, the testimony and evidence should be sensitively appreciated, and the privacy of the child should also be protected. The purpose of this provision is to ensure that POCSO cases are dealt only in Special Courts “designated for similar purposes” as laid down in the Act, and to ensure speedy trial.

According to Section 28(1) of POCSO Act, State Governments should, in consultation with the Chief Justice of the Hon’ble High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act, in order to facilitate the speedy trial. The Standing Committee Report on the POCSO Bill had observed that the establishment of multiple courts or legal infrastructures would not be useful and recommended that “wherever the legal framework has been created under the Commissions for Protection of Child Rights Act, 2005, the same should be used.” Accordingly, if a Sessions Court has been notified as a Children’s Court under the Commissions for Protection of Child Rights Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act. The POCSO Act does not expressly require Special Courts to exclusively deal with offences under the POCSO Act or offences against children.

#### **Structural Modifications of the Court-room**

According to Section 33 (4) of POCSO Act, the “child-friendly atmosphere” of the courtroom should be created “by allowing a family member, a guardian, a friend or relative, in whom the child has trust or confidence, to be

present in the Court.” This provision bears no reference to the physical dimension of the courtroom or the behaviour required to ensure that the child’s interaction with the criminal justice system is child-friendly.

#### **Preventing exposure towards accused while recording testimony of the victim child**

Section 36(1) of POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused at the time of recording evidence, and for this purpose it can record the evidence using video conferencing, single visibility mirrors, curtains, or any other device.

#### **Child-friendly procedures**

Section 33(2) of POCSO Act prohibits the Special Public Prosecutor and the defence lawyer from putting questions directly to the child. All questions during the Chief examination and Cross-examination must be routed only through the Special Court. The very purpose of such a provision is to guarantee that the child does not feel insecure, intimidated or threatened by the SPP and the defence lawyers and age appropriate questions were also permitted to ask. The POCSO Act has given statutory recognition to the Supreme Court’s direction in *Sakshi Vs Union of India*<sup>6</sup>, (2004) 5 SCC 518 that during a trial of child sex abuse or rape. All the questions asked during cross-examination should be given in writing to the Presiding Officer of the Court so that they can be addressed to the victim or witnesses in a language understood by the child. As per Section 33 (3)<sup>7</sup> POCSO Act, frequent breaks should be allowed to the child during trial if necessary. Special Courts must ensure that children are not called repeatedly to testify in the Court under Section 33(5)<sup>8</sup>. The Model Guidelines on the POCSO Act emphasize that “the child’s testimony should not be delayed by other matters. The Court should bear in mind the child’s concentration, the length of any recording, and the need for frequent breaks.”

#### **Position of the Survivors and Victims**

The Voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. The reality is that there is a gross failure to support and rehabilitate the victims and their family. As a result of this, either the victims turn hostile or the witnesses turn hostile, or they simply lose hope and stop cooperating for investigation or the Court Proceedings. The timely payment of compensation and due rehabilitation of the victim are key to ensure a proper trial that actually brings out the truth.

Section 33(8)<sup>9</sup> of POCSO provides that in appropriate cases, in addition to punishment, the Special Court may direct payment of compensation to the child for any physical or mental trauma caused to the child and also for immediate rehabilitation. In pursuant to the parent Act, the POCSO Rules of 2012 dedicated Rule 7 to the procedure

and parameters of providing such compensation. Rule 7(3) enlisted the various parameters/factors to be considered by the Special Court in deciding such compensation, such as gravity of the offence, expenditure incurred/likely to be incurred on medical treatment, loss of educational opportunity, financial conditions, etc. Rule 7(4) and (5) states that after the amount is decided by the Special Court, it is to be disbursed from the Victims Compensation Fund or such other scheme by the legal services authority within 30 days of receipt of such order.

In a sample study conducted by the Delhi Commission for Protection of Child Rights (a statutory body constituted under Section 17 of The Commissions for Protection of Child Rights Act, 2005) in collaboration with Human Development Society titled Mapping of Needs and Priorities in 2019: A Study of Child Rape Victims in Delhi was conducted and the study highlighted the challenges the child rape victims and their families face, and aspects that have a definite bearing on their rehabilitation and social reintegration.

