



SEXUAL OFFENCES AGAINST MINORS AND RELATED LAWS

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CHAPTER-I INTRODUCTION

“There was darkness at noon. The raped and mutilated dead body of the child felt nothing.”

- Paritosh Vyas, Civil Servant (IRS)

“I was barely 8 yearly old when I was trained to seal my lips.”

- A victim of sexual assault at the age of 27

1.1 INTRODUCTION

The crime against women in our country has shown a consistent rise during the past few decades. The women in Indian society have been victims of humiliation, torture and exploitation for as long as we have had written records of social organization and family life. Being physically weak and also a mediator of sexual act. She is exposed to all the risks of sexual assaults. Through virginity is valued by males, but also violated by males in the form of rape. In India¹ rape constitutes 3 percent of all reported crimes but among the crimes against women, rape constitutes the highest percentage despite less reporting due to multiple factors. According to the latest report by NCRB, rape cases in India jump 678 percent since 1971. In the year 2006, the total number of rape cases were 1954 all over India with Delhi having reported the highest number amongst all Union Territories and the states of Madhya Pradesh, Uttar Pradesh and Maharashtra outnumbering the other states². According to an article in India Today³, every two hours a rape occurs somewhere in India. Rape being considered the most heinous crime against women reflects the sexually starved society. Women are being raped at work, on

¹ Bureau of Police Research & Development. Crime in India (1979) p.117

² National Crime Record Bureau, Ministry of Home Affairs East Block, R.K.Puram, New Delhi

³ Kapoor C. Raped: Delayed Action: India Today.....15.4.1983 p.27

the street, in the fields, in the secluded places, in their homes, in buses, trains and cars and by the strangers, relatives, in - laws, the neighbours and even the blood relatives. Teachers rape their students, employers' rape female employees, police rape the female in custody and any male getting an opportunity and being placed on superior pedestal makes an attempt to molest the female. The minor girls are raped by elderly and the tender small girls who are unaware of the feeling of sexual pleasure are also not spared by the males. The problem of rape is universal phenomenon and is considered to be a serious problem in many countries. In United States, the annual rate of rape cases was 26, in Canada 8, in UK 5.4 per lack of population. As per police Research and Development⁴ data, the heads of crime to register an increase, in 1983 over 1973 was 'Rape' 106.2 percent followed by other Indian Penal Code Offences (82.4 percent). However, these figures represent the tip of the iceberg. As, in India, the cases are quite less reported than actually prevalent due to a host of reasons. A few of the main reasons of poor reporting of the crime of rape is the lack of trust with law enforcement agencies, social attitude and effects on victim, the victim being more victimized at different levels of the path for justice and the victim rather than the accused being looked upon at fault for rape or allied sexual offence. Other factors for poor reporting could be ignorance. Shame humiliation, fear of disgrace to family, threats and associated future social aspects. It is not that the poor girls are only rape victims, but women employees' inmates of various homes, hospitals, maid servants, deaf and dumb, mentally retarded, beggars, lunatics and even handicapped females are not spared. The rape victim faces social stigma, police harassment during interrogation, and finally the long-drawn procedures of the Courts during the trial. On analysing the background of victims of rape it was found that the unmarried girls constituted

66.7 percent and outnumbered the married females, 59.5 percent were of below 18 years of age, 40.5 percent between 18-30 years; the victims were mostly from poor income group and educational background⁵. The socio-cultural background of the rapist, type of rapist and the modus operandi used by the rapist show that the rapes were by and large situational or at the most partially planned or drawn into sexually by chance. Most of the rapists were married and sexually assaulted females known to them. If they encounter unexpected refusal, they generally react by verbal or physical violence.

The constant increases in the commission of the crime against women show the disability and humiliation that the India women suffer. The social welfare organizations, media and the public realized this alarming rise in crime and voiced for a change in the law as a result of which major amendments in law relating to rape were made in the year 1983 that is about seventeen years

back. The social situations have changed and still the crime related with sex is on an increase Crime statistic for 2006 released by the Home Ministry National Crime Records Bureau (NCRB) show that 18 women are victims of crime every hour. The number of rapes a BERINGday has increased nearly 700 percent since 1971 when such cases were first recorded by the NCRB. The number has grown from 7 to 53 rape cases per day.

Several sexual attacks have been reported in Rajasthan the jewel of Indian tourism. It is one destination where culture speaks for itself and where the spirit of India is evident in its people, ambience and buildings. With a record arrival in 2005-06 of more than 1.2 million foreign tourists and 17 million domestic tourists, Rajasthan has been one of ty most popular destinations for tourists, especially those from France, Britain, Germany, the US, Italy, Australia, Canada, Switzerland, Japan and Bangladesh.

Today Rajasthan is the tourist rape capital in India. Just before Christmas, an American national was molested in Pushkar and a British journalist was raped in Udaipur. Earlier a French woman was raped also in Pushkar. In 2005 in Rajasthan, a German tourist was raped by an autorickshaw driver and his accomplice in Jodhpur.

⁴ Bureau of Police Research & Development, Crimes in India, 1983 p.1.

⁵ Ram Ahuja "Crime Against Women" Rawat Publications Jaipur 1987 at p.20-65.

Rajasthan has always been considered a very peaceful state but the recent rape and molestation cases have been affecting its image a tourism department official admitted recently.

Travel guide books have started advising women traveling to India to wear loose, long clothes to avoid unwelcome attention.

But this social evil of rape was not restricted to women only, with the passage of time it was clearly seen that the molesters were even targeting the minors of the society as they were easy to handle, control and molest. Sexual offences against minors in India have reached an epidemic proportion and a large number of them are being committed by the protection homes and in the greatest number of the cases the molester or the accused is in close relation or known to the child.

The 56-page report⁶ by the Asian Centre for Human Rights (ACHR), citing NCRB statistics, stated that a total of 48,338 child rape cases were recorded from 2001 to 2011 and India saw an increase of 336% of child rape cases from 2,113 cases in 2001 to 7,112 cases in 2011. These are only the tip of the iceberg as the large majority of child rape cases are not reported to the police while children regularly become victims of other forms of sexual assaults too.

ACHR blame the Government of India i.e. The ministry of women and child development in the state governments for the continuing sexual assault on the children in the juvenile justice homes. The National Commission for protection of child rights, state commissions for protection of child rights and the child welfare committees intervene only after crimes are reported but there are no preventive mechanisms for regular inspections.

The Report also highlighted four major failures of the continuing sexual assaults in the government run and added or unregistered juvenile homes. First, most state governments have not formed inspection committees which are mandated to inspect the juvenile justice homes and report at least one in three months. Though the ministry of women and child development while approving projects for all the States and union territories under the integrated child protection scheme since 2010, it never raised the issue of inspection committees with the government of Delhi, Chhattisgarh, Puducherry, Bihar, Jharkhand, Tripura, Uttar Pradesh, Meghalaya and Nagaland despite having yearly meetings for the last three years. In fact, no separate budgetary allocation has been made under ICPS for the functioning of the inspection committees. There is a conscious effort on the part of ministry to avoid the issue of the inspection committees.

Second, there are hundreds of unregistered child care homes across the country despite the requirement to register the same within six months under JJ(C&PC) Act,2006. Inspection is seldom carried out in these unregistered homes and children remain extremely vulnerable to sexual abuse in these homes. The ministry of women and child development had raised the issue of non-registration of children's home with Jharkhand on 21st January 2013, Odisha on 9th November 2012, Arunachal Pradesh on 29th August 2012, Haryana on 29th August 2012,

Rajasthan on 29th August 2012, Andhra Pradesh on 11th July 2012, Assam on 11th July 2012,

Mizoram on 15th March 2012, Karnataka on 28th June 2012 and Kerala on 17th January 2012, among others, but unregistered children's home exists across the country.

⁶ India's Hell Holes: Child Sexual Assault in Juvenile Justice Homes

In many cases funds are given by the state governments even if institutions are not registered under JJ (C&PC) Act. There is no punitive provision Per se for non-registration of institutions what section 23 of JJ (C&PC) Act allows authorities to take action against willful neglect, mental or physical suffering of children but little action is taken.

Third, though there are 462 District Child Welfare Committees (CWCs) in 23 states mandated to verify fit institutions, majority of them exist only on paper. The state government of Karnataka in October 2010 put the conditions that “members of CWCs cannot visit child care institutions, when they are not holding a sitting, without prior permission of the heads of these institutions,” thereby prohibiting random and surprise inspections.

Fourth, though Rule 40 of the JJ (C&PC) Rules 2007 provides for separate facilities between for boys and girls as well as according to age i.e., for boys and girls up to 12 years, 13-15 years and 16 above, this provision has not been complied with. The lack of segregation on the basis of gender, nature of offences and age facilitates senior inmates to commit the offences against minor inmates including girls. ACHR stated that POCSO Act, 2012 will not address the menace of child sexual abuse unless the Government of India creates a special fund under the integrated child protection scheme to provide financial assistance for prosecution of the offenders under the POCSO. ACHR also, among others, recommended immediate establishment of the inspection committees in all the districts and mandatory inspection of the juvenile justice homes by the inspection committees in every three months; stopping funds to any home unless inspection reports are submitted; separate budgetary allocations for the functioning of the inspection committees, ban on posting of male staff in girl’s homes, separation of residential facilities based on the nature of offenses, gender and age, completion of inspection of unregistered homes within six months and registration of cases against the authorities of the unregistered juvenile justice homes.

1.2 RAPE OF MINORS AND RELEVANCE OF POCSO

There is an alarming increase in sexual assaults on tender aged girls in recent years, an indication of the erosion of the basic norms, virtues, morals and discipline of the society. Tender aged girls of 2-3 years old being brought to doctors with injuries on genitals, the parents not even disclosing the facts to doctors the cause of the injuries. The offenders are either near relatives or much known person. The small baby is helpless and has to face barbarous and heinous attack. The men who want to satisfy their sexual urge, the small girls are an easy prey. The girl may not be able to resist, complain, give statement or the parents may not report the matter due to shame.

According to Article of Hindustan Times, Dated 26th Jan,2008, minors most of them under the age of 10 are the victims in one-third of the total rape cases registered with the **Rape Crisis Cell (RCC)** of the Delhi commission of Women. Of the 69 cases registered with the RCC in 2007, victims in 21 are minor, in 2006 of the 199 cases, 45 of victims were minor. The number of cases, however is lower than the actually figure for Delhi since all rapes reported to the police are not necessarily registered with the RCC.

The latest youngest victim was one and a half year old was raped by a passerby when she was sleeping with her father outside their house. The latest (2006) statistics of the NCRB reveal that rape was the fastest growing crime in India.

The child is killed sometimes of the rapist after the sexual assault. In the case of Jumman Khan⁷the girl of six years were strangled after rape, in another case⁸ the accused raped and murdered one and a half year old girl, in other cases^{9,10} similar history of rape and

⁷ Jumman Khan v. State of U.P. 1986(1) Crimes 242(Alb)

⁸ Mohd Chaman v. State 1998 III AD (Delhi) 693

⁹ State of Orissa v. Jaharla Das 1991(1) Crimes 19(Orissa)

¹⁰Devi Lal V. State 1986(1) Crimes 638(Delhi)

strangulation resulting in death of minor girl had been reported one and a half year old girl, in other cases^{11, 12} similar history of rape and strangulation resulting in death of minor girl had been reported. When the children of immature age are involved in the sexual assault, question of legality of their version comes and it plays an important role in the conviction of an accused. Contradiction in the evidence of minor girl did not affect the credibility of the other witnesses and medical.

When the children of immature age are involved in the sexual assault, question of legality of their version comes and it plays an important role in the conviction of an accused. Contradiction in the evidence of minor girl did not affect the credibility of the other witnesses and medical

evidence¹³. Medical examination of the victim, question of consent, corroboration, identification of accused and testimony are important aspects in cases where the victim is of tender age.

The minor girls are also exposed to deviated form of sexual assaults as reported in the case of Kartar Singh¹⁴ where the accused put his penis in the mouth of the one girl aged 8 years and discharged semen in her mouth and urinated in the mouth of other girl 6 years, he also inserted finger in the genital parts as held in the case of Abdul¹⁵ the accused inserted his tongue in the genitals of a girl aged five years.

The new act **Protection of Children from Sexual Offences Act, 2012 (POCSO)** was introduced in India to protect the rights of children, the new Act provides for a variety of offences under which an accused can be punished. The act defines a child as a person under age of 18 years. It encompasses the biological age of the child and is silent on the mental age considerations. The new act recognizes forms of penetration other than penile-vaginal penetration and criminalizes acts of immodesty against children too.

The act is gender-neutral. With respect to pornography, the Act criminalizes even watching or collection of pornographic content involving children. The Act makes abetment of child sexual abuse an offence. It also provides for various procedural reforms, making the tiring process of trial in India considerably easier for children. The Act has been criticized as its provisions seem to criminalize consensual sexual intercourse between two people below the age of 18.

In the matter of punishment for offence committed by a person under this act, the Hon'ble Supreme Court observed that on the commission of crime, three types of reactions may generate¹⁶:

1. The traditional reaction of universal nature which is termed as punitive approach. It regards the criminal as a notoriously dangerous person who must be inflicted severe punishment to protect the society from his criminal assaults.
2. The other approach is the therapeutic approach. It regards the criminal as a sick person requiring treatment. Appropriate treatment and reformatory punishment should be given to rehabilitate the criminal.

¹¹ State of Orissa v. Jaharla Das 1991(1) Crimes 19(Orissa)

¹² Devi Lal v. State 1986(1) Crimes 638(Delhi)

¹³ Jairaj V. State of Karnataka 1991(1)Crimes 278(Kant)

¹⁴ Kartar Singh V. State 1993(1)CC Cases 233(HC)

¹⁵ Abdul R.Pathan V. State of Maharashtra 1983(2)crimes 2(Bom)

¹⁶ T.K. Gopal @ Gopi vs State of Karnataka (2000) 6 SCC 168

3. The third is the preventive approach which seeks to eliminate those conditions from the society which were responsible for crime causation.

The Protection of Children from Sexual Offences (Amendment) Act, 2019 seeks to provide for strict punishments to those who are engaged in sexual offences against children, death penalty in cases of aggravated sexual assault made on children. This amendment bill aims at making the offences 'gender neutral' against children and this bill seeks to amend the POCSO Act 2012, by providing strict punishments for offences for crimes against all children below the age of 18. This bill also brought an amendment to the 'Punishments for aggravated penetrative sexual assaults'.¹⁷

1.3 RESEARCH METHODOLOGY

The methodology adopted by the researcher in this paper shall be Doctrinal researches. The researcher would be doing in-depth research on how the government of India became pro-active in past a decade for dealing rape cases and specially for the rape against minors and in light of the POCSO Act, 2012 the researcher is trying to make out the major procedural as well substantive changes in law for sexual offences against minors in past decade.

1.3.1 STATEMENT OF RESEARCH PROBLEM

The present study relates to the issues that are related to the victimization and along with it carries on with the investigation, inquiry and trial procedure in case of Minor Rape. The researcher aimed at knowing the investigation, inquiry and trial procedure that is applied in such

cases especially with respect to psychology of the victim. Moreover, the duties of media in confining itself from not revealing the identity of the victim which if revealed will have negatives effects on the child's daily life after such incidents. What all are the measures that are taken by the judiciary, legislature and executive in dealing with the sensitivity of the victim and how the investigation goes about by the police officers. In addition to that the researcher is discussing Victimization as a concept, in order to look into the after effects of such instances in the psychology of these children as they grow up and differently, they behave to situations in comparison to others of the same age group.

1.3.2 HYPOTHESIS OF THE STUDY

In the light of the abovementioned problem the researcher would put to test: Whether there is proper implementation and application of the POCSO Act and what the type of interpretation is given by judges, time to time while interpreting this statute with other laws for the time being in force? Whether there are enough procedural safeguards for protecting the interests of the child and providing him justice in limited time possible?

¹⁷ The Protection of Children from Sexual Offences (Amendment) Act, 2019 (Act 25 of 2019) s. 6

1.3.3 AIM AND OBJECTIVE OF THE STUDY

The present research work has been undertaken by the researcher with an objective to find answers to the following questions, as well as to give the answer to the hypotheses mentioned above:

- To examine and review the legal provisions of the POCSO Act and the Rules under it
- To review the implementation of the POCSO Act based on covering the following aspects:
 - ✦ Right of the victim/survivor to get a support person and legal representation
 - ✦ Delay in filing FIR, recording of statement of the victim/survivor under Section 164 CrPC and the Final Report from the Police (charge sheet)
 - ✦ Delay in completion of trial
 - ✦ Rate of conviction and acquittal
 - ✦ Sentencing by Special Courts
 - ✦ Mandatory reporting
 - ✦ Victim compensation – interim and final
- To analyse the role of all stakeholders in the implementation of the POCSO Act
- To identify areas requiring improvement and make suitable recommendations

1.3.4 RESEARCH QUESTIONS

- I. What was the need of POCSO Act when there was already IPC covering offences of sexual offences?
- II. Have legislature been successful in making a child friendly procedure for dealing with cases under POCSO?
- III. What approach have judges of special courts have taken in the best interest of the child?

1.4 CHAPTERISATION SCHEME OF THE DISSERTATION

Chapter one – In this Chapter, the researcher has confined himself in presenting the statistical data for pre POCSO Act era and the data presented in chapter is majorly from the sources such as NCRB and Reports which led to the formation of POCSO Act in 2012.

Chapter two – In this chapter, the motive of the researcher is to present the major loop holes in the criminal justice system of India which led to the formation of POCSO Act and explaining how the statutory laws before 2012 were not sufficient enough for dealing the social evil of rape which was committed against minors irrespective of their age and gender. Moreover, the researcher has also included the amendments which were made after the commencement of the act to make the act more effective and child friendly keeping the best interests of the child in the mind.

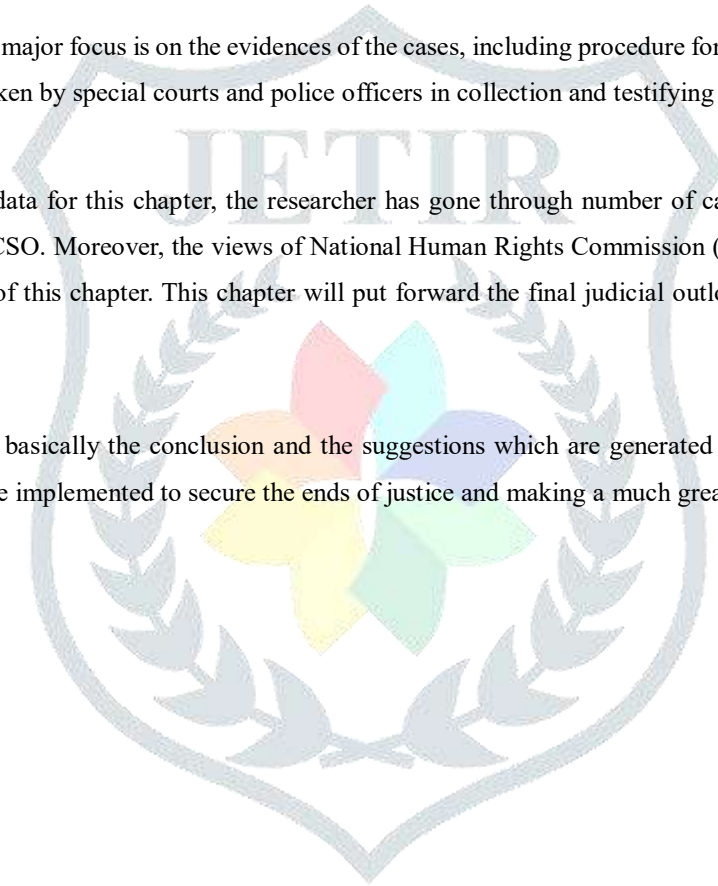
Chapter three – This chapter deals with all types of offences dealt under POCSO and what punishments are associated with those particular offences. The legislature was successful in drafting an act with a purpose of curbing this social menace in the society. The beauty of the POCSO Act lies in its bifurcation of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, and sexual harassment and further including the child pornography and abetment or attempt of such offences. Therefore, this chapter will be an overview of the punishment and offences mentioned in the Act.

Chapter four – After understanding that what all offences and punishments have been provided by the legislature, the researcher then shifted his focus from the substantial provisions of the act to the procedural provisions of the act. Thereby, in this chapter the researcher will be focusing on the procedure of reporting cases and the role of special courts in dealing with such cases. And in addition to that the researcher will also discuss the duties and obligation of media in protecting the child's identity from the society.

Chapter five – In this chapter the major focus is on the evidences of the cases, including procedure for recording statement of the victim and what important steps to be taken by special courts and police officers in collection and testifying the evidences.

Chapter six – While collecting data for this chapter, the researcher has gone through number of cases as this chapter is focused on judicial view on the cases of POCSO. Moreover, the views of National Human Rights Commission (NHRC) has also been considered by the researcher in preparation of this chapter. This chapter will put forward the final judicial outlook of the judiciary in past to the present times.

Chapter seven – This chapter is basically the conclusion and the suggestions which are generated after the deep study of the act to which the researcher thinks can be implemented to secure the ends of justice and making a much greater deterrent effect on the society.



2.1 NEED FOR POCSO

Child sex abuse crimes before the enactment of the POCSO Act were dealt with under the **Indian Penal code,1860**. Child Sexual abuses were prosecuted under the Indian Penal Code under the following sections.

- **SECTION 375 – RAPE**
- **SECTION 354 – OUTRAGING THE MODESTY OF WOMEN • SECTION 377 – UNNATURAL OFFENCES**

The IPC was not sufficient enough to protect children and criminalize non-traditional sexual abuse that differs from the traditional crimes mentioned in IPC, such as child trafficking and pornography and the sale of children.

There were several loopholes in the IPC which could not effectively protect the child due to various loopholes like:

- **IPC 375** doesn't protect male victims or anyone from sexual acts of penetration other than "traditional" peno-vaginal intercourse.
- **IPC 354** lacks a statutory definition of "modesty". It carries a weak penalty and is a compoundable offence. Further, it does not protect the "modesty" of a male child.
- In **IPC 377**, "unnatural offences" are not defined. It only applies to victims penetrated by their attacker's sex act and is not designed to criminalize the sexual abuse of children.

The insufficiency of IPC as well as the lack of strict laws to effectively combat violent crimes such as sexual exploitation and child abuse led to the creation of the POCSO Act, 2012. This was in due compliance with Article 15 of the Constitution of India which mandates the states to protect the children of this nation and instead of the United Nations Conventions on the Rights of the Child which prescribes the set of standards to be followed by state parties in securing the best interest of the child.

The purpose of the government is to protect children from sexual assault, sexual harassment and pornographic crimes and to establish a special court to hear issues related to such crimes and child sexual abuse crimes and was to provide a child-friendly procedure to deal with the child victims and to ensure the child's health physical, emotional, intellectual and social development. The major change which was sought to be brought with the help of this POCSO Act, 2012 was to make a gender-neutral act.

SECTION 2(d), POCSO defines child - "child" means any person below the age of eighteen years.

The word 'Child' here clears the intention of the legislature in making this act a gender-neutral act and this being socially beneficial legislation, the judiciary has been interpreting all its provisions in such a way that even the ambiguous provisions of the actors turn out to be beneficial for the child.

2.2 IS POCSO EXHAUSTIVE

POCSO is not exhaustive. Section 2(2) read with Section 42A read with preamble states that the provisions of POCSO shall be in addition to and derogation of any other law for the time being in force. Moreover, according to Section 42A, if there is any inconsistency between POCSO and any other law POCSO shall be having an overriding effect to the extent of inconsistency (Section 42A was substituted for earlier section 42 by the 2013 amendment act).

Below are certain mentions that prove that POCSO Act cannot be read in isolation and how the inconsistencies with other laws dealt with by the judiciary

2.2.1 SECTION 375 (EXCEPTION 2)

It states that sexual intercourse or sexual acts by a man with his wife, the wife not being under 15 years of age, is not rape.

Whereas, the statement of objects and reasons point no.4 of POCSO clearly states that – It is, therefore, proposed to enact self-contained comprehensive legislation inter alia to provide for the production of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and the wellbeing of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provides for the establishment of the special court for speedy trial of such offences.

The above-mentioned inconsistency was before the Supreme Court of India in 2017 in a famous case¹⁸ where the issue was whether the sexual intercourse between the man and his wife, being a girl between 15 and 18 years of age is rape or not. The court observed that there are various statutes like The Protection of Human Rights Act (1993), Protection of women from Domestic Violence Act (2005), The Prohibition of Child Marriage Act (2006), Juvenile Justice Act (2015), and The Protection of Children from Sexual Offences Act (2012) wherein a child is a person below 18 years of age who is entitled to the protection of human rights including the right to live with dignity. However, if the child is a married girl and the husband of the girl child would be committing aggravated penetrative sexual assault under Section 5(n) of the act when he has sexual intercourse with her and can be punished under section 6 of the act. Also, such a girl falls under the ambit of Section 2(14)(xii) of the Juvenile Justice Act as a “child in need of care and protection”. However, exception 2 to section 375 of IPC provides that sexual intercourse with a girl child between 15 to 18 years of age is not raped if the sexual intercourse is between the girl child and her husband.

The court observed that there is no rationale for an artificial distinction that has been made in exception 2 to section 375 between a married girl and an unmarried girl. There is an apparent conflict between the provisions of the Indian Penal Code and POCSO. The rape of a married girl child is not rape under IPC but it is an offence under section 5(n) of the POCSO Act and punishable under section 6. Moreover, Section 42 and Section 42A of the POCSO Act were added by Criminal Law Amendment Act, 2013. These amendments in the POCSO Act were brought by the same amendment by which section 375 and section 376 and other sections of the IPC relating to the crime were amended. Section 42 of the POCSO Act makes it clear that where an offence is punishable both under POCSO Act and IPC then the offender if found guilty of such offence is liable to be punished under the act which provides more severe punishment. Section 42A has two parts, the first part of the section provides that the provisions of the POCSO Act are in addition to and not above any other law, the second part of the section provides that the case there in case there is any inconsistency between POCSO and any other law then the POCSO will be having an overriding effect to the extent of the inconsistency. Therefore, POCSO will prevail

¹⁸ Independent Thought Vs Union of India AIR 2017 SC 4904

over IPC and exception 2 in so far as it relates to the children is inconsistent with the POCSO Act. Therefore, the court struck down exception 2 of section 375 as it relates to a girl below 18 years of age as it was discriminatory and violative of Article 14, Article 15, and Article 21 and it was inconsistent with the provisions of POCSO.

Lastly, the court also said that it is not creating any new offence but only removing what was unconstitutional and offensive.

2.2.2 PRESUMPTION AND DETERMINATION OF AGE OF CHILD

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.

There is no procedure to determine the age of the child in the case of POCSO or IPC, in the case of **Jarnail Singh vs. State of Haryana**¹⁹, the court held that when such question as to the age of the victim arises the procedure prescribed in The Juvenile Justice (care and protection of children) Act, 2015 would be applicable. Rule 12(3) of Juvenile Justice (care and protection of children) Rules, 2007 were applicable to determine the age of the child in conflict with the law. The court held that this provision should also be the basis for determining the age of a child victim of crime.

Now The Juvenile Justice (care and protection of children) Act, 2015 provides for the provision of determination of age under section 94(2) of the act, in which the committee or the board may refer to:-

1. The date of birth certificate from school or the matriculation certificate from the concerned examination board.
2. In the absence of first the birth certificate given by a corporation, municipal authority, or panchayat.
3. In the absence of first and second the age shall be determined by ossification test or any other latest medical age determination test conducted on the order of the committee or the board.

And if the child prima facie appears to be a child, then the court will continue with the inquiry process. The above process can be followed by any court before which the age of a person either the victim or the accused is in question. The moot question is what steps are to be followed in case age of a minor or child is to be ascertained.

2.3 EFFECT OF CRIMINAL LAW AMENDMENT ACT 2013

Social stigmas make it difficult for Indians to talk about the sexual assault of children in public. Activists have also blamed the government for inadequacy in protecting children from such assaults. Even implementing the POCSO Act, 2012 was not sufficient in curbing the atrocities which were faced by children irrespective of their age. The number of registered child rapes rose 151% from 5,484 in 2009 to 13,766 in 2014, according to the National Crime Records Bureau (NCRB).

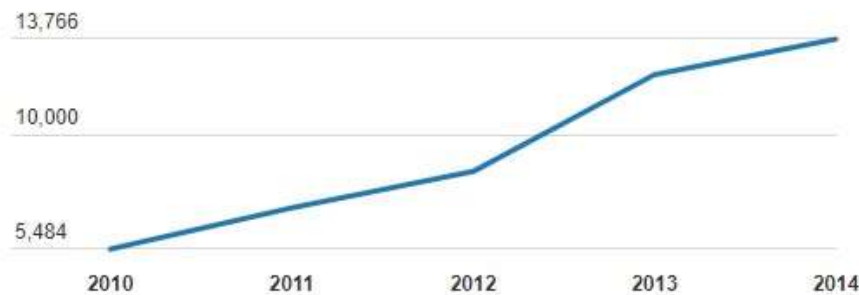
¹⁹ AIR 2013 SC 3467

In addition, 8,904 cases were registered nationwide under the POCSO Act and 11,335 under the category “assault on women (girl child) with intent to outrage her modesty under Section 354

IPC (which includes stalking, voyeurism, use of criminal force with an intent to disrobe, etc.)”, according to the NCRB.

The Data of 2010-14 regarding child abuse clearly depicts that the even the implementation of a special law for child protection against such heinous offences failed drastically but on the other it has to be appreciated that during this era the people of India became vigilant enough and started reporting the cases for the child sexual abuse.

Child Rapes, Five-Year Trends



Just when the government became a bit more pro-active in curbing this social evil of child rape an incident took place in Delhi which shook everyone not only on national level but also at the international level. The Nirbhaya Rape case took place in chilly winters of December'12 where six accused brutally raped the victim and damaged her vagina, removed her intestines from the body, damaged her internal organs by inserting an iron rod in her and after thirteen days from the date of assault she died.²⁰

Headlining the protests were the youth of the country fed up with the spiraling crime rate against women and the inefficiency and lackadaisical approach of the lawmakers and police personnel towards checking such crimes.

The people, especially women, felt helpless, and the authorities couldn't care less. Denied justice, the common man took to overwhelming protests calling for the strictest punishment to the rapists and enacting stricter laws for the safety of the women.

The incident of December 2012 made the government took even more serious steps for curbing the menace of rape in the society and the Justice verma committee was the first outcome of the decisions of government.

On March 21, 2013, the rape laws in the country were amended.

The new tougher anti-rape law -- Criminal Law (Amendment) Act, 2013 -- to punish sex crimes redefined rape and made punishments more stringent -- including the death penalty for repeat rape offenders. The Justice Verma Commission was formed to give recommendations in a timebound manner to improve the rape laws of the country. On the basis of these recommendations, the Criminal Law Amendment Act (2013) or the Nirbhaya Act came into force.

Several crimes against women were also brought under the ambit of the law. These included stalking, voyeurism, acid attacks, sexual harassment and trafficking. It also brought up the age of consent from 16 to 18 — meaning that even if a sexual act is carried out with the consent of a girl under 18 years of age, it will be considered statutory rape. The definition of rape was amended.

²⁰ Mukesh & Anr vs State (NCT of Delhi) (2017) SC

2.3.1 CONSENT OF THE VICTIM

In IPC, the expressions “Against her will” and “without her consent” is used and other expressions which are used in IPC under section 375 relates to the consent which is given under misconception of a fact or under the pressure of death or whatsoever which points towards that the consent of the victim was not free. Against her will means intercourse despite her opposition and implies an element of force or compulsion. Here it is to be noted that an act done against a person’s will does not necessarily mean that it is done without his/her consent. The expression ‘against her will’ has a much wider import than the term ‘without her consent. An act done without one’s will shall always be without her consent but the converse is not true. For instance, a woman who agrees to sexual intercourse under the influence of an intoxicant or mistake of fact will be said to have consented but that does not mean she was willing for it.

In the POCSO Act, the consent of the child is generally immaterial because the act aims at protecting the interest of the child pending both civil as well as criminal law, consent of a minor is not treated as valid consent, as the minor is incapable of thinking rationally and cannot understand the pros and cons of the act. And thus, not eligible to give consent to sexual intercourse. But the fact that the accused had the consent of the victim may be a mitigating factor while providing for bail to the accused as well as while the sentencing of the accused this factor will help the defence in reducing the term of imprisonment of the accused.

In the case of **Virender Singh vs. State of Himachal Pradesh**²¹, the issue was whether the bail was to be granted in a case where a major developed consensual sexual relation with a minor. The court relied on the earlier judgment given by the honorable to Supreme court in the case of

State of Madhya Pradesh vs. Surendra Singh²², wherein the court said, “It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing court is expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence depending upon the gravity of the offence.”

The court also observed that neither section 376 of IPC nor section 6 of POCSO create any restriction on the grant of bail, therefore under such circumstances such consensual act on behalf of the victim acts, as a mitigating factor and the bail may be granted to the accused in such cases. In a recent order²³, while replying to an anticipatory bail application by the accused, the Nagpur bench of the Bombay High Court observed that the consent of a minor had no value in the eyes of law. The court was hearing a bail application for a person accused of committing penetrative sexual assault on a minor girl. Before the court, the accused claimed that he and the victim had a "love affair" and that the girl had willfully eloped with him. The victim's statement did not indicate consent, according to the court and considering the fact that the victim’s statement did not indicate the consent was the reason behind rejecting the bail of the accused.

2.3.2 ALTERNATIVE PUNISHMENT AND OVERRIDING EFFECT TO POCSO

After receiving the President’s assent on 2nd April 2013, the CLA Act amended the Section 42 and inserted a new Section 42A in the POCSO Act. Section 42A provides that the provisions of POCSO Act shall be in addition to and not in derogation with the provisions of any other law, and in case of inconsistency, the provisions of the POCSO Act shall have an overriding effect to the extent of the inconsistency.

²¹ Cr.MP(M) No. 77 of 2021

²² AIR 2015 SC 3980

²³ Peer Mohammad Ghotu Mohd. Ismail vs. State of Maharashtra

SECTION 42: Alternate punishment – Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, ²[376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], ³[376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.]²⁴

The purpose of section 42 is to give the general law of IPC an overriding effect over POCSO in the matters of punishment since IPC provides for greater punishment for rape. The only caveat being that the act or omission must constitute an offence under IPC as well as the POCSO.