In *Re Nipun Saxena & Anr Vs Union of India & Ors*<sup>10</sup>, (2019) 2 SCC 703 the Hon'ble Supreme Court has directed that the Special Court, upon receipt of information as to commission of any offence under the Act by registration of FIR, shall on his own or on the application of the victim make an enquiry as to the immediate needs of the child for relief or rehabilitation and pass appropriate order for interim compensation.

Nipun Saxena's case was preceded by another pertinent judgment passed under POCSO Act by the Supreme Court in *Alakh Alok Srivastava Vs UOI*<sup>11</sup>, (2018) SCC OnLine SC 212 wherein the Apex Court directed for each High Court to constitute a three-judge committee to regulate and monitor the progress of trials under POCSO. In addition, each state was directed to constitute a Special Task Force to ensure that investigation is properly conducted under POCSO Act.

### **Latest Judgments of The Hon'ble Supreme Court And High Courts With Respect To Pocso Act**

#### **The body of a woman is her own temple**

The Hon'ble Supreme Court held in *State of Madhya Pradesh Vs Madhanlal*<sup>12</sup> in 2015 that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. These are crimes against the body of a woman which is her own temple. These are offences which suffocate the breath of life and sully the reputation. And reputation, needless to emphasize, is the richest jewel one can conceive of in life. No one would allow it to be extinguished.

When a human frame is defiled, the "purest treasure, is lost. Dignity of a woman is a part of her non-perishable

and immortal self and no one should even think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most. It is sacrosanct.

#### **POCSO Act Is Gender Neutral: The Hon'ble Delhi High Court Awards 15 year Jail Term For a Man For Sodomizing a 6-year-old Boy.**

In *Re Jabbar Vs State*, the Hon'ble Court said "The POCSO Act applies to every person below 18 years of age". The Delhi High Court upheld the conviction of a man for sodomizing a 6-year-old boy and sentenced him to rigorous imprisonment of 15 years under the Protection of Children from Sexual Offences (POCSO) Act. A bench of Hon'ble Justice SP Garg and Justice C Hari Shankar observed that the Protection of Children from Sexual Offences (POCSO) Act is gender-neutral and it does not discriminate or distinguish between a boy and a girl, as victims of sexual offences.

#### **Sexual Offences constitute an altogether different class of crime which is the result of a perverse mind: Allahabad High Court**

In *Re Bodhi Sattwa Gautam Vs Subhra Chakraborty*<sup>13</sup>, AIR 1996 SC 922, the Hon'ble Supreme Court observed that "Sexual offences constitute an altogether different class of crime which is the result of a perverse mind. By their very nature these crimes cannot be treated at par with matrimonial offence. Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right of privacy and sanctity of a female and is a serious blow to her supreme honor offending her self-esteem and dignity."

It was again reiterated in *Mohd Kaleem Vs State of Uttar Pradesh* decided on August 22, 2019 by Hon'ble Justice Sanjay Kumar Singh.

The Allahabad High Court held that sexual offences constitute an altogether different class of crime which is the result of a perverse mind. By their very nature these crimes cannot be treated at par with matrimonial offence. Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right of privacy and sanctity of a female and is a serious blow to her supreme honor offending her self-esteem and dignity. Allowing quashing of charge-sheet, pursuant to a compromise, will, in such cases, only embolden the perpetrators of such crimes, which otherwise are on the increase, in society.

If the accused in such a case is an affluent person and the prosecutrix comes from a socially or economically weaker strata of the society, quashing in such a case would only encourage commission of such offences, as the accused, using his money power or otherwise, may be able to induce the prosecutrix or victim to enter in to settlement with him

and then seek quashing of criminal proceedings, on the strength of that settlement.

**The Judge is at the liberty to test the capacity of a child witness:**

In Re P Ramesh Vs State, Criminal Appeal No. 1013 of 2019 decided on August 1, 2019, the Hon'ble Justice Dr. Dhananjaya Y Chandrachud and Hon'ble Justice Indira Banerjee of the Hon'ble Supreme Court held that in order to determine the competency of a child witness, the judge has to form her or his opinion. The Judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her or him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In Criminal proceedings, a person of any age is competent to give evidence if she or he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she or he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her or him and gives rational answers to those questions, it can be taken that she or he is a competent witness to be examined.

**In Re Sri Joubansen Tripura Vs The State of Tripura, The Hon'ble Tripura High Court has held that "Conviction Of Accused Only On The Basis Of Presumption Under POCSO Act Would Offend Article 20(3) and Article 21 Of The Constitution of India"**

The Tripura High Court held that the conviction of an accused only on the basis of presumption under Section 29 and Section 30 of the POCSO Act would offend Article 20 (3)<sup>14</sup> "No person accused of any offence shall be compelled to be a witness against himself" and Article 21<sup>15</sup> "Right to Life of the Constitution of India." Noting that such presumption would lead up to the prosecution commencing the trial with "an added advantage", a Division Bench comprising of Hon'ble Chief Justice Akil Kureshi and Justice Arindam Lodh observed thus:

"Upon meticulous reading of Section 29 and Section 30 of the POCSO Act, according to us, prosecution will commence the trial with an additional advantage that there will be presumption of guilt against the accused person, but, in our considered view, such presumption cannot form the basis of conviction, if that be so, it would offend Article 20 (3) and 21 of the Constitution of India.

Perhaps, it is not the object of the legislature to incorporate Sections 29 and 30 under the POCSO Act."

**The Hon'ble Delhi High Court in Dinesh Sharma and others Vs State and another has held that "POCSO - FIR Cannot Be Quashed On The Ground That Victim Decided To Compromise Matter After Attaining Majority"** A single judge bench comprising of Hon'ble Justice Subramonium Prasad observed thus:

"Exercising jurisdiction under Section 482 Cr.P.C<sup>16</sup> to quash an offence under POCSO Act would go against the intention of the legislature which has brought out the special enactment to protect the interests of children. The FIR cannot be quashed on the ground that the victim after attaining majority has decided to compromise the matter with the accused." The Court, while noting that the exercise of jurisdiction under Section 482 of Cr P C in quashing an offence under POCSO will go against the intention of the legislature, also relied on the Statements of Objects and Reasons of the POCSO Act which reads "heinous crime like rape cannot be quashed by the High Court by exercising power under Section 482 Cr.P.C. even if the prosecutrix and the accused have entered into a compromise."

**Victim Girl and Man In Love and Living Together For 4 Years Won't Make POCSO Offence Compoundable Even If Girl Agrees To It held Madras High Court.**

In a significant ruling, the Hon'ble Madras High Court held that once a victim girl gives a complaint about an offence under the POCSO Act, and the case is registered, it becomes an offence against State and the subsequent compromise won't take away the offence. Underlining that any offence committed under the POCSO Act is not compoundable offence, the Bench of Hon'ble Justice P. Velmurugan observed,

"The scope of the (POCSO) Act is very clear, mere falling in love is not an offence but a person who is above 18 and who had sexual assault intentionally against a child who is under 18 years is an offence."

Facts of the Case: A case was registered against the Petitioner for the offence u/s 5(1)<sup>17</sup> read with Section 6<sup>18</sup> of the POCSO Act and after trial, the petitioner was convicted and sentenced to undergo 10 years R.I.

At the outset, the Court noted that before the trial Court, the victim girl had deposed and further her statement was also recorded u/s 164 Cr.P.C.<sup>19</sup> before the Magistrate, wherein she had clearly stated that the appellant had committed the offence. Significantly, noting that at the time of the commission of offence, the victim child was aged under 18 and hence, the victim is a child under Section 2(1)(d) of the POCSO Act, the Court observed,



"The evidence of the victim girl is very clear that she was at the age of 17 years on the day of occurrence and the appellant had made a false promise that he would marry her and against her will, he had forceful penetrated sexual intercourse repeatedly with her, subsequently, he refused to marry her." Further, the Court noted that after the completion of examination of prosecution witnesses, the appellant convinced the victim girl and filed an affidavit and even in the affidavit, the victim girl had not stated that no such occurrence occurred, but, she had only stated that for four years they had been living together.

Significantly, the Hon'ble Court ruled, "Even assuming that victim girl had fallen in love with the appellant and admitted that they are living for four years, even on the date of commission of the offence, provisions of POCSO Act attract. It is not a compoundable offence. Subsequently, she cannot turn it to compound the offence."

**In Re Badri Nath Vs Union Territory of Jammu and Kashmir, the Hon'ble Jammu and Kashmir High Court has held that "POCSO - Victims Entitled To Receive Information About Court Proceedings"**

The Jammu and Kashmir High Court has held that (minor rape) victims are entitled to receive most appropriate information of the proceedings which would include the status of the accused including his or her bail, temporary release, parole or pardon, escape, absconding from justice or death.