For instance, for penetrative sexual assault the minimum punishment prescribed under POCSO is 7 years imprisonment, whereas the parallel provision under IPC prescribes a punishment 10 years (if woman is between 16-18 years) or 20 years (if a woman is under 16 years of age). In such cases, the offender will be sentenced in accordance with the punishment prescribed by IPC. The amendment in POCSO was necessitated due to the inclusion of new offences in IPC, added by the CLAA. In order to extend the enhanced punishments in IPC to the cases falling under POCSO, section 42 of POCSO was amended and newly created offences (section 376AB, 376B, 376DA, 376DB) were substituted.

SECTION 42A: Act not in derogation of any other law - The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.]²⁵

The motive of the legislature in making a provision which gives an overriding effect to the act is pretty clear. This provision has been of supreme importance while passing judgements in cases where there is an ambiguity as to which act or provision to be followed while passing judgements.

For instance, in a famous case²⁶ the court has clearly stated, “Another aspect of the matter is that the POSCO was enacted by Parliament in the year 2012 and it came into force on 14th November, 2012. Certain amendments were made by Criminal Law Amendment Act of 2013, whereby Section 42 and Section 42A, which have been enumerated above, were added. It would be pertinent to note that these amendments in POCSO were brought by the same Amendment Act by which Section 375, Section 376 and other sections of IPC relating to crimes against women were amended. The definition of rape was enlarged and the punishment under Section 375 IPC was made much more severe. Section 42 of POCSO, as mentioned above, makes it clear that where an offence is punishable, both under POCSO and also under IPC, then the offender, if found guilty of such offence, is liable to be punished under that Act, which provides for more severe punishment.”

²⁴ Protection Of Children from Sexual Offences Act, 2012 (Act 32 of 2012 as amended upto Act 34 of 2019)

²⁵ Supra 22

²⁶ Supra 16

2.4 EFFECT OF CRIMINAL LAW AMENDMENT ACT 2018

The journey from “no” law to deal with sexual abuse of children to having a “special” law like the POCSO Act and efforts to implement it, has witnessed contribution from various actors. The POCSO Act is meant to be a socio-beneficial piece of legislation, whose objective is to provide justice to the child. However, it has also opened up several debates which call for continued research to strengthen existing knowledge, information and evidence that can help inform and chart out the course of justice for children.

Even after the enactment of POCSO Act, 2012 and CLAA, 2013 this social menace was nowhere close to have a downfall. In 2016, 21% of the total 39,068 cases of rape were against minor girls below the age of 16 years²⁷. Over the last few years, several states have introduced or passed Bills to allow death penalty for rape of girls below the age of 12 years²⁸. On April 21, 2018, the government promulgated the Criminal Law (Amendment) Ordinance, 2018.

The Bill amends the IPC, 1860 to increase the minimum punishment for rape of women from seven years to ten years, Rape and gang rape of girls below the age of 12 years will carry minimum imprisonment of twenty years and is extendable to life imprisonment *or* death and Rape of girls below the age of 16 years is punishable with imprisonment of twenty years or life imprisonment.

The Ordinance amends the IPC, 1860, POCSO Act, 2012 and other laws related to rape of women. The POCSO, Act states that the punishment which is higher between the POCSO Act and the IPC will apply to rape of minors.

Table 1: Major changes proposed in Criminal Law (Amendment) Bill, 2018

Age of women	Offence	Punishment under IPC,1860	Criminal law (Amendment) Bill, 2018
Below 12 years	Rape	<ul style="list-style-type: none"> • Minimum: 10 years • Maximum: life imprisonment 	<ul style="list-style-type: none"> • Minimum: 20 years • Maximum: life imprisonment or death
	Gang Rape	<ul style="list-style-type: none"> • Minimum: 20 years • Maximum: life imprisonment 	<ul style="list-style-type: none"> • Minimum: life imprisonment • Maximum: life imprisonment or death
	Rape	<ul style="list-style-type: none"> • Minimum: 10 years • Maximum: life imprisonment 	<ul style="list-style-type: none"> • Minimum: 20 years • Maximum: no change

²⁷ Crime in India – 2016, NCRB report

²⁸ These states include Haryana, Madhya Pradesh, Rajasthan, and Arunachal Pradesh

Below 16 years	Gang Rape	<ul style="list-style-type: none"> • Minimum: 20 years • Maximum: life imprisonment 	<ul style="list-style-type: none"> • Minimum: life imprisonment • Maximum: no provision
16 years and above	Rape	<ul style="list-style-type: none"> • Minimum: 7 years • Maximum: life imprisonment 	<ul style="list-style-type: none"> • Minimum: 10 years • Maximum: no change

Moreover, the investigation into the rape of a child must be completed within three months. The Ordinance reduces this time period to two months for all rape cases under the code of Criminal Procedure, 1973 plus the Ordinance bars anticipatory bail in cases of rape of minor girls below 16 years of age. Further, any appeal against a sentence for rape cases must be disposed of within six months.

In the case of rape of minors, according to the POCSO Act, the victim may either be male or female (and the offender could also be of either gender). However, in cases of adults under the IPC, rape is as an offence only if the offender is male and the victim is female. The Law Commission of India (2000) and the Justice Verma Committee (2013) had recommended that this definition of rape should be made gender neutral and should apply equally to both male and female victims^{29,30}. The Ordinance does not address this issue.

Table 2: Differences in punishment for rape between minor boys and girls

Age (in years)	Boys	Girls (before ordinance) 2018	Girls (after ordinance) 2018
Below 12	10 years to life imprisonment	10 years to life imprisonment	20 years to life imprisonment/death
12-16	7 years to life imprisonment	10 years to life imprisonment	20 years to life imprisonment
16-18	7 years to life imprisonment	7 years to life imprisonment	10 years to life imprisonment

²⁹ Report No. 172: Review of Rape Laws, Law Commission of India, March 2000.

³⁰ Report of the Committee on Amendments to Criminal Law, 2013, January 23, 2013.

2.4.1 DEATH PENALTY NOT A DETERRENT ON SOCIETY

“Introducing death penalty was nothing but a populist move.”

The introduction of death penalty will reduce the number of reported cases of sexual offence against children. As many as 94% of the accused are known to the victims in cases of child sexual abuse. When most accused are personally known to the victims and their families, the possibility of death may deter the victims to file a complaint.

There is also a higher likelihood that the accused would rape and murder a victim to avoid getting caught.

Further, no empirical evidence exists to suggest that death penalty has a deterrent effect over and above life imprisonment, according to the Law Commission’s 2015 report on death penalty³¹. The report suggested abolishing death penalty for all cases except terrorism. In 28.9% of the cases where a trial court awarded the death sentence, the case ended in acquittal by a higher court. The death sentence was conclusively given in only 4.3% of cases--trial courts erroneously imposed the death penalty in 95.7% cases, according to the report.

If we look at the timeline, the ordinance introducing death penalty was brought right after the Unnao and Kathua rape cases in early 2018 because of a huge uproar. PM Narendra Modi went to the World Trade Organization meeting where India was criticised for its policy on women and child safety, and the ordinance was brought in immediately after.

In the Kathua case³², an eight-year-old girl was abducted, raped and murdered in a village near Kathua in Jammu and Kashmir in January 2018. Six of the seven accused were convicted in the case, of which three were imprisoned for life and three sentenced to five years in jail.

In the Unnao case³³, a 17-year-old girl was gang-raped in April 2017, and the accused is a member of the Uttar Pradesh legislative assembly from Unnao, and was a member of the

Bharatiya Janata Party, in power in the state and at the Centre. The case resulted into convicting the accused and awarding him imprisonment for life on 20 December 2019.

In addition, the bill is silent when it comes to protecting the victim and their family in cases where the accused is in a position of authority. Merely increasing the punishment for aggravated sexual assault is not enough.

³¹ Report no.262, August 2015

³² Mohd. Akhtar vs The State of Jammu and Kashmir

³³ kuldeep singh sengar vs state of u.p. & anr

3.1 SEXUAL OFFENCES AGAINST MINORS

In order to more proficiently curb the heinous sexual crimes and offences done against children, the legislature has bifurcated the sexual offences against minors into further sub-categories: a) Penetrative sexual assault

- b) Aggravated penetrative sexual assault
- c) Sexual assault
- d) Aggravated sexual assault
- e) Sexual harassment

3.1.1 PENETRATIVE SEXUAL ASSAULT

SECTION 3: Penetrative sexual assault - A person is said to commit "penetrative sexual assault" if--

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.³⁴

There is no real or material difference between the definition of rape in the terms of Section 375 of the IPC and penetrative sexual assault in the terms of Section 3 of the POCSO Act. The only difference is that the definition of rape is somewhat more elaborate and has two exceptions but the sum and substance of the two definitions is more or less the same and the punishment (under Section 376(1) of the IPC) for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for 'aggravated' rape under Section 376(2) of the IPC is the same as for aggravated penetrative

³⁴ Supra 22

sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of the IPC – the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the Trial Court but the ordinary criminal court would be the Trial Court for an offence under the IPC.³⁵

The word ‘Manipulates’ in Section 3(c) is an artificial creation. An act of manipulation the body of the victim to obtain sexual gratification will fall under this category. In a case where the accused manipulated the thighs of the victim to be held tightly together to cause penetration of the crevice, when the muscles engulf the object which penetrates to create or simulate the same effect as in a normal penile-vaginal intercourse.³⁶

The word ‘penetrate’ means in the concise Oxford Dictionary ‘find access into or through, pass through.’ When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word ‘insert’ means place, fit, thrust.’ Therefore, if the male organ is ‘inserted’ or ‘thrust’ between the thighs, there is ‘penetration’ to constitute unnatural offence.³⁷

SECTION 4: Punishment for penetrative sexual assault

- (1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than 10 years but which may extend to imprisonment for life, and shall also be liable for fine.
- (2) Whoever commits penetrative sexual assault on a child below 16 years of age shall be punished with imprisonment for a term which shall not be less than 20 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and he’ll also be liable to fine.
- (3) The fine imposed under sub-section (1) Shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

The consecutive punishment for Section 3 has been provided under section 4 of the Act. As discussed before by the researcher this punishment section has been amended in year 2019 with respect to the Criminal Law Amendment Act, 2018 further hi not only this section but all the punishment sections in POCSO Act are amended make a deterrent effect on the offenders in this regard.

It was held by the Bombay High Court – Aurangabad bench that for proving offence under Section 4 of the POCSO Act the prosecution has to establish that the accused has committed penetrative sexual assault on the victim who is child being below the age of eighteen years as per definition of child under Section 2(d) of the POCSO Act. As per Section 3 of the POCSO Act a person is said to commit

³⁵ Supra 16 (Para 47)

³⁶ Santosh vs State of kerala (2021) Ker HC

³⁷ Khanu vs Emperor AIR 1925 Sind 286

penetrative sexual assault if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person.³⁸

Further it was observed that as regards the offence under Section 3 of the POCSO Act it is pertinent to note that there is a presumption under Section 29 of the POCSO Act as to certain

offences. Said provision says that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. In the present case accused is charged for the offence punishable under Section 4 of the POCSO Act and he has been convicted for the said offence by the impugned judgment. The offence under Section 3 i.e., penetrative sexual assault is punishable under Section 4 of the POCSO Act. Thus, presumption can be raised under Section 29 of the POCSO Act that the accused has committed offence under Section 3 of the POCSO Act which is punishable under Section 4 of the said Act.³⁹

3.1.2 AGGRAVATED PENETRATIVE SEXUAL ASSAULT

SECTION 5: Aggravated penetrative sexual assault - (a) Whoever, being a police officer, commits penetrative sexual assault on a child --

- (i) within the limits of the police station or premises at which he is appointed; or
- (ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or
- (iii) in the course of his duties or otherwise; or
- (iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child--

- (i) within the limits of the area to which the person is deployed; or

³⁸ Rajudan Gemardan Charan vs The State Of Maharashtra (2019) Bom HC (Para 8)

³⁹ Supra 36 (Para 22)

- (ii) in any areas under the command of the forces or armed forces; or
- (iii) in the course of his duties or otherwise; or
- (iv) where the said person is known or identified as a member of the security or armed forces; or
- (c) whoever being a public servant commits penetrative sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or
- (e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or
- (f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or
- (g) whoever commits gang penetrative sexual assault on a child.

Explanation. - When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

- (h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

- (i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or
- (j) whoever commits penetrative sexual assault on a child, which--
- (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; ^{1***}
- (ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;
- (iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; ^{1***}
- ²[(iv) causes death of the child; or]
- (k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or
- (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or
- (m) whoever commits penetrative sexual assault on a child below twelve years; or
- (n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or
- (o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

- (p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or
- (q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or
- (r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or
- (s) whoever commits penetrative sexual assault on a child in the course of ³[communal or sectarian violence or during any natural calamity or in similar situations]; or
- (t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
- (u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

The penetrative sexual assault turns into aggravated penetrative sexual assault when anyone of the above-mentioned conditions is fulfilled. Conditions such as taking advantage of child's mental health or physical disability, committing penetrative sexual assault on child below the age of 12 years, committing penetrative sexual assault by a relative of a child through any means, etc. Will fall under this category. The punishment for aggravated penetrative sexual assault is given under Section 6 of the Act.

The area of law which has its ambiguity maintained is called grey area in law. Incest in India is a grey area in law. There is no penal provision which explicitly deals with incest as an offence. Thus, if at all there is any sexual act which is prohibited by religion or social ritual, the offence of incest would come under the preview of section 375, Indian penal code or in case of an unnatural offence the incestuous relation u/s 377, Indian penal code provided the ingredients are fulfilled. But now after the enactment of POCSO Act, 2012 where section 5(n) describes that any sexual assault with the relations mentioned in the particular section will be a part of aggravated penetrative sexual assault. In my personal view, this was the legislature's one of the first step where the legislature has come up with something which relates to incest and further criminalized it with a greater punishment in comparison to an offender not been mentioned in section 5 of the Act.

A major ambiguity was faced by the court in the case of **Eera through Dr. Manjula vs State (NCT of Delhi) and anr. (2017) SC**, where the victim was physically major but mentally a child of age below than 18 years of age, so the main issue was whether the definition of child in section 2(1)(d) includes the mental age of a person so that the mentally retarded person or extremely intellectually challenged person who has even crossed the biological age of 18 years, because if such a person is included in this category then the

accused can be held liable for aggravated penetrative sexual assault under Section 5(k) and can be punished under section 6 of the Act. According to Justice Dipak Misra, the legislature has intended to protect any kind of sexual harassment and sexual assault by virtue of the POCSO Act and the legislature was alive to the condition of mental disability. The legislature has dealt with various facets that are likely to offend the physical identity and mental condition of a child. The procedure is child friendly and safeguards the interests and well being of the children. It also lays stress on the mental, physical disadvantage of a child. The purpose of POCSO Act is to treat the minors as a class by itself treat them separately so that no offense is committed against them as regards to sexual assault, sexual harassment, and sexual abuse. The POCSO Act has to protect the minors by prescribing the statutory age which has the Nexus with legal eligibility to give consent. Parliament has felt it appropriate that the definition of the term 'age' by biological age to be safest yardstick than referring to a person having mental retardation, moreover the legislature in Section 164(5A)(b) has already safeguarded the interest of mentally disabled persons, therefore the court held that definition in Section 2(d) defining the term 'age' cannot include mental age.

According to Justice Nariman, the definition of child in Section 2(1)(d) shows that it is exhaustive and refers to any person below the age of 18 years. 'Year' has been defined in Section 3(66), General Clauses Act, 1897 which means a year reckoned according to British calendar. This coupled with the age makes it clear that what is referred to is physical age only. Section 5(k), POCSO Act makes it clear that when mental disability is spoken of it is expressly mentioned by the statute and what is mentioned this child's mental disability and not adults. Therefore, if the word 'mental' is read into section 2(1)(d) of the Act then it would be doing violence to both the intent and language of parliament.

SECTION 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 20 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.
- (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

Recently, the Allahabad High Court, in its judgment³⁸ delivered on November 18 in an appeal by an accused who put his penis into the mouth of a 10-year-old boy, had modified the conviction the accused by holding that this act would fall within the ambit of Section 3 (penetrative sexual assault). An offence under this Section carries a minimum sentence of 7 years' imprisonment under Section 4. The Court held that the act would not fall under Section 5 (aggravated penetrative sexual assault), punishable under Section 6 with minimum imprisonment of 10 years which may extend to imprisonment for life and fine.

Penetrative sexual assault is defined under Section 3, which reads, “a person is said to commit penetrative sexual assault if he penetrates his penis, to any extent, into the mouth of a child or makes the child do so.”

The judgment notes in two places that the victim was 10 years old at the time of the incident.

Despite this, unfortunately, the judge has not taken note of clause ‘m’ of Section 5 of the POCSO Act, which reads that whoever commits penetrative sexual assault on a child below 12 years is said to have committed aggravated penetrative sexual assault. In fact, the judgment even makes a mention of this provision, but does not apply it to the facts of this case.

Thus, the view taken by the Allahabad High Court is erroneous on the face of Clause ‘m’ of Section 5 read with Section 3 of the POCSO, and the view taken by the Special Court was rather a correct view.

³⁸ *Sonu Kushwaha v. State of Uttar Pradesh*

It is unfortunate that in recent times, High Courts have been delivering judgments pertaining to various provisions of the POCSO Act with hugely varying interpretation. This, despite the fact that the provisions of the POCSO Act are very clear and the language is unambiguous, leaving no room for confusion or unnecessary legal jugglery.

A classic example was seen in what came to be known as the 'skin to skin' judgment of the Bombay High Court, which held that pressing the breast of a child without removing her clothes will not amount to 'sexual assault' under Section 7. While setting aside this judgment, the Supreme Court held that the law has to be given an interpretation that gives effect to the intention of legislature instead of defeating it.⁴⁰

Similarly, in July last year, the Madras High Court⁴¹ observed that judges dealing with cases under the POCSO Act, must necessarily be given special training and sensitization on how to deal with such cases. Justice P Velmurugan was prompted to make this observation after he noted that a trial court judge had failed to appreciate the legal consequences that would follow when a child subjected to sexual assault was below the age of 12 years.

3.1.3 SEXUAL ASSAULT

SECTION 7: Sexual assault – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

From the above provision, four essentials to constitute the offense can be determined:

⁴⁰ Attorney General for India v. Satish (2021) SC

⁴¹ Venkatachalam v. The Inspector of Police (2021) Mad HC

1. Sexual intent of the offender,
2. Touching the private parts of the child,
3. Making the child touch their private parts or of some other individual,
4. Commits any other act that entails physical contact without penetration.

Therefore, establishing the sexual intent of the offender is vital and the other essentials would fall into place.

SECTION 8: Punishment for sexual assault - Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

In the case of **Satish vs state of Maharashtra**⁴², the accused lured the victim to his house under false pretexts of giving her guava. He pressed the victim's breasts while trying to remove her salwar. The question raised before the Court was whether this act would fall under the purview of sexual assault as per Section 7 of the POCSO Act.

An appeal against the Session Judge's order was heard by a single judge Nagpur Bench of the Bombay High Court. **Sections 342** (punishment for wrongful confinement), **354**, and **363** (punishment for kidnapping) of **the Indian Penal Code** were attracted.

According to Section 7 of the POCSO Act, any individual who touches the private parts of a minor or does any other act with sexual intent has committed the offense of sexual assault. The Court acquitted the accused from the charge under Section 7 and upheld the conviction of the accused under Section 354 of the IPC.

A major distinction between the offense in the two statutes is that in Section 354 of the IPC, the wrongdoer is imprisoned for a tenure of one year, whereas as per Section 7 of the POCSO Act, the punishment is of three years. The Court acquitted the accused from Section 7 due to the following three reasons:

1. The prosecution did not present the argument that the accused removed the top of the victim before molesting her.
2. The punishment must be proportional to the offense committed. Under Section 7, more stringent punishment is given, therefore, cogent evidence is required to be presented.
3. It was unclear whether the accused put his hand inside the victim's top with the objective of molesting her. So, 'skin-to-skin' contact would prevent such an act committed from being an offense under Section 7.

⁴² famously know as 'skin to skin' case

Stating these reasons, the Court held that the accused is guilty of outraging the victim's modesty under Section 354 of the IPC.

It was argued that 'skin-to-skin' contact is necessary to constitute the offense of sexual assault under Section 7 of the POCSO Act. In the second part of the Section 'contact' was preceded by 'physical'. Therefore, it can be inferred that skin-to-skin contact is necessary. Further, under Section 354 even touching the clothes would be considered as a criminal force.

This judgment was overruled by the Supreme Court bench comprising of Justice U.U. Lalit, Justice S Ravindra Bhat, and Justice Bela M Trivedi.⁴³ They held that the entire objective of having an act to protect children from sexual offenses would be destroyed if the interpretation of touch or physical act under Section 7 of the POCSO Act is constricted. The flawed interpretation of the Bombay High Court would not only impose limits on the law to safeguard the citizens from harm but would also overthrow the intention of the legislature in its entirety.

The Supreme Court stated, the reasoning in the High Court's judgment quite insensitively trivializes – indeed legitimizes – an entire range of unacceptable behavior which undermines a child's dignity and autonomy, through unwanted intrusions.

The very object of the act would be undermined in case someone touches the sexual or nonsexual parts of the body of a child with gloves, condoms, sheets, or with a cloth. The sexual intent is present but according to the Bombay High Court's interpretation, it would not amount to an offense of sexual assault under Section 7 of the POCSO Act.

The Supreme Court stated that the most important ingredient for constituting the offense of sexual assault under Section 7 of the POCSO Act is the 'sexual intent' and not the 'skin to skin' contact with the child. The prosecution is not required to prove a skin-to-skin contact to prove that the offense has taken place.

The Supreme Court held that Section 7 of the POCSO Act would cover both direct and indirect contact, that is, irrespective of whether there was skin-to-skin contact or not, an offense under this section would be constituted. The intention of the offender to touch a child inappropriately is enough to attract the provisions of this section. Therefore, the court clarified and widened the interpretation of Section 7.

Another case which was overruled by the above judgment was **Libnus vs State of Maharashtra (2021)**, an appeal was made in Bombay High Court challenging the judgement of the special Court. The court was of the opinion that under section 7 of the POCSO Act, the expression sexual assault involves touching of vagina, penis, anus or breasts of the child or making the child touch vagina, penis, anus or breast of other person. The court further stated that holding the hands and opening the zip of the pants does not fit under the meaning of sexual assault. The High Court of Bombay was of the opinion that case comes under the ambit of sect 354A (1) of IPC which deals with sexual harassment and convicted the appellant under the same section and partly allowed the appeal.

The main contention of the accused is that the victim used to visit his house and it cannot be said that the touch was a 'bad touch'. To answer this question, the court stated that the victim being a small girl, it cannot be presumed that she is not aware of good touch or bad touch. The victim has expressly stated that the accused touched her and she felt the touch was a bad touch.

⁴³ Attorney General for India v. Satish and another (2021) SC

The present judgment⁴⁴ however is commendable as it considers that a child has the capacity to understand the difference between good touch and bad touch and does not leave them vulnerable and subjected to the opinion of the adults concerning the intention of the accused.

3.1.4 AGGRAVATED SEXUAL ASSAULT

SECTION 9: Aggravated sexual assault - (a) Whoever, being a police officer, commits sexual assault on a child-

- (i) within the limits of the police station or premises where he is appointed; or
- (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
- (iii) in the course of his duties or otherwise; or
- (iv) where he is known as, or identified as a police officer; or

(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child--

- (i) within the limits of the area to which the person is deployed; or
- (ii) in any areas under the command of the security or armed forces; or
- (iii) in the course of his duties or otherwise; or
- (iv) where he is known or identified as a member of the security or armed forces; or

⁴⁴ Supra 42

- (c) whoever being a public servant commits sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or
- (e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or
- (f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or
- (g) whoever commits gang sexual assault on a child.

Explanation.- when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

- (h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or
- (i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or (j) whoever commits sexual assault on a child, which--
- (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or
- (ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

- (k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or
- (l) whoever commits sexual assault on the child more than once or repeatedly; or
- (m) whoever commits sexual assault on a child below twelve years; or
- (n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or
- (o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or
- (p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or
- (q) whoever commits sexual assault on a child knowing the child is pregnant; or
- (r) whoever commits sexual assault on a child and attempts to murder the child; or
- (s) whoever commits sexual assault on a child in the course of '[communal or sectarian violence or during any natural calamity or in any similar situations]; or
- (t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
- (u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

²[(v) whoever persuades, induces, entices or coerces a child to get administered or administers or direct anyone to administer, help in getting administered any drug or hormone or any chemical substance, to a child with the intent that such child attains early sexual maturity.]

Section 9 is similar to section 5 of the Act. The mere difference between the two sections is that section 5 talks about Aggravated penetrative sexual assault but section 9 only talks about of Aggravated sexual assault. The act of penetration is the major difference between the two provisions.

The consecutive punishment for section 9 is provided under section 10 of the Act.

SECTION 10: Punishment for aggravated sexual assault - Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Justice P. Velmurugan of the Madras High Court observed that the victim was under 12 years of age and so it would be “aggravated sexual assault” that come under Section 9(m) and is punishable as per Section 10, POCSO Act. The court while dismissing the appeal had modified the conviction of the accused-appellant as per Section 9(m) that is punishable as per Section 10, POCSO Act and directed the Trial Court to take proper steps to imprison the accused who is on bail.

As per the prosecution , accused, neighbour, took the minor victim to his house while she was playing outside her house and he sexually harassed her. Next day , he called her and she refused to go . He threatened her. The accused following victim was witnessed by mother of the victim. On enquiring the victim , her mother came to know of the whole incident and she filed a complaint with police against the accused .

The Trial Court convicted the accused as per Section 7 read with Section 8, POCSO Act, with 3 years of rigorous imprisonment along with one thousand rupees as fine ,which if defaulted, he would have to undergo further six months of imprisonment and as per Section 506(i), IPC, with one year of rigorous imprisonment.

An appeal was filed before the High Court, the court noted and opined:

“15. On a careful reading of the evidence of the victim girl, it would reveal that the appellant sexually harassed the victim girl, who is below the age of 12 years and also threatened her not to disclose the said incident to anybody. If the age of the victim girl is above 12 years, the commission of sexual assault falls under Section 7 which is punishable under Section 8 of POCSO Act and if the age of the victim girl is below 12 years, it is termed as an 'Aggravated sexual assault', which falls under Section 9(m) punishable under Section 10 of POCSO Act.

Further, the minimum punishment for the offence under Section 7 of POCSO Act is three years, which is punishable under Section 8 of POCSO Act, whereas for the offence under Section 9(m) of POCSO Act is five years, which is punishable under Section 10 of POCSO Act.

16. Under these circumstances, this Court finds that the appellant has committed the offence under Section 9(m) of POCSO Act which is punishable under Section 10 of POCSO Act.” This is one of the top legal judgments in India.⁴⁵

3.1.5 SEXUAL HARASSMENT

SECTION 11: Sexual harassment - A person is said to commit sexual harassment upon a child when such person with sexual intent, -

- (i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
- (ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
- (iii) shows any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
- (v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (vi) entices a child for pornographic purposes or gives gratification therefor.

Explanation. -Any question which involves "[sexual intent]" shall be a question of fact.

The offense of sexual harassment has been defined under section 11 where in the accused with sexual intent utters any words or makes any sound or any gesture or exhibit any object or part of the body with the intention that such action shall be heard or seen by the child.

⁴⁵ Sampath vs State Rep. By The Inspector of Police, All Women Police Station, Kangeyam, Tiruppur District.

(2021) Mad HC

It also includes such an act which makes a child exhibit his own body or any part so as it is it can be seen by such person or any other person.

A comparison of the offence of sexual harassment in the POCSO and those offences in the IPC of a non-penetrative nature which do not amount to sexual assault shows that sexual harassment under section 11 POCSO is a combination of the IPC offences of sexual harassment, stalking and

“word, gesture or act intended to insult the modesty of a woman” under sections 354A, 354B, 354C, 354D and 509 of the IPC respectively.

With regard to offences pertaining to sexual harassment, the IPC has not consistently used gender-specificity of the perpetrator (as in section 509 IPC where the perpetrator is gender neutral) and victim (as in clauses (i), (ii) and (iv) of section 354A(1) IPC where the gender of the victim is not specified). However, section 11 POCSO has been framed in a gender-neutral manner that is coherent and consistent with the principle of equality. There is no material available regarding the rationale of Parliament behind the adoption of a mixture of gender specific and gender-neutral approaches in sections regarding sexual harassment in the IPC. This approach can be labelled as inconsistent and unreasonable and against Article 14 of the Constitution, as no intelligible differentia can be adduced by classifying the perpetrator as male in all instances except one, and the victim as female in all instances except three.

Under section 354A IPC, a male person can sexually harass another male person in three ways, excluding the showing of pornography to him. Whether the courts will use the principle of *generalis specialibus non derogant* in stating that this offence was meant to apply to instances of sexual harassment of men upon women alone – as seen in the offences under sections 354, 354B, 354C, 354D, 375 and 376 IPC– remains to be seen.

SECTION 12: Punishment for sexual harassment - Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

While punishment under section 12 POCSO is imprisonment of either description for a term which may extend up to three years and also fine, under section 354C IPC it is imprisonment of either description for a term from one to three years and fine for first conviction, and imprisonment of either description for a term from to seven years and fine on second conviction. Under section 354D IPC, punishment on first conviction shall be imprisonment of either description for a term which may extend to three years and fine. Punishment on second or subsequent conviction has also been specified: imprisonment of either description for a term which may extend to five years and fine. An application of section 42 POCSO shows that in the case where a male watches or stalks a female child, the punishment under sections 354C and 354D IPC apply, instead of section 12 POCSO, as the quantum of punishment for the IPC offences are greater. However, if a male watches or stalks a male child, or a female watch or stalks a male child, or if a female watches or stalks a female child, then section 12 POCSO would apply. Such differential treatment to the same classes of persons shows incongruence to the principle of equality.

3.2 USING OF CHILD FOR PORNOGRAPHY

Child pornography has been defined and punished in sections 13 and 14 of the POCSO. The IPC does not specifically criminalize child pornography, even though the sale of obscene material and the sale of obscene objects to young persons are specific offences under sections 292 and 293 of the IPC. However, section 67B of the IT Act, 2000⁴⁶ makes child pornography a punishable offence. Punishment

⁴⁶ The Information Technology Act, 2000 Act no. 21 of 2000

on first conviction shall be with imprisonment of either description for a term which may extend to five years and with a fine which may extend to 10 lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to 10 lakh rupees.

Analyzing this provision in accordance with section 42A POCSO, in any case which attracts sections 13 and 14 POCSO, section 14 POCSO prevails regarding punishment, not section 67B of the Information Technology Act 2000. These provisions are consistent with one another, coherent and congruent with general principles of statutory interpretation and fundamental legislative principles characteristic of a rule of law society.

However, within the POCSO itself, a glaring anomaly exists. Section 15 of the POCSO punishes the storage of any form of child pornography for commercial purposes by any person. The punishment may be any of the following categories: (a) with imprisonment of either description for a maximum period of three years or; (b) with fine or; (c) with both.

Thus, an offender gets a lighter punishment when compared to a person who stores child pornography for non-commercial purposes. Also, imprisonment is optional, and an offender can escape by payment of fine alone, as it is not compulsory that payment of fine need accompany imprisonment.

The legislative intention here is highly questionable. Is it that Indian law seeks to protect persons who store child pornography for commercial purposes? Or perhaps legislature felt that “storage” of child pornography material for commercial purposes does not involve “using the child”? The

Explanation in Section 13 POCSO states that the expression “using the child” includes “involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material”.

It is appropriate to refer to section 67B of the IT Act, 2000 when examining what could be meant by “storage” of child pornography. Sub-section (a) of section 67B creates the offence of “causing to be published or transmitted” material in any electronic form which depicts children engaged in sexually explicit act or conduct. Additionally, subsection (b) criminalises “collecting”, “seeking”, “browsing”, “downloading”, “exchanging” or “distributing” of material in any electronic form depicting children in obscene or indecent or sexually explicit manner.

Section 15 POCSO is inconsistent with provisions in section 14 POCSO as well as section 67B of the IT Act, 2000. Section 15 POCSO does not seem correct in being congruent with government policy principles as set out in parliamentary reports.⁴⁷

It is not possible to differentiate storage of child pornography for commercial purposes and storage of child pornography for non-commercial purposes. Children used in both categories constitute a single class of minors who have been sexually abused. If such a differentiation were to be made, the law should have granted greater punishment to a person who stores child pornography for commercial purposes. Such a provision is inconsistent with the rest of the offences in the POCSO and the IT Act, 2000. It also violates the spirit of the law, as embodied in corresponding storage offences relating to commercial trafficking of women and children in the IPC and the Immoral Traffic (Prevention) Act, 1956⁴⁸. Applying the various indices for doctrinal analysis, the existence of such a provision shows inconsistency with legislative provisions, incorrectness due to incongruence with governmental policy principles set

⁴⁷ Para 24 at pp. 56-57 of “The Information Technology (Amendment) Bill 2007”, 50th Standing Committee report (2007–2008)

⁴⁸ Act No. 104 of 1956

out in parliamentary debates, and incongruence with the principle of equality. The absence of a minimum mandatory punishment in section 15 of POCSO renders it incorrect to the extent that it also permits judicial discretion.

3.3 ABETMENT AND ATTEMPT OF OFFENCES UNDER THE ACT

People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the said Act. The said Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine. The said Act recognizes almost every known form of sexual abuse against children as punishable offences, and makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child. Further, by providing for a child-friendly judicial process, the said Act encourages children who have been victims of sexual abuse to report the offence and seek redress for their suffering, as well as to obtain assistance in overcoming their trauma. In time, the said Act will provide a means not only to report and punish those who abuse and exploit the innocence of children, but also prove an effective deterrent in curbing the occurrence of these offences.

The court will take the accusation of the child at face value and if you are prosecuted by police the court will presume that you have committed the offence or abetted or attempted to commit the offence.

The Act also contains provisions regarding attempt of any offence which is punishable under the POCSO Act with a term of imprisonment of any description provided for the offence, for a term which may be extended for one-half of the imprisonment for life or, as the case maybe, one-half all the longest term of imprisonment provided for that offense or with fine or with both.