A single bench of Hon'ble Justice Sanjay Dhar observed thus in view of the guidelines issued by the Union Ministry of Women and Child Development under Section 39<sup>20</sup> of the POCSO Act.

### CONCLUSION

The intention behind the POCSO Amended Act is laudable. However, the rhetoric over severe punishments should not deflect our attention from the problems related to implementation of POCSO Act so far such as lack of adequate Special courts, lack of sensitization for investigators and prosecutors in dealing with child victims, poor rate of convictions etc. The poor conviction rate and epidemic rise in crimes under POCSO itself leaves an unpleasant picture of the manner in which the criminal justice system is being administered and managed in India. As per the last available data from the National Crime Records Bureau 2016, less than three per cent of child rape cases that came up before the Courts ended in convictions.

While hearing a Public Interest Litigation in 2017, the Hon'ble Delhi High Court was told that only 18.49 per cent of people accused of child sexual abuse under the POCSO (Protection of Children from Sexual Offences) Act were found guilty by Courts in the capital in the first half

of 2016. A report by the National Law School Bangalore, which examined 667 judgments between 2013 and 2015, highlighted this predicament. It expressed that alleged victims and their family members turned hostile in "67.5% cases, and in just 26.7% cases these people dared to testify against the accused".

Once a POCSO case is filed, the long-winded procedure provides the accused more than enough time to coerce and intimidate the victims or their families to backtrack on their complaints. This situation turns out to be more complicated when the accused is someone from the family itself. The conviction rate drops even further due to these circumstances.

According to Health Assessment Questionnaire's analysis of POCSO cases it handled since 2013, the average time taken for completing a child's testimony in seven of the 10 cases was 242 days, which is eight months as against the mandated 30 days. On an average, these cases remained pending for 69 months, which is 5.75 years, as against the mandated period of one year.

The provisions of capital punishment might provoke the accused to murder the victims and increase the risk of sex offenders doing away with their victims to destroy evidence and to ensure that there is no principal testimony. This proposition is widely feared among various NGOs and Child right activists. Everyone wants the perpetrator to be punished but not at the cost of the life of the victim.

Taking suo moto notice of the huge pendency of POCSO cases, the Hon'ble Supreme Court has directed the establishment of Special Courts in each district.

Simply having laws and numerous guidelines do not per se guarantee protection of the child. The focus should be more on taking measures to ensure faster and efficient investigation and prosecution of POCSO cases.

### REFERENCES

- [1]. Ncrb, is an indian government agency responsible for collecting and analysing crime data as defined by the indian penal code and special and local laws. Ncrb is headquartered in new delhi and is part of the ministry of home affairs, government of india.
- [2]. Article 19 (1) of uncr -states parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
- [3]. The united nations convention on the rights of the

- child
- [4]. Article 34 -states parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, states parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
- [5]. The inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and materials.
- [6]. Article 36 -states parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare (2004) 5 scc 518
- [7]. Sec 33 (3) -the special court may, if it considers necessary, permit frequent breaks for the child during the trial.
- [8]. Section 33 (5) -the special court shall ensure that the child is not called repeatedly to testify in the court.
- [9]. Section 33 (8) -in appropriate cases, the special court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.
- [10]. (2019) 2 scc 703
- [11]. (2018) scc online sc 212
- [12]. 2015 scc online sc 579
- [13]. Air 1996 sc 922
- [14]. Article 20 (3) -no person accused of any offence shall be compelled to be a witness against himself
- [15]. Article 21 -protection of life and personal liberty no person shall be deprived of his life or personal liberty except according to procedure established by law
- [16]. Sec 482 of cr p c -saving of inherent powers of high court. Nothing in this code shall be deemed to limit or affect the inherent powers of the high court to make such orders as may be necessary to give effect to any order under this code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.
- [17]. Sec 5 (1) -whoever commits penetrative sexual assault on the child more than once or repeatedly
- [18]. Sec 6 -punishment for aggravated penetrative sexual assault.--(1) whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.
- [19]. Sec 164 of cr p c -recording of confessions and statements.
- [20]. Sec 39 of pocso act -guidelines for child to take assistance of experts, etc