CHAPTER-IV

INVESTIGATION, TRIAL AND RECORDING OF EVIDENCES UNDER THE ACT INTRODUCTION:

Police investigation is one of the most important parts of the Criminal Justice System which is carried out independently by the police under the oversight of the judiciary. The police investigation is carried out as per the processes prescribed under Chapter 12 of the Criminal Procedure Code, 1973⁴⁹ (CrPC) which deals with the information to the police and their powers to investigate. Once the investigation is completed, the officer in charge of the police station forwards the report along with all relevant documents to a Magistrate empowered to take cognizance of the offence. The outcome of an investigation by the police may result in either closure of the case by filing a final report, or by filing a charge sheet in the court for commencement of trial. If in an investigation, it is found that an offence is committed and there is sufficient evidence to prosecute the accused, then the final report is termed as 'charge sheet'. But, in the absence of evidence, untraced accused, or false FIR the final report is termed as 'closure report'.

⁴⁹ The Code of Criminal Procedure, 1973 (Act no. 2 of 1974)

Therefore, to file an appropriate 'final report' in the form of a charge sheet or closure report to the Magistrate it is important on the part of the police to complete its investigation without unnecessary delay and with due diligence. Timely and thorough investigation and filing charge sheets are the most crucial elements of the justice delivery system.

4.1 CHALLENGES IN INVESTIGATION PROCESS

These are the challenges which are faced during the investigation: -

1. Delay in lodging of FIR
2. Relying on the sole testimony of the victim
3. Narrow timelines for investigation
4. Role of forensics in investigation
5. Use of scientific technologies for collection of evidences

4.1.1 DELAY IN LODGING OF FIR

Section 19 of this act starts with a non-obstante clause providing for lodging the First Information either to the local police or to the Special Juvenile Police unit. Section 19(5) mandates the police to provide immediate care and protection either by taking the child abused to a shelter home or to the nearest hospital, if the child is in urgent need of the same. It is obligatory on the part of the police receiving the First Information to report the matter within a maximum time limit of 24 hours not only to the special court but also the child welfare committee. While reporting, it is expected to report about the need of care and protection to the child and steps taken in this regard.

It is necessary to report on time in order to have solid and credible oral and physical evidence. Delay denies distinctive evidence. As time passes without a crime being reported, a shadow of doubt descends on reliability, increasing the risk of evidence manipulation. As a result, excess delay can be fatal, calling into question the information's veracity, and the prosecution bears the responsibility of providing a credible explanation for the delay in reporting. The social stigma attributed to female victims of sexual offences and their families in the Indian community is the major cause of non-reporting or delayed reporting of such crimes. All bystanders and other child sexual abuse witnesses have a legal obligation to report the incident to the authorities, as outlined in section 21 of the POCSO Act. Section 20 requires hotels, hospitals etc. for mandatory reporting of any child sexual abuse or sexually exploitative behavior against a minor to the authorities. However, because sexual offences are considered "crimes in isolation," eyewitnesses may not be accessible in the majority of cases.

The purpose of first information report (FIR) is to initiate the investigation process in criminal matters.⁵⁰ According to Justice Madan Lokur,⁵⁰ case reporting is hampered by two factors: first, social stigma, and second, obstacles in reporting cases of incest or if the offender is closely

⁵⁰ Lalita Kumari v. State of Uttar Pradesh (2014) 2 SCC 1 ⁵⁰ Supra 16

linked to the family of the child victims. It was also recommended that victims who are now adults but who were sexually abused as children be encouraged to open up and share their stories.

The Supreme Court in **State of Andhra Pradesh v. M. Madhusudhan Rao**,⁵¹ summarized the established position on delay in filing an FIR,

“Delay in lodging FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Thus, FIR is to be filed more promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same for the reason that in case the substratum of the evidence given by the complainant/informant is found to be unreliable, the prosecution case has to be rejected in its entirety.”

However, in sexual offences, particularly against children, immediate filing of an FIR may not be possible for several reasons. First, the child victim may not wish to mention the incident out of shock or shame because of the stigma attached to such offences, fear because she may be under threat, or a lack of vocabulary or understanding to explain the abuse. As a result, in some cases, the offence may be discovered only when the victim shows signs of pregnancy. For instance, in **State Andhra Pradesh v. Turugopi Venkateswara Rao**,⁵² the accused, finding the 11-year-old victim alone in the house, forcibly took her into his house, closed the doors from inside and committed aggravated penetrative sexual assault on her. He threatened to kill her if she revealed the incident to anyone, and therefore, the victim kept it to herself. A week later, she started having severe pains in her stomach and on questioning by parents, revealed what happened and they rushed to file a complaint. The delay in filing FIR was considered understandable under the circumstances.

Even if the victim discloses the incident, she may be dissuaded by relatives, society, as well as the police, from lodging the FIR. These social realities have also been acknowledged by the Supreme Court in **State of Himachal Pradesh v. Prem Singh**,⁵³ wherein it observed,

“So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR.”

○ IMPORTANCE OF MEDICO-LEGAL TEST IN INVESTIGATION:

Medico-legal opinion is crucial in determining guilt or innocence during the investigation of numerous bodily offences. The medical test is useful in a variety of ways, including determining the nature and severity of injuries as well as determining the approximate time when the injuries were inflicted on the body. Injuries to the private parts and other bodily injuries are extremely helpful in understanding the dynamics of the incident in sexual offences, such as penetrative sexual assault. In combination with the provisions entrenched under

⁵¹ (2008) 15 SCC 582

⁵² Sessions Case No. 37 of 2015, decided on 7.6.2017

sections 164-A and 357 of Cr.PC, section 27 of the POCSO Act provides for the procedure and measures to be taken while performing a medical examination of a minor victim.

○ CONSEQUENCES OF DELAY IN CONDUCTING MEDICAL TEST:

Medical examination is undertaken long after a sexual abuse act on various occasions, which is likely to result in no reported injury to the private area, offering favorable defence grounds.

“Because the woman came forward to the police after several days of physical attack, damage to her body could not be found, advantage cannot be given, the Delhi High Court stated in the case of **Durgesh Jha v. NCT Delhi**.⁵⁴ As a result, in late-reported cases of

⁵³ AIR 2009 SC 1010

⁵⁴ 2017 SCC OnLine Del 9648 at para 17

penetrative sexual assault, the absence of damage to the victim's body or private parts may not be enough to hinder the prosecution case, and the victim cannot be labelled a liar.

Different types of evidence, such as oral evidence, are employed in courtrooms around the world. Documentary evidence, digital evidence, and a variety of other forensic evidences all help corroborate the judicial process. During the course of a trial, there is no requirement of exact number of witnesses.⁵³ As long as the testimony is logical, consistent, and proportional to the probability, and it inspires implicit trust, it can be accepted.⁵⁴

“Under the subject of appreciating the law of evidence the quality of witnesses' evidence is more important than the number of witnesses, as there is no need to have a large number of witnesses,” the Supreme Court said.⁵⁵ Also the apex court on other instance said that “The criminal justice system in this country is at a cross road. In many cases, reliable, trustworthy, and credible witnesses to the crime rarely come forward to testify in court, and even the most hardened offenders manage to escape the law. Even the prosecution's most dependable witnesses become hostile due to intimidation, fear, and a variety of other factors.”⁵⁶ Evidence other than an eye witness is often regarded as secondary in nature, despite the fact that it clearly aids in corroborating and so strengthens the probity of a fact.

4.1.2 RELYING ON THE SOLE TESTIMONY OF THE VICTIM

Another challenge in the process of investigation comes into picture in cases of sole testimony. The Apex Court ruled in **Joseph v. State of Kerala**⁵⁹ that where there is a single witness to an incident, his testimony must be accepted with caution and after being tested against the touchstone of evidence offered by other witnesses or the material evidences on record. This Court also declared that section 134 of

⁵³ The Indian Evidence Act, 1872 (Act no. 1 of 1872), Sec. 134

⁵⁴ Kunju v. State of Tamil Nadu AIR 2008 SC 1381

⁵⁵ Laxmibai v. Bhagwantbuva (2013) 4 SCC 97 at para 39

⁵⁶ Dharam Deo Yadav v. State of U.P. 5 (2014) 5 SCC 509 para 30 ⁵⁹ (2003) 1 SCC

the Indian Evidence Act does not specify a minimum number of witnesses, and that the Court could record and uphold a conviction based on the testimony of a single eye witness. The Court concluded in the case of **State of Haryana v. Inder**

Singh⁵⁷ that the quality of the witnesses, not the quantity, is what matters in assessing the guilt or innocence of the accused. The testimony of a single witness must be reliable and trustworthy and should not leave any doubt in the mind of Court.⁵⁸ Similarly in case of **Ganesan V. State Represented by its Inspector of Police**,⁵⁹ Supreme Court held that conviction of accused is possible on sole testimony. So it is another challenge for the courts to figure out on what evidences to rely.

In case of **Rameshwar v. State of Rajasthan**⁶⁰ Justice Vivian Bose said “Many crimes that are frequently perpetrated between accomplices in secret, such as incest, misdeeds involving females (or unnatural acts), could never be brought to justice”. It is difficult to obtain an eyewitness in different conditions of crime, such as in sexual offence cases, because the crime is committed in a remote location. This circumstance can also be seen when a victim is killed after being raped or committed other crimes. In such cases, scientific (forensic) evidence plays a critical role in corroboration. So in the cases where there is a single witness the chances are that the evidences might be tempered with. Apart from this, the witness turning hostile might create another difficulty to take the investigation forward.

□ CHALLENGE AS TO ADMISSIBILITY OF HOSTILE WITNESS:

It is well established that the prosecution can rely on the testimony of hostile witnesses to the extent that it supports the prosecution account of the incident. Such witness's testimony cannot be considered "washed off the records," as it is still admissible in court, and there is no legal limit to basing an accused's conviction on such testimony provided it is substantiated by other trustworthy evidence.⁶¹ The Court may, in its discretion, allow the person who calls a witness to ask any question that might be asked under cross-examination by the opposing party under Section 154 of the Indian Evidence Act. The argument that the testimony of a witness who has been called and cross-examined by the party with the Court's permission cannot be believed or

disbelieved in part and must be rejected entirely is incorrect. The courts may rely on much of the testimony that supports the prosecution's case and is backed up by additional evidence.

4.1.3 NARROW TIMELINES FOR INVESTIGATION

According to the Criminal Procedure Code (CrPC), investigations into crimes punishable up to ten years must be completed within 60 days, and investigations into crimes punishable by more than ten years in prison (including rape) must be completed within 90 days of detaining the accused, or else the accused would be released on bail.⁶² CrPC was amended in 2018 to speed up the process by reducing the investigation period for all rape cases from 90 to 60 days. Though every investigation shall be conducted without undue delay, but since the perpetrators are large in numbers so there can be no upper limit to the number of investigations.

⁵⁷ (2002) 9 SCC 537

⁵⁸ Ramnaresh & ors. v. State of Chhattisgarh; 2012 (3) Supreme 81

⁵⁹ CRIMINAL APPEAL No. 680 of 2020

⁶⁰ AIR 1952 SC 54

⁶¹ Brajendra Singh v. State of Madhya Pradesh; AIR 2012 SC 1552

⁶² Supra 48, Section 167

Recently, some state governments have reduced the duration for the investigation of crime. Two major steps in this regard are Disha Act of Andhra Pradesh and Shakti Act of Maharashtra.

Disha Act envisions an investigation to be executed in 7 working days and a trial in 14 days from the date of filing the charge sheet, allowing for the collection of adequate evidence and the passing of judgement within a 21 days timeframe. Whereas Shakti Act calls for a case's probe to be completed in 15 days and a trial to be conducted within 30 days. In general, the length of an investigation is determined by the seriousness of the crime, the number of defendants, and the agencies involved. The investigation entails the investigating officer (IO) and forensic expert inspecting the scene of the crime; recording the victim's and witnesses statements (by the IO and the judicial magistrate); medical examination of the victim and accused persons; and collecting documents relating to age from parents, local bodies, and school. This is in addition to the fact that in many cases of rape, the victim is traumatized for a period of time and is unable to recount the incident in entirety. The duration and quality of an investigation are also affected by whether a police station has separate investigation and law and order divisions, which is another long-awaited police reform that is still awaiting compliance with the Supreme Court's directions. The

amount of available IOs and female police officers, as well as the size and growth of the FSL and its DNA unit, all play an important role.⁶³

Sensitive offences should be investigated as soon as possible. However, setting short investigation deadlines, leaves room for procedural flaws that could be exploited during the trial. Apart from this, there are also high chances that in such short span of time, quality evidences are not found and the accused is let off due to lack of evidences found against him. Instead of imposing unrealistic deadlines, the police should be given more resources to ensure that they can deliver effectively.

4.1.4 ROLE OF FORENSICS IN INVESTIGATION

The legal definition of forensic or scientific evidence is not specified under Indian law. Several forensic inputs, such as DNA and voice matching, have long been regularly employed in courtrooms, but these professionals have been excluded from the Indian judicial system.

○ ROLE OF EXPERT OPINION IN FORENSIC EVIDENCES:

Section 45 of the Indian Evidence Act, 1872 provides for the 'Opinions of experts,' by which courts are able to formulate their opinion on various areas. The law goes on to say that an expert is not a fact witness and that his testimony is truly advisory in nature.⁶⁴

⁶³ Give adequate time for Probe, THE HINDU, Dec. 31. 2020

⁶⁴ Section 293(4)(g) introduced by Act of 2005 [the Criminal (Amendment) Act, 2005], s. 26 (w.e.f. 23-06- 2006)

○ JUDICIAL RESPONSE ON EXPERT OPINION:

The opinion of an expert witness differs from the testimony of a fact witness. The expert's responsibility is to provide his or her view together with justification and supporting evidence.⁶⁵ The court should neither cede its authority to a third party or subject its own decision to an expert, but rather treat expert testimony as any other evidence.⁶⁶ The Supreme

Court in **Pattu Rajan v. State of Tamil Nadu**⁶⁷, stated unequivocally that expert testimony is advisory in nature and that the court is not bound by expert testimony. Expert testimony is taken into consideration by the Court, but it is not binding. A government scientific expert, on the other hand, is not on the same level as an expert called by the opposing party to defend its position.

The matter of disputes between the eye witness and the expert opinion has been addressed by the Indian Supreme Court in a number of decisions. In case no opinion is present, the Supreme Court should seek assistance from an authorized textbook and apply its expertise and knowledge. In the absence of an expert opinion, the court should carry out its duties.⁶⁸

○ CHANCES OF FRAUD IN FORENSIC EVIDENCES:

One of the pillars of the legal system is the reliability of expert testimony. The idea that forensic evidence is perfect, is incorrect as even these leaves plenty of room for forensic fraud and manipulation. It is a complex domain in which forensic solutions are specially designed to achieve the intended goal of leading an investigation.

When an expert witness knows he or she is a fake or is otherwise giving misleading testimony, the situation is similar to that of any other witness who is defrauding the court. Such behaviour is both illegal and unethical.

Several instances of forensic tampering have been reported in India.⁶⁹ The Delhi High Court ordered a CBI investigation in relation to fake DNA tests presented by a forensic expert in various instances.⁷⁰ In **Nisha Thakur v. Union Public Service Commission**,⁷⁴ the same expert's educational qualifications were challenged before the same high court. India, like other nations, requires an ethical standard to ensure the integrity of expert advice.

4.1.5 USE OF SCIENTIFIC TECHNOLOGIES FOR COLLECTION OF EVIDENCES

Forensic professionals assess physical artefacts such as biological samples acquired from various sources such as crime scenes and other sources, as well as medico-legal exams, utilizing a variety of forensic technology.

⁶⁵ Prem Sagar Manocha v. State (NCT of Delhi) (2016) 4 SCC 571

⁶⁶ State of Karnataka v. Jayalalitha (2017) 6 SCC 263

⁶⁷ 2019 (2) SCC (Cri) 354

⁶⁸ Ajay Kumar Parmar v. State of Rajasthan (2012) 2 SCC (Cri) 201

⁶⁹ Rajiv Singh v. State of Bihar, 2015 SCC OnLine SC 1336

⁷⁰ State (NCT of Delhi) v. Khursheed 2018 SCC OnLine Del 10347 ⁷⁴ 2015 SCC

OnLine Del 14324

1. DNA EVIDENCES:

The relevance of DNA was highlighted by the then Chairman of the Law Commission of India, he emphasized on the DNA evidences by stating that if the DNA does not match then the person cannot be held guilty. If there is corroborative evidence, either circumstantial or direct, where the DNA matches, guilt can be proven. "In the coming years, DNA should be employed extensively, and I am confident that doing so would allow us to overcome the current dilemma caused by hostile witness."⁷¹ DNA aids in the identification of the offender as well as the victim in a variety of ways in sexual crime cases. However, the inviolability of the DNA sample is critical since it can be contaminated for a variety of reasons.

Under sections 53-A and 164-A of the Criminal Procedure Code, the investigator of a rape case must expressly request that the offender's or victim's medical examiner acquire blood samples for DNA testing. DNA is a powerful forensic tool for both proving guilt and proving innocence. DNA has to be crucial in redressing injustice by convincingly showing the innocence of wrongfully condemned defendants.

2. NON-DNA EVIDENCES:

Non-DNA evidence such as hair, fibers, soils, and paint, toxicology, digital forensics including telephony, and impression and pattern evidence like fingerprints, handwriting, footprints etc. are all significant for corroboration in sexual offences. Another set of

evidence is CCTV footage and Spectrograph (voice match), both of which are quite useful for human identification and other uses.

□ DIGITAL EVIDENCES:

Cyber footprints are mostly used to enhance crime investigation in today's digital world. Manipulation and tampering with digital data are difficult for law enforcement organisations to identify, but digital forensics comes to the rescue. The Information Technology Act of 2000, Chapter XI, makes it illegal to tamper with computer source documents (section 65), hack a computer system (section 66. Call Detail Records (CDRs) analysis provides crucial connecting links such as geo-location, conversations, movements, and numerous behavioral patterns that can be used to corroborate statements. Digital inputs are a trustworthy and admissible kind of evidence, as defined by Indian law.⁷²

⁷¹ Saranya v. State of Tamil Nadu 2016 SCC OnLine Mad 23294

⁷² Evidence includes all documents including electronic records produced for the inspection of the Court are call documentary evidence. S. 92 and Sch. II of the Act 21 of 2000; INDIAN EVIDENCE ACT, 872 S. 3

However, because digital inputs only reflect activities performed on a machine (electronic device), linking a digital device to an offender remains a difficult task for an investigator. As a result, transforming digital material into admissible evidence in a court of law necessitates extensive practice thereby acting as a challenge in the investigation.

The use of electronic evidence in courtrooms has a long history in the global legal landscape; however, the trustworthiness of digital evidence has been recognized by all jurisdictions.⁷³ In India, in addition to the Information Technology Act of 2000, a series of procedural laws govern the relevance and admissibility of electronic evidence. There are various concerns to address, such as certification under Sections 65-A and 65-B of the Information Technology Act.

The extent of cyber forensics is vast and the usage of diverse tools and techniques, as well as their varying methods of operation, poses plenty of concerns for legal and technical specialists equally. The lack of proper guidelines for the collection, acquisition, and presentation of electronic evidence, rapid technological change, big data, use of antiforensic techniques by criminals, and the use of free online tools for investigation, among other issues, all point to the need for current technologies to be amended.

□ EVIDENCE COLLECTION FOR AGE DETERMINATION:

The determination of age below the age of 18 years is still a critical aspect in child sexual abuse's legal argument.

The JJ Rules, 2016, were enacted by the Central Government. The Supreme Court has also asked lower courts, boards, and committees not to undertake robing inquiries. Only when other documentation of age evidence such as birth certificate from school etc. are unavailable, as stipulated in section 94 of the JJ Act, 2016, must a medical examination for age estimation be done. The age of a person can be determined by a medical specialist using:

- (i) the Ossification test, or
- (ii) any other current medical procedure accessible, such as the status of pubic hair, the growth of secondary sexual features, and so on.

4.2 OUTCOME OF LAPSES IN INVESTIGATION:

“Investigators are overburdened with vast numbers of cases, and there is a pressing need to separate the investigating wing of the police from the segment responsible for maintaining peace and order,” Justice Madan Lokur said.⁷⁴ The Kerala High Court, while ordering a retrial in the Walayar rape-death cases, noted that the acquittal of the defendants was due to errors in the initial investigation, untrained prosecution, and the trial judge's passive involvement. The High Court went so far as to call the trial a "mock trial" because of the faults. In 2017, a rape and death case involving two sisters, ages 13 and 9 years, occurred in Walayar, Kerala. On January 13, 2017, the 13-year-old sister was discovered hanging in her home. On March 4, 2017, the younger

⁷³ R. v. Wood (1983) 76 Cr App R 23; Castle v. Cross [1985] 1 All ER 87; R. v. Shephard [1993] Crim LR 295

⁷⁴ Conference proceeding of National Initiative to Reduce Pendency and Delay in Judicial System, by Supreme Court of India, 2018.

sister, who was nine years old at the time, was found hanged in her home. They were both from the Scheduled Caste community. Both girls were sexually assaulted, according to postmortem investigations. In the instance of the younger girl, the autopsy findings even supported the possibility of homicidal hanging. "We are compelled to note that the first phase of the investigation in these cases was completely filthy," Justice Hariprasad wrote in his decision. The early faults in the inquiry, according to the Court, destabilized the case. The investigating officer, who was delegated to investigate these instances approximately a week after the younger girl's death, doing a relatively decent job, he was unable to acquire any proper scientific proof. High Court held that "The police officers investigating crimes against women and children, particularly those under the POCSO Act, must have high standard of integrity and skill. They should receive sufficient legal training in order to comprehend the complexities of the law. Furthermore, they should be given clear instructions on how to obtain scientific data in such situations. More importantly, they should be sympathetic to the victims', their families', and society's emotions and sentiments when investigating such serious crimes ".⁷⁵

4.3 ROLE OF MEDIA IN POCSO CASES

The media is the gatekeeper and watch dog of the society. The media acts as multifaceted institution with multiple activities.

It takes the message simultaneously from all the parties involved and builds the opinion on an issue, with definitely threatens the establishment from violating rights with the growth of the number of news channels and in increasing popularity of "breaking news" Electronic Media has come to play a major role in stirring public opinion and consciousness public advocacy outside the court through well- established mechanism like lobbying, negotiations and mobilization of public opinion has been effectively undertaken by the media.

The current trend of media on reporting cases commonly known as "Trial by media" has witnessed the sensation of self- manifested stories, half- baked truth resulting in the violation of right of individuals, resulting media reporting transforming into media circus.

Trial by media is a phrase popular in the last few decades to describe the impact of television and print media coverage on a case by creating a wide spread perception of guilt on part of accuse regardless of any verdict in a court of law and hence the accuse is held guilty even prior to his trial. The blatantly violate the code is sell their story and boost their TRP, leaving far reaching injury to the reputation of the accused. The media involves itself so intensely and during such high publicity court cases the media sensationalizes the case and provokes atmosphere of public hysteria which not only makes a free and fair trial impossible but also maligns in the reputations of the accused to such degraded level that their rest of life comes under public- hatred and had scrutiny.

Suspects and accused apart, even victim and witnesses suffer from excessive publicity and invasion of their privacy rights.

On the other facet, the trial by media interferes with the administration of justice and tends to lower the authority of courts and finally hampering the functioning of democracy because an independent judiciary to dispense justice without fear or favour is necessary and its strength is the faith of the public in general in that institution.

⁷⁵ State of kerala V. Madhu @ Kutti Madhu, CRL.A.No.1357 OF 2019

SECTION 23: PROCEDURE FOR MEDIA

- (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.
- (2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

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

- (3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.
- (4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

On 21st March'2022, a Supreme Court bench comprising Justices Indira Banerjee and J.K. Maheshwari, in a judgment⁷⁶, expressed differing opinions over whether an offence under Section 23 of the POCSO Act, 2012 is non-cognizable, and thus, prior permission of the magistrate to the police would be needed to investigate it. Justice Banerjee held that the offence under 23 of the POCSO is a cognizable offence, while Justice Maheshwari treated it as a noncognizable offence. Both the judges have given their separate reasons for their conclusions.

As per the CrPC, cognizable offences are those offences for which a police officer may arrest a person without a warrant. On other hand, for a non- cognizable offence, a police officer has no authority to arrest without a warrant. Section 155(2) of the CrPC makes it obligatory for a police officer to investigate a non-cognizable case with the prior permission of the Magistrate.

Section 23 of the POCSO Act makes the disclosure of the identity of the child a punishable offence with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both. It applies equally to media reports.

⁷⁶ Gangadhar Narayan Nayak vs. State of Karnataka & ors. (2022) LiveLaw (SC) 301

In the present case, Gangadhar Narayan Nayak, also known as Gangadhar Hiregutti, the appellant-accused, is the Editor of Karavali Munjavu Newspaper. The victim's mother lodged a complaint against him under section 23 of the POCSO Act since a report in the newspaper published the name of her child. After investigation, the police filed a charge-sheet at the Court of the Principal District Judge, Uttar Kannada, Karwar. On April 19, 2018, the Court of the Principal District Judge, Uttar Kannada, Karwar, took cognizance of the offence alleged and directed that summons be issued to Nayak. He sought discharge from the offence on the ground that offence under section 23 being non-cognizable, police could not have investigated the offence without the nod of the Magistrate under Section 155(2) of the CrPC.

Justice Banerjee's reasoning

Justice Banerjee examined and interpreted Sections 23, 19, 31 and 33(9) of the POSCO Act, giving these provisions a literal interpretation, and keeping the child's dignity and privacy into consideration. Taking note of section 19, Justice Banerjee held that it does not exclude the offence under section 23. Section 19 provides for the reporting of offence. It begins with a nonobstante clause overriding the CrPC. Keeping this into consideration, Justice Banerjee held, "This is patently clear from the language and tenor of Section 19(1), which reads "... any person who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed.....".

The expression 'offence' in Section 19 of the POCSO Act, Justice Banerjee wrote, would include all offences under the POCSO Act, including the offence under section 23 of publication of a news report disclosing the identity of a child victim of sexual assault. She held that the disclosure of the identity of the child in the media may also expose the child victim of a sexual offence to vindictive retaliation by the perpetrators of the crime or their accomplices.

Senior Advocate Devdatt Kamat, representing the appellant, relied upon section 31 of the POCSO Act, which provides that the provisions of the CrPC, including provisions as to bail and bonds, are to apply to the proceedings before a Special Court under the POSCO Act. Rejecting the argument, Justice Banerjee noted that section 31 has nothing to do with reporting or investigation of an offence as contemplated in section 19 of the POCSO Act. She also rejected the reliance sought to be placed by Kamat on section 33(9) of the Act, which confers powers of a Court of Sessions on the Special Court to try offences under the Act. Justice Banerjee offered the same reasoning for the rejection of this argument, that is, this section has nothing to do with reporting or investigation of an offence under POSCO.

"It is well settled that legislative intent is to be construed from the words used in the statute, as per their plain meaning. Had Legislature intended that the Cr.P.C. should apply to investigation of an offence under Section 23 of POCSO, would specifically have provided so. The expression "investigation" would, as in Section 4(1) or (2) of the Cr.P.C., have expressly been incorporated in Section 31 or Section 33(9) or elsewhere in POCSO", Justice Banerjee held.

Justice Banerjee adverted to similar provisions protecting the identity of the victim of sexual offences, namely Section 228A of the Indian Penal Code, Section 327(2) of the CrPC, and Section 74 of the Juvenile Justice [JJ] Act. She said the object of these laws, including section 23 of the POCSO Act, is to prevent the disclosure of the identity of the victim. The identity of the victim should not be discernible from any matter published in the media.

Referring to Article 16 of the United Nations Convention on the Rights of the Child, Justice Banerjee held the JJ Act and the POCSO Act are in furtherance of the obligations of India under the Convention. Article 16 of this Convention provides that no child shall be subjected to arbitrary or unlawful interference with their privacy. It has been ratified by India. In this view,

Justice Banerjee held “The provision of Section 23 of POCSO which protects child victims of sexual abuse from unwarranted intrusion into privacy, harassment and mental agony has to be strictly enforced. The provision cannot be allowed to be diluted”.

She held that the right of a child to dignity not only requires that the child be protected from offence of sexual assault, sexual harassment and pornography, but also requires that the dignity of a child be safeguarded.

“Disclosure of the identity of a child who is a victim of a sexual offence or who is in conflict with the law is in fundamental breach of the right of the child to dignity, the right not to be embarrassed”, she held.

Justice Maheshwari’s reasoning

Justice Maheshwari noted that the POCSO Act does not clarify regarding cognizable and non-cognizable offences. He referred to the CrPC scheme on cognizable and non-cognizable offences. The first schedule of CrPC provides for the classification of offence, which is in two parts. The first part specifies the punishment, cognizability or non-cognizability, bailability or non-bailability; and triability by which court. The second part deals with the offences committed under any other law and specify the description of the offences: cognizability or non-cognizability, bailability or non-bailability; and triability by which court. On a reading of the schedule, Justice Maheshwari opined that it is clear that for offences punishable with a sentence of imprisonment for less than three years or with fine, if prescribed in that law, the commission of such offence under any other law would be non-cognizable,ailable and triable by any magistrate. He thus held that if the sentence prescribed for the offence is less than three years, then those offences of the POCSO Act would be non-cognizable.

On the interpretation of section 19 of the POCSO Act, Justice Maheshwari differed with Justice Banerjee to hold that it does not specify that all the offences under the POCSO Act are cognizable. Besides, he held that section 19 or other provisions of the POCSO Act also do not specify how and in what manner the investigation on reporting of the commission of offence under sub-section (1) of section 19 be done by the police. He thus held that in absence of any procedure for investigation under the POCSO Act, either for cognizable or non-cognizable offences, the procedure prescribed in CrPC ought to be followed in the matter of investigation, enquiring into and trial. He further held that section 19 of the POCSO Act overrides the provisions of CrPC only to the extent of reporting the matters to the police or the Special Juvenile Police Unit and other ancillary points so specified in section 19.

Justice Maheshwari also doubted the correctness of the Delhi High Court’s 2016 judgment in the Santosh Kumar Mandal case, in which it was held all offences under the POCSO Act are cognizable.

Having held that the offence under section 23 of the POCSO Act is non-cognizable, Justice

Maheshwari adverted to section 155 of the CrPC to opine that its language makes it clear that it is mandatory that no police officer shall investigate a non-cognizable case without the order of the Magistrate. Therefore, the said provision is mandatory and required to be complied with prior to investigating a non-cognizable offence. Section 155(2) of the CrPC provides for the permission of the Magistrate but under the POSCO Act, it is the Special Court designated which deals with offences under the Act. Justice Maheshwari thus held that “Magistrate” in Section

155(2) be read as “Special Courts” for offences under the POCSO Act, and the special courts may take cognizance of any offence under the POCSO Act.

On the merits of the present case, he chose to set aside the order taking cognizance of the offence as the Special Court failed to take note of the procedure under section 155(2) of the CrPC which mandates prior permission of the court to investigate the offence.

Since the division bench could not arrive at a unanimous conclusion, the matter has been unanimously directed to be placed before the Chief Justice of India for listing it before an appropriate bench.

4.4 SPECIAL COURTS AND PROCEDURE TO BE FOLLOWED

The POCSO Act prescribes very limited structural requirements for Special Courts. These prerequisites include the designation of Special Courts, appointment of Special Public Prosecutors (SPP), and the use of certain tools to prevent contact between the child victim and the accused at the time of evidence. The POCSO Act also vests the Special Courts with the responsibility of ensuring that the atmosphere is child-friendly, but does not elaborate on structural modifications required for the same. ‘

4.4.1 ESTABLISHMENT OF SPECIAL COURTS

According to Section 28(1), POCSO Act, State Governments should, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act, to facilitate 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.”⁷⁷ 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.⁷⁸

This provision is based on the recognition that children, due to their distinct status, require special care and attention. Moreover, 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 an understanding of the complexities of abuse, the child should feel supported, testimony and evidence should be sensitively appreciated, and the privacy of the child should be protected. The purpose of this provision is to ensure that POCSO matters are dealt with only in Special Courts “designated for similar purposes” as laid down in the Act, and to ensure speedy trial. The legislative intention is that Judges and SPPs be well versed with matters concerning offences against children or sexual offences.

However, the POCSO Act does not expressly require Special Courts to exclusively deal with offences under the POCSO Act or offences against children. This results in delays in hearings, the judge and SPP being overworked and the child potentially being exposed to other accused persons, police, and lawyers while waiting for the trial. Moreover, structural modifications needed to prevent exposure between the child and the accused, including the provision of screens and partitions,⁷⁹ separate entrances and waiting rooms, and an overall child-friendly atmosphere⁸⁰ is difficult to maintain. The court hall cannot be designed primarily for children, as these are not the only cases being dealt with by the Special Court. The Judge and the SPP are also compelled to constantly switch their mind-set from POCSO matters to other matters.

⁷⁷ Department-Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Fortieth Report On The Protection Of Children From Sexual Offences Bill, 2011, (Standing Committee Report on POCSO Bill) para 5.10.

⁷⁸ Supra 22, Section 28(1) proviso.

⁷⁹ Supra 22, Section 36(2)

⁸⁰ Supra 22, Section 33(4)

4.4.2 APPOINTMENT OF SPECIAL PUBLIC PROSECUTORS (SPP)

According to Section 32(1), the State Government should appoint a SPP “for conducting cases only under the provisions of [POCSO] Act.” Advocates with a minimum of seven years’ practice are eligible to be appointed as an SPP. The language of the provision suggests that the SPPs must exclusively handle POCSO cases. The purpose of this provision is to ensure that SPPs are trained in the provisions of the POCSO Act, as well as in the distinct procedural requirements, and they form a pool of dedicated prosecutors to achieve the goals of speedy trials and child-friendliness.

However, due to the increased workloads, PP’s rarely handle only POCSO matters, and POCSO cases may be delayed because of this. The Studies revealed that existing PPs or Additional PPs were specified as PPs in Andhra Pradesh, Assam, Delhi, and Maharashtra. PPs rarely spend enough time with the child before the hearing and often meet the child only on the day of the hearing. This denies them the opportunity to form a relationship of trust with the child and effectively orient the child with the court hall and the judicial process or ascertain the child’s vocabulary, developmental needs, or disability. The PP’s often lack training on how to question and communicate with the child.

4.4.3 TOOLS AND FACILITIES TO RECORD TESTIMONY AND PREVENT EXPOSURE

Section 36(1), 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.

Exposure to the accused can destroy the confidence of the child and can trigger the memory of the traumatic assault. The exposure could also provide the accused with an opportunity to intimidate the victim. The POCSO Act, however, does not address exposure to the accused before the trial and outside the courtroom. The Studies revealed that most courts do not have separate waiting rooms or entrances for victims. This results in the child often having to enter via the same entrance and wait in the same room as the accused and their lawyers. Some Special

Courts ensure that the child is made to wait in the Judge’s chambers or if a support person is available, in the canteen, but this is not a regular practice.

Special Courts employ various mechanisms to prevent exposure to the accused, including using separate halls or partitions. However, many courts do not mandatorily apply this provision and sometimes the child is exposed to the accused present at the time of recording the testimony.

4.4.4 PROCEDURE UNDER THE ACT FOR SPECIAL COURTS

The POCSO Act lays down the procedures to be followed by special courts while trying cases under the Act. The points below captures the extent of compliance to these procedures drawing from the understanding of the Act, Observations and judgment analysis.

□ Direct Cognizance by the Special Court

Section 33(1), POCSO Act, empowers the Special Court to directly take cognizance of an offence based on a complaint or upon a police report, without the accused being committed to it for trial.⁹ The police must, therefore, bring the matter directly before the Special Court instead of initiating committal proceedings before a Magistrate. This is to facilitate speedy trial of sexual offences against children.

Judgements of various High Courts have clarified the powers of the Special Courts to take direct cognizance of cases under the POCSO Act. Despite this, accused persons have been produced before the Magistrate’s Courts and which further leads to committal proceedings which leads to delay in the proceedings and it will be very apt to say at this point that justice delayed is justice denied.

□ Questioning Children

Section 33(2), POCSO Act, prohibits the Special Public Prosecutor and the defence lawyer from putting questions to the child directly. All questions during the examination-in-chief and crossexamination must be routed through the Special Court Judge. Under Section 33(6), POCSO Act, the Special Court should not allow aggressive questioning or character assassination of the child and should ensure that dignity of the child is maintained during the trial.

It was further observed that the prosecutors and defence lawyers are allowed to pose questions to the child victims, but questions are also routed through the Judge in many cases. Judges usually intervene actively when degrading or insensitive questions are posed to the child. It appeared that Judges also prevent the defence from asking insensitive questions, or ensure that they are rephrased before being put to the child. Defence lawyers, in general, seemed to be discontented about questions being routed through Judges.

“Judges interfere a lot with the questioning process. They often do not let us ask the questions that we need to ask. When I ask certain kinds of questions, which may be personal or worded a little harshly, then the district judge asks instead of me. But these questions need to be asked; otherwise, innocent people will get punished. In some cases, they may ask the witness again, in a more sensitive manner, if they feel the question is personal.”

-Defence Lawyer

As per Section 142 of the Indian Evidence Act, leading questions (questions which suggest answers) must not be asked during the examination-in-chief if the defence lawyer raises an objection, except with the permission of the Court.⁸¹ A member of the judiciary acknowledged that while leading questions ought not to be allowed in chief examination, he permits them in cases under the POCSO Act, since ‘children are innocent’.

□ Creation of Child Friendly Atmosphere

Section 33(4) POCSO Act, requires the Special Court to create a child-friendly atmosphere by allowing a family member, guardian, friend, or relative, in whom the child has trust or confidence, to be present in the court. Interviews revealed that Judges interact with the victim generally, and give the child sufficient time to relax. They sometimes also offer water, and enquire if the child has had food prior to recording of evidence. A child respondent shared that the Judge’s assurance that it would be helpful if she answered honestly, and his efforts to calm her when she was tense, enabled her to answer the questions. One of the Judges also mentioned that he asks the victim if she is intimidated by anyone present in the courtroom. If the victim

responds affirmatively, such person is sent out of the courtroom. Further, if the child wants a member of the family to be present, that person is made to sit next to the child.

Efforts made by the Judge to make the child comfortable have come through in some of the judgements as well. For instance, in a case, the accused had allegedly committed penetrative sexual assault on a 16-year-old girl. Steps taken while recording her statement were stated in the judgement,

⁸¹ The Indian Evidence Act, 1872 (Act no. 1 of 1872), Section 141 & 142

“The Court has created a child-friendly atmosphere as required under Section 33(4) of the Act. When the witness was asked whether she wants any assistance of her parents or any other person in whom she has trust or confidence, she has stated that she can give evidence with the assistance of her mother.”

With respect to whether the court is child friendly, respondents had differing opinions. A respondent working with children felt that, “Courts are not child friendly. The atmosphere is hostile. They should be like the JJB, where they sit in a circle and make the child feel comfortable. The guard who screams ‘silence’ loudly in the court scares the child. The judicial system is not fair. There is no child friendly measures taken by the court other than conducting the proceedings in camera”.

The child does not get orientation to the court complex or court room by the prosecutor, but wherever a CHILDLINE representative is present, s/he gives the victim a tour of the Court, orients her to the courtroom, and provides her the emotional support she needs.

From the facts gathered it is observed that the Special Courts to create a child friendly atmosphere in the court room are evident. The victim however may not experience the same outside the court room.

□ Minimizing Appearances in Court and Permitting Breaks during the Trial

Special Courts should ensure that children are not called repeatedly to testify in the court under Section 33(5), POCSO Act. As per Section 33(3) POCSO Act, frequent breaks should be allowed to the child during trial, if necessary.

The child’s examination is generally completed in one visit. In exceptional cases, the defence lawyer is given another date for cross-examination. The cases are posted on a day-to-day basis in a POCSO case, indicating that the examination of the child is sought to be completed at the earliest. Case notes maintained by the Special Courts visited, showing the dates on which, they were posted, corroborated this information. A Special Court Judge stated that the chief and cross examination is completed on the same day, and that the child is not called again, even when defence lawyers do not agree to it. However, when a request is made for adjournment on behalf of the child, it is granted.

In the JJB, the child is called for examination on two days, once for chief examination and subsequently for cross- examination.

□ Protection of Identity

Section 33(7), POCSO Act, requires the Special Court to protect the identity of the child during the investigation and trial. For reasons recorded in writing, the Special Court can permit disclosure, if it is in the interest of the child. The Explanation to Section 33(7) states that identity of the child would include “the identity of the child’s family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.”

A Special Court Judge shared that he protects the identity of the child by not revealing the child’s or the parents’ names in the Court. It emerged from judgement analysis that the identity of the victim was compromised in 493 out of 509 cases (96.85%). The name of the child was identified in 103 of the 493 cases (20.8%). In some cases, the names of the child and parents, though not disclosed in the body of the judgement, were listed at the end of the judgement. In some cases, though the name of the victim was protected, other information was released, making it easy to identify her. This included the victim’s address, class/school details, village details, names of parents, grandparents, siblings, any other family members, or informants, with or without reference to their professions.

□ Award of Compensation

Section 33(8), POCSO Act, empowers the Special Court to direct payment of compensation, in addition to punishment, for physical or mental trauma caused to the child or for immediate rehabilitation. Rule 7(1), POCSO Rules, states that interim compensation can be awarded by the Special Court on its own or based on an application by or on behalf of the child, at any time after the FIR has been registered. The purpose of interim compensation is to meet the immediate rehabilitation or relief needs of the child. Compensation, interim and final, can be awarded even if the accused is acquitted, discharged, or untraceable, if according to the Special Court, the child has suffered loss or injury. Rule 7(3), POCSO Rules, specifies 12 factors that the Special Court should consider before it awards compensation. The compensation awarded should be paid from the Victim Compensation Fund or any other government scheme for compensating and rehabilitating victims and must be paid by the State Government within 30 days of the receipt of the order.

□ Prompt Recording of Evidence and Disposal of Cases

Evidence should be recorded within 30 days of the Special Court taking cognizance of the offence, as per Section 35(1), POCSO Act. Reasons for the delay should be recorded by the Special Court.

The Special Court Judges interviewed stated that they try to complete the cases within one year and do not give adjournments 'unless the request is from the complainant's side.' A court staff also seconded this view and stated that the victim is called only once for evidence unless the defence lawyer files a petition for recall of witness. In such cases the child may be called twice or thrice.

A prosecutor who was interviewed strongly believes that 'Practically it is not always possible there are procedural issues. Usually, it takes about 2 months to conduct the examination in chief itself.'

□ Avoiding Exposure to the Accused

Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused while testifying. For this purpose, curtains, single visibility mirrors, and videoconferencing facilities can be adopted.

Efforts are made to minimise exposure to the accused at different stages of the case. With respect to accused contacting the victim, a Special Court Judge shared that he does not grant bail easily, and when he does, he grants a conditional bail with the specific condition that the accused must not threaten the victim.

A few judgements have mentioned the measures taken to protect the child from exposure to the accused.

"Before examining and recording the evidence of the victim child (P.W.1) precautions were taken to ensure that she did not face the accused by using curtains, at the same time ensuring that the accused was able to hear the statement of the victim-child and communicate with his counsel as mandated under Section 36 of the Act."

□ In-Camera Trials

Section 37, POCSO Act, requires the Special Court to conduct the trial in-camera, and in the presence of the parents of the child, or any other person in whom the child has trust or confidence. The child can also be examined in a place other than the courtroom, if the Special Court deems fit.

Many respondents shared that the child victim's examination was conducted in-camera. The Judge, public prosecutor, defence lawyer, court staff, child and a family member are present during the examination. While all cases under POCSO Act are heard in-camera, it is unclear whether the examination of other witnesses is also done in-camera. A member of the judiciary in one district was of the view that only the child victim's evidence needs to be in-camera. In the other district, it appeared that except for official witnesses such as police and doctors, all witnesses are heard in-camera. In a serious offence, even doctors may be heard in-camera. This was confirmed by one of the doctors interviewed.

In JJBs, POCSO cases are heard in camera even if the child victim is not present. A contradictory view was shared by a doctor who had gone as a witness in many cases before the JJB. He stated that his examination was conducted in-camera only in one case.

□ Assistance of Interpreters, Experts and Special Educators

Under Section 38, POCSO Act, the Special Court may take the assistance of a qualified translator, interpreter, special educator, or a person familiar with the manner of communication of a child. Pursuant to the Criminal Law Amendment Act, 2013, Section 119 of the Indian Evidence Act was amended to provide that a witness who was unable to speak, could give evidence in any other intelligible manner, such as by writing or by signs. Such writing or signs should be made in open court and would be considered oral evidence. While the Special Court has discretion under the POSCO Act to seek the assistance of an expert, it is mandatory under the proviso to Section 119, Indian Evidence Act, 1872 for the court to take the assistance of an interpreter or special educator when recording the statement of a witness who cannot communicate verbally, and to video-graph the statement.

It emerged from the interviews that in most cases, Special Courts engage special educators or translators or any other expert if the child is disabled. Judgement analysis revealed that efforts were made to engage an expert through the police or other channels. The Courts do not maintain a list of experts. They are usually brought by the police, who may have used the same expert during investigation. This, however, is also dependent on whether the child has had basic formal education in the sign language or if the child's disability is of a degree that the child can communicate. A Special Court Judge shared that in a case of a child with intellectual disability, the police had arranged for a special interpreter and professional psychologist. In another case before the same court where the child was speech and hearing impaired, assistance from a teacher from a school for the deaf was taken. Another Special Court Judge had not had the occasion to record evidence using an interpreter or an expert. Though a case of a child with 90% disability had come before this court, assistance could not be taken from a special educator, as the child's disability prevented her from communicating effectively.

□ Assistance of Private Legal Practitioners

Section 40, POCSO Act, recognizes the right of the family or guardian of the child to take assistance of a legal counsel of their choice in proceedings under the POCSO Act. The District Legal Services Authority is required to provide them with a lawyer in case they are unable to afford one. However, there is no information regarding a legal aid lawyer or a private lawyer having provided assistance to victims in the two districts. The DLSAs have confirmed that no legal aid lawyer has been appointed to assist the child or the family of

the child. While there is reference to a legal aid lawyer being provided to the accused, judgements do not indicate courts having facilitated such services either. Hence, it can be assumed that no additional legal representation was provided for child victims.

□ Appointment of Support Persons

As per Rule 4(7), POCSO Rules, CWCs have been entrusted with the responsibility of appointing Support Persons with the consent of the child and the child's parents or the person whom the child trusts.

The CWCs sometimes don't even appoint support persons in certain districts. The severe lack of such services was also experienced by children when interacting with prosecutors, as there was nobody to support them when the prosecutor was allegedly rude or when the defence lawyer insisted on a compromise.

CHAPTER-V CONCLUSION AND SUGGESTIONS

CONCLUSION

The Child is the beautiful creation of God, the age in which the Child has to get nurtured and developed effectively and tenderly, they suffered the brutal agony of Sexual Abuses and other sorts of heinous offences including the Penetrative Sexual Assault, Sexual Harassment, Aggravated Penetrative Sexual Assault and so on. After the commencement of the POCSO Act, 2012 the dredging situation has been minimised up to an effective level as the Child Abuses Cases have been lowered down if we compare to the earliest. This Act has indeed minimised and curtailed the brutal rates of Child Sexual Abuses and thus, by preventing the chances of these abovementioned offences have beautifully and efficiently safeguarded and protected the Child Interests on the large and extensive scale. Moreover, by the effective commencement and the making of the POCSO Act, 2012, the Child Vicinities have been prevented from the cruel atrocities of the mankind and also for each hardcore perpetrator the Act prescribes the stringent and hard forms of punishment so that to create a deterrent effect upon these hardcore and habitual offenders or the perpetrators at large and along with it to punish them and on the other hand to safeguard the entire masses and vicinities of the Minor Child in order to protect them from the savage and barbaric atrocities of the Child Sexual Offences and other forms of cruel exploitations against them. One of the foundations of the POCSO Act, 2012 is its component to give expedient equity to youngsters who are casualties of rape. Be that as it may, numerous genuine institutional bottlenecks influence the legitimate security of youngsters beneath the age of 18 years. An undeniable model is the course of events for youngster declaration and finish of the trial as in form of Speedy Trial set down in Section 35 of the POCSO Act, 2012. This requires the youngster declaration to occur inside a month of the taking of cognizance by the Court, and the preliminary inside a time of the equivalent. Notwithstanding, these arrangements are more frequently ridiculed than agreed to because of the overburdened idea of courts in India.

5.1 DETERMINANTS OF CHILD SEXUAL ABUSE

According to the findings, child sexual abuse is a multidimensional phenomenon involving the interaction of individual, family, community, and society influences. Patriarchal cultural norms and power disparities based on class, gender, and sexual preferences emerged as prevalent descriptive themes that elevated the risk of child sexual abuse.

Early childhood child sexual abuse exposure has also been linked to a higher risk of revictimization and entry into commercial sex work.

5.2 PERPETRATION OF CHILD SEXUAL ABUSE

The perpetrators of child sexual abuse in India are known to the abused children, and many of them are family members, according to research conducted. Multiple elements at the individual, family, and social levels play a substantial influence in child sexual abuse perpetration. The perpetrators, who are frequently known to the victims, take advantage of their proximity to potential victims, and the lack of severe punishment by family members, as well as the protective mentality of family members toward the abuser, frequently leads to the occurrence going unreported.

Precocious exposure to sexual behaviors and acts, traumatic sexual experiences in childhood, sexual interests and exploration, deprivation and failure in romantic relationships, and young boys who have been coerced into homosexual acts are all factors that contribute to the development of young sexual offenders.

5.3 HEALTH OUTCOMES OF CHILD SEXUAL ABUSE IN INDIA

The health outcomes of child sexual abuse can be grouped into mental health, physical health, behavioral and interpersonal. The studies, both quantitative and qualitative, reported high risks for psychiatric disorders including obsessive compulsive disorders, suicidal behaviors, and depression. The victims of child sexual abuse were also found to have increased risks for temperamental problems, poor social adjustment, lack of trust, and insecure relations with parents. Lower academic performance was also associated with reporting child sexual abuse in one study. Only one quantitative study evaluated the associations between increased risk of Sexually Transmitted Infections (STI) and child sexual abuse. The studies suggest that sexually trafficked women or the one involved in commercial sex work and had experienced child sexual abuse report high prevalence and risk behaviors for HIV infection.

5.4 INTERVENTIONS FOR CHILD SEXUAL ABUSE IN INDIA

According to NCRB figures for 2019, India's legislative framework, the POCSO Act of 2012 has led in higher reporting of child abuse cases. However, concerns like mandatory reporting of child sexual abuse instances, a lack of clarity on legislation among professionals (medical officers and police), and a general lack of professional support for child sexual abuse victims in India²¹² pose possible implementation challenges.

Fear of indignity, guilt, community denial, associated socio-cultural stigma (especially if the abuse occurs within the family). Another important issue in India is the lack of effective supervision of numerous sectors.

5.5 SUGGESTIONS

5.5.1 IMPROVEMENTS TO BE MADE IN INVESTIGATION PROCESS

The true essence of a fair trial is fairness in the investigation and gathering of evidence. The investigation's quality, particularly the collection of scientific evidence, is poor and needs to be improved. The numerous penalties for procedural lapses haven't been used very often. In the vast majority of cases, the police file charge sheets, but the evidence frequently fails to meet the standard of proving guilt "beyond a reasonable doubt," resulting in acquittals in an apparent huge percentage of cases. The problem of witnesses, especially victims, being hostile as a result of threats and intimidation exacerbates the situation, defeating the objective of special legislation. The child sexual abuse can take several forms, as mentioned in Chapter 3, including penetrative and nonpenetrative sexual assaults, as well as child pornography abuse. Because each sort of sexual abuse requires a separate gathering of evidence and each case has its own set

of circumstances, there is no one set criteria that fit all list of behaviours that can be used in an investigation. In fact, scientific research necessitates an open mind and a thirst for information in order to connect the dots and prove beyond a reasonable doubt that a crime was committed. However, the following are some of the broad activities related with conducting a child sexual abuse investigation:

I. POLICE OFFICERS

- Each district must identify and train a specific team of police officers to undertake scientific investigations, as outlined in the initial chapters, and they must be placed in accordance with the number of cases to minimise case overcrowding.
- For collecting of forensic evidence and sampling of physical evidence relevant to sexual offences, investigating personnel must be given specialised inputs.
- Erring police personnel who intentionally engage in mischief during the investigation of child sexual abuse cases must face legal punishment under section 166 A (a) (b) of the IPC.
- Supervisory officers' roles must be well defined in order for them to contribute meaningfully to quality investigation. The superior officers of police have the same authority as the jurisdiction's station house officer under Section 36 of the CrPC. Superior officials, such as Deputy Superintendents of Police (Dy.SP) and Superintendents of Police (SP), must have received proper training to supervise child sexual abuse investigations and trials. They must be up to date on the most recent judgments on the issue.

II. FORENSIC AND MEDICAL EXPERTS

- The medico-legal examination must be video recorded and saved as live evidence in order for the court to help them throughout the trial.
- Incorporating forensic insights into the evidence collection process instills a scientific mindset and improves the validity of judicial decision-making. In each state, forensic facilities must be improved with regard to both trained professionals and machines so that expert opinions may be supplied within a reasonable amount of time.
- Taking a child to the doctor and having him or her undergo medical and legal testing. If necessary, the IO must offer written instructions to the medical expert regarding the age opinion. If necessary, age can also be determined through a medical test later.
- If the accused is known, genuine attempts must be made to apprehend him as quickly as possible after receiving child sexual abuse information. If the criminal is unknown, every attempt should be made to identify him as soon as possible. For this purpose, CCTV footage or human intelligence may be useful. The last seen approach is very important in linking crime to the perpetrator.
- If a dispute emerges during an investigation over the age of a victim child under the age of 18, the age in such a case can be decided by court meant to deal with such matters.

5.5.2 NEED FOR PROPER INFRASTRUCTURE AND DEDICATED JUDICIAL

OFFICERS

The trial process is extremely slow, resulting in a significant amount of pending cases in the courts, directly contradicting the POCSO Act's aim. It has been observed that judges had broad latitude in determining the severity of punishment and other areas of adjudication without providing adequate justifications. The constitutional courts have been sitting on appeals for a long time, causing the cases to drag on indefinitely.

Stringent measures are required to contain the rising trend of crime against children and deterrent effect must be achieved through the strict laws. Rules dealing with child pornographic material are needed to be framed and liability of each person responsible for the crime must be fixed. Death penalty has been added to the act and most of the perpetrators are the known family member of the victim, this may give reason to the family for not reporting the case. One of the priorities of the criminal justice system has to be speedy disposal of the case to ensure that victim does not go through the same ordeal of trial and event continuously, which will enhance the pain of the victim and trauma which she has suffered will continue. Speedy investigations can sometimes deteriorates the quality of investigations and thus accused is let off free. Conviction rate has been less and to address this issue Supreme Court has also directed the state for setting up of special court dealing with POSCO Act cases. This can only be achieved if proper infrastructure and dedicated manpower is built to tackle the issue at hand. Appointment of judicial officers and special public prosecutor should be made priority.

I. LAWYERS

- The number of Special Prosecutors must be determined by the amount of cases. Prosecutors who are overburdened jeopardise the quality and efficiency of trials.
- Hostile witness cases, especially prosecutrix hostility, must be handled with prudence and attention. The prosecution should conduct a more reasonable cross-examination of such witnesses.
- Prosecution is responsible for effective follow-up in the courts. Every court must assemble a team of officers for this reason.

II. COURTS

Several unique measures in trial processes are desired as a result of the POCSO Act. These are following recommendations:

- If the age of the child is in dispute, it must be decided in accordance with the law, particularly the principles set forth in **Jarnail Singh v. the State of Haryana**.⁸² Court in this case the procedure of age determination is codified in JJ Act,⁸³ which can be referred in cases of when there is a reasonable ground to doubt child's age.

⁸² (2013) 7 SCC 263.

⁸³ JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, section 94(2).

- The Special Court's infrastructure must be strengthened in accordance with the POCSO Act's requirements.
- For court officials handling child sexual abuse matters, a training and sensitization programme must be undertaken.
- During the trial, it is necessary to ensure uniformity in decisionmaking. Judges offer drastically different decisions under similar situations, demonstrating an overly judge-centric approach to legal interpretation. Reasoned and speaking judgments are required.
- During the proceedings, the court must maintain a child-friendly environment. The accused should never be allowed to interact with the victim. Direct interviewing of the child by the prosecution or defence should be prohibited.
- Every Special Court should keep a list of certified translators, interpreters, and experts on hand to assist in the recording of the child victim's testimony.
- Despite having obvious medical injuries to private areas, the constitutional courts have exonerated the rape accused without providing any logical rationale. To contradict the conclusion of the medico-legal expert or a convincing forensic judgement, logic must be expressed (speaking orders) in the interest of justice.
- At the level of each high court, a third-party assessment of the Special Courts' operation is required, and the assessment report may be kept confidential, although general remarks may be shared with these courts for improvement.
- To grant capital sentence, the Supreme Court must decipher the theory of "rarest of rare."
- Under the special enactment, the term of "child" under section 2(d) of the POCSO Act to be expanded to include mentally challenged victims of sexual abuse. This has been one grey area which requires more practical approach.

III. COURT'S INFRASTRUCTURE

Pendency and vacancy have traditionally been used to examine the relationship between access to justice and judicial infrastructure. As a result, infrastructure debates have mostly focused on numbers, such as the construction of more courtrooms. While new courtrooms and residential complexes are necessary, existing courtrooms and their facilities are rarely updated. Because current courtrooms have received significant funding, conversations should focus on developing plans to modernise them and equip them with improved technology and infrastructure.

- The Department of Justice should collaborate with state law departments to develop a plan for renovating and maintaining old courthouses.

- All High Courts should be required to submit annual infrastructure status reports, including information on budgetary expenditures and activities taken to maintain and renovate existing court complexes as well as buildings new ones, to the Supreme Court. Similarly High court should mandate District courts to do the same.
- Oversee the establishment of infrastructure grievance redressal cells in District Courts, as well as an online complaint site where the general public can file complaints.

5.5.3 REGISTRATION OF FIR

Once a crime has been reported, time is critical for gathering evidence. As a result, excessive delay in filing a FIR not only compromises the evidence, but also gives the defence a chance to rebut the claim.

- If the victim child arrives at the police station, she should be treated with care, ideally by a female officer. Her parents, family members, or a trusted person must be notified.
- The details of the crime must be shared with the 'One Stop Centre' and the relevant senior police personnel.
- If the police get information but no complainant comes forward, they can record a case as a complaint on their own initiative.

5.5.4 NON-FUNCTIONAL CHILD WELFARE COMMITTEES (CWC's)

Though every district in every state is obligated to create a Child Welfare Committee which will be solely responsible for any offences involving children. But merely providing it in the statute is not enough. In a few cases, the State Governments have been restricting surprise inspections by the CWCs. The State Government of Karnataka while appointing the CWC members in October 2010 put the conditions that “members cannot visit child care institutions, when they are not holding a sitting, without prior permission of the heads of these institutions”. This effectively prohibits random and surprise inspections which is essential for the CWC to certify whether the institutions are “fit” as per the JJ(C&PC) Act. On 16 April 2012, the Allahabad High Court while hearing the matter of sexual abuse at Rajikiya Shishu Grih, Allahabad observed as under⁸⁴:

“The Court must also express its disappointment that the Child Welfare Committees consisting mainly of Social Workers which have been constituted under the Juvenile Justice Act (2000) [JJ Act] for attending to the welfare of children, have shown little proactive sensitivity for addressing the myriad problems relating to children, but have simply been passing orders in a mechanical and bureaucratic manner, with no sense of mission and thus have given little relief to children in distress.”

5.5.5 NEED FOR TRACKING LICENCES GRANTED TO CHILD CARE HOMES

It will not be an understatement to state that juvenile justice homes, established to provide care and protection as well as re-integration, rehabilitation and restoration of the juveniles in conflict with law and children in need of care and protection, have become India's hell holes where inmates are subjected to sexual assault and exploitation, torture and ill treatment apart from being forced to live in inhuman conditions.

⁸⁴ Matter Of Government Children's Home At Shivkuti Allahabad v. Manju R. Chauhan, PIL No. 4207 Of 2012.

Majority of privately/NGO run homes are not registered under Section 34(3), which provides that “all institutions, whether State Government run or those run by voluntary organisations for children in need of care and protection shall, be registered under this Act in such manner as may be prescribed.”

Oblivious to the systematic sexual assaults in the juvenile justice homes, Section 19(5) of the POCSO provides that reasons needs to be recorded as soon as possible after the report. Section 19(6) of POCSO further provides that without unnecessary delay report the matter to CWC.

The sexual assault on children in the juvenile justice homes continues unabated as the Government of India i.e. the Ministry of Women and Child Development and the State Governments have failed to implement the JJ(C&PC) Act in letter and spirit. It failed to address four critical areas indispensable for addressing child sexual abuse in juvenile justice institutions i.e. functional Inspection Committees, registration of all juvenile justice homes, effective and functional Child Welfare Committees and separation of inmates on the basis of the nature of the offences, sex and age.

5.5.6 NON-ESTABLISHMENT OF INSPECTION COMMITTEES

Most State governments have not formed Inspection Committees which are mandated to inspect the juvenile justice homes under the JJ(C&P) Act as provided under Section 65 of the JJ(C&PC) Act. Rule 63 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 mandates the Inspection Committees to “visit and oversee the conditions in the institutions and appropriateness of the processes for safety, well being and permanence, review the standards of care and protection being followed by the institutions, look out for any incidence of violation of child rights, look into the functioning of the Management Committee and Children’s Committee”.

The Ministry of Women and Child Development itself has repeatedly failed to raise the need for establishment of the Inspection Committees while approving projects for all the States and Union Territories under the Integrated Child Protection Scheme (ICPS). The Project Approval Board (PAB) of the ICPS indeed never raised the issue of inspection Committees with a number of state governments despite holding discussions for approval of grants since 2010.

5.5.7 NEED FOR SEX EDUCATION

Sex education is not a subject taken up with seriousness with children in school or at home in the community. Most public and private schools in India do not provide any kind of sexuality education. There are very few schools that do focus on health and hygiene in those classes. A study shows that a majority of Indian parents also do not discuss sexuality with their children.

This is because the family’s conservative social fabric does not allow for an open space wherein conversations about issues related to sexuality can be initiated.

And since the adults did not receive sexuality education themselves, and do not have a culture of discussing their own sexuality issues with others, they fail to see the need for formal comprehensive sexuality education. There is also a common concern that these ‘unnecessary’ talks will disrupt the social order or affect family values and culture that has been held strongly for all these years. It

covers the physical, biological, psychological and social aspects of a person's being and sexuality. It covers issues like bodily changes and differences, and relationships with other youngsters, teachers, and society at large, to discussing important social issues like bullying, abuse, infections, and breakups. And yes, it also provides information about sex along with the importance of consent and safety, all in age and stage appropriate terms. In an environment where crimes against women and children are increasing, where there is also an apparent increase in cases of young people eloping, and where the patriarchal system remains intact, sex education will enable young people deal with their sexuality maturely, stay physically and mentally healthy, make responsible and informed decisions, and also develop mutual respect for themselves as well as other people across the gender spectrum.

5.6 RECOMMENDATIONS TO THE MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA:

- Issue direction to the effect that no funds are to be given to any juvenile justice homes whether run by the State Governments or NGOs unless the latest quarterly report of the Inspection Committees is submitted for consideration of further grants.
- Issue necessary guidelines to ensure that Inspection Committees or Child Welfare Committees or any other authorities during their inspection provide an atmosphere where the inmates could give their opinion about the status of the homes or their situations to the inspecting team without fear of retribution or punishment by the staff which therefore requires conducting interviews without the presence of any staff of the juvenile home and the Inspection Committees mandatorily inquire about sexual assault and the same is reflected in the Inspection Reports;
- Instruct all the state governments to transfer the staff posted in the Juvenile Justice Homes at regular period with a view to rule out vested interests and possible criminal nexus.
- Set up separate residential facilities for boys and girls up to 12 years, 13-15 years and 16 years and above;
- Direct the State government to conduct a survey of the unregistered homes to be completed within six months and register cases against the authorities of the unregistered juvenile justice homes for any violations of the Section 23. of the Juvenile Justice (Care and Protection of Children) Act.
- Create a Special Fund under the Integrated Child Protection Scheme to provide financial assistance for prosecution of the offenders under the POCSO.
- Provide adequate financial and human resources to NCPCR and SCPCR for Protection of Child Rights for implementation of the role.

BIBLIOGRAPHY

PRIMARY SOURCES

LEGISLATION

1. The Constitution of India, 1950
2. Protection of Children from Sexual Offences Act, 2012
3. Protection of Children from Sexual Offences (Amendment) Act, 2019
4. Protection of Children from Sexual Offences Rules, 2012
5. Juvenile Justice (Care and Protection of Children) Act, 2000
6. Juvenile Justice (Care and Protection of Children) Amendment Act, 2006
7. Juvenile Justice (Care and Protection of Children) Rules, 2007
8. Juvenile Justice (Care and Protection of Children) Act, 2015
9. Juvenile Justice (Care and Protection of Children) Model Rules, 2016
10. The Indian Penal Code, 1860
11. The Criminal Law Amendment Act, 2013
12. The Criminal Law Amendment Act, 2018
13. The Code of Criminal Procedure Act, 1973
14. The Indian Evidence Act, 1872
15. The Information Technology Act, 2000
16. The Commissions for Protection of Child Rights Act, 2005

SECONDARY SOURCES**BOOKS**

1. Durga Das Basu, Criminal Procedure Code, 1973, 4th edition, Lexis Nexis Butterworth, Nagpur, 2008
2. Dr. J.N. Pandey, The Constitution of India, Forty Fifth Edition, Central law Agency, Allahabad, 2008,
3. Ahmed Sidique's, Criminology and Penology, Sixth Edition, Eastern Book Company, India, ISBN: 93-5028-172-4
4. Gaur, K.D., Textbook on Indian Penal Code (Universal Law Publishing, 5th edition).
5. Ratanlal Dhirajlal, The Indian Penal Code, 33rd Edition, Lexis-Nexis India, ISBN :8180386333
6. R.V. Kelkar's, Criminal Procedure, Fifth Edition, Eastern Book Company, Lucknow, ISBN: 93-5028-053-1
7. Prof S.N. Mishra, Indian Penal Code, Sixteenth Edition, Central Law Publications, Allahabad ,2008
8. The Children And Laws In India With Reference To Pocso Act, 2012
9. Bureau of Police Research & Development. Crime in India (1979)
10. Ram Ahuja "Crime Against Women" Rawat Publications

ARTICLES

1. Hunny Matiyani, Sexual Abuse of Children: A Sociological Study in Delhi Metropolis
2. Ministry of Women and Child Development, Government of India, Study on Child Abuse: INDIA 2007, 2007, 68
3. The Global Girlhood Report 2020: How COVID-19 is putting progress in peril, Published by Save the Children.
4. Hannah Maslen & Colin Paine, When Should the Police Investigate Cases of Non-recent Child Sexual Abuse, 38
5. An Analysis of Missing Male Victims of Child Sex Trafficking (CST), NATIONAL CENTRE FOR MISSING AND EXPLOITED CHILDREN

REPORTS

1. WHO, Report of the consultation on child abuse prevention, Geneva, World Health Organization, 1999
2. IIPS & ICF, (2017). National Family Health Survey (NFHS-4), 2015-16, International Institute for Population Sciences, Mumbai, India
3. NCRB Annual Report, 2019
4. Report No.262 titled "The Death Penalty, Law Commission of India, August 2015.
5. India's Hell Holes: Child Sexual Assault in Juvenile Justice Homes
6. Report No. 172: Review of Rape Laws, Law Commission of India, March 2000.
7. Report of the Committee on Amendments to Criminal Law, 2013, January 23, 2013.

8. 84TH Law Commission Report
9. The Information Technology (Amendment) Bill 2007”, 50th Standing Committee report (2007–2008)
10. Department-Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Fortieth Report On The Protection Of Children From Sexual Offences Bill, 2011, (Standing Committee Report on POCSO Bill)

WEBSITES

1. <https://www.humanrightspulse.com/mastercontentblog/rise-in-online-child-sexual-abusecases-amidst-covid-19-pandemic>.
2. <https://www.lawyerscollective.org/wp-content/uploads/2017/07/Joint-Submission-toMoWCD.pdf>.
3. <https://www.indiaspend.com/death-penalty-in-pocso-act-may-imperil-child-victims-ofsexual-offences/>
4. <https://www.unicef.org/india/what-we-do/end-childmarriage>.
5. https://www.academia.edu/6825476/CHILD_WELFARE_COMMITTEES_IN_INDIA_A_comprehensive_Analysis_Aimed_at_Strengthening_the_Juvenile_Justice_System_for_Children_in_Need_of_Care_and_Protection.
6. <https://satyarthi.org.in/wp-content/uploads/2021/03/Police-Case-Disposal-Pattern.pdf>

