

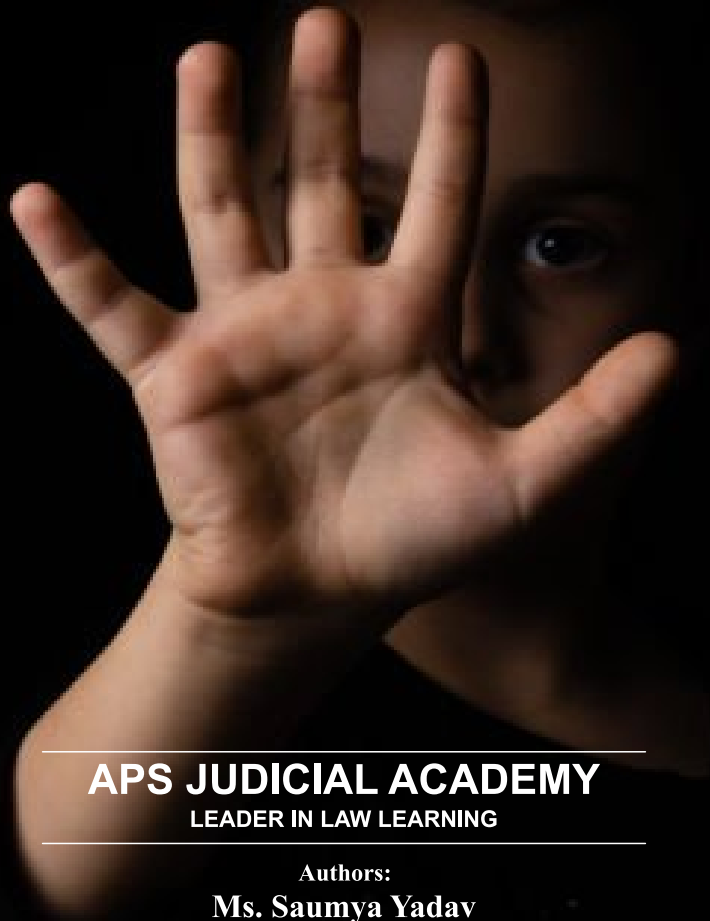
**A Comprehensive Guide**  
to The Protection of Children from Sexual Offences Act

# POCSO Act 2012



"Legal Insights, Case Analysis, & Practical Implications"

UNDER THE GUIDANCE OF  
**ABHAY PRATAP SINGH**  
(FORMER JUDGE)



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Authors:  
**Ms. Saumya Yadav**  
**Ms. Pratibha Sharma**

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**Understanding POCSO:  
A Comprehensive Guide  
To  
The Protection of Children from Sexual Offences  
(POCSO) Act, 2012  
"Legal Insights, Case Analysis, & Practical Implications"**

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## **DISCLAIMER**

The material provided is intended for educational and informational purposes only. The content herein reflects the authors' understanding and interpretation of the Protection of Children from Sexual Offences (POCSO) Act and related legal principles at the time of writing. It is not a substitute for professional legal advice.

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## **INTRODUCTION**

Sexual offences, in addition to being illegal, come with a lifelong shame and stigma for the victim which may ultimately lead to deterioration of emotional and psychological health. Due to the associated stigma, the sexual offences often go unreported, leading to offenders escaping punishment and getting motivation to repeat offences. Consequently, the law tends to keep sexual offences at a higher pedestal than all other offences.

The impact of sexual offences is multiplied when the victims belong to vulnerable groups such as women, children, elderly persons and disabled persons, etc.

What makes children more vulnerable to sexual offences is their limited understanding of sexual boundaries, tendency to trust easily and underdeveloped ability to communicate. Even if sexual offences against children are reported, the procedure of trial becomes a challenge given their limited ability to communicate and understand. In such a scenario, it becomes the responsibility of lawmakers to craft the trial procedure in a way which serves the justice to the victim and the society, without having any adversity, emotional or psychological effect on the victim and upholding the rights of the accused at the same time.

## HISTORICAL DEVELOPMENT

**Article 15(3) of the Indian Constitution** empowers the state to make any special provision for women and children. Deriving its power from this article, the Central Government enacted the **Protection of Children from Sexual Offences Act in the year 2012** (hereinafter referred to as the ‘Act’ in this book). The Act was **enacted on 19 June 2012** and **came into force on 14 November 2012**.

The Government of India acceded to the **Convention on the Rights of the Child**, adopted by the General Assembly of the United Nations, on the 11th December, 1992, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child. According to **Article 34** of the Convention on Child Rights:

*“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

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



## **SCOPE AND OBJECTIVE OF THE LEGISLATION**

The objective of the Act as deduced from its long title which is ‘to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences.’

To fulfil this objective, various kinds of sexual offences against children have been defined under the Act along with punishment for the same. A Special Court and Special Public Prosecutor are also provided to conduct trials of offences committed under the Act mainly for the purpose of a speedy trial. Although, the trial procedure as provided under the Code of Criminal Procedure (hereinafter referred to as ‘CrPC’) which is now replaced by the Bharatiya Nagarik Suraksha Sanhita (hereinafter referred to as ‘BNSS’) is applied during the trial of a person accused of any of the offences under the Act; certain special provisions to maintain the privacy and dignity of the child victim are spanning across the Act. The intention of the legislation in incorporating such provisions is to protect the child victim from the hassle and emotionally exhausting judicial process of trial while ensuring justice to the child victim.

The Act covers the following within its ambit-

- Definition of sexual offences against children
- Punishment for sexual offences against children
- Establishment of Special Court for trial of offences committed under the Act
- Special child-friendly procedure for recording statements of child victims and recording of evidence.

## WHO IS A 'CHILD' UNDER THE POCSO ACT?

### Defining a "Child"

The Act is applicable if any of the offences provided are committed against a child which is defined under **Section 2(d)** of the Act as “**child**” means **any person below the age of eighteen years**. Thus, applicability of the Act is confined to persons below the age of 18 years.

In the case of *Jarnail Singh v. The State of Haryana*<sup>1</sup>, the Supreme Court held that in case of doubt, the age of a person against whom an offence has been committed under the Act may be determined according to the procedure for determination of age provided under the erstwhile Juvenile Justice (Care and protection of Children) Rules, 2007. At present, the procedure has been provided under section 94 of the Juvenile Justice (Care and protection of Children) Act, 2015 and the rules framed by the respective state governments.

### “The Dichotomy of Mental and Biological Age”

In *Erra vs. State of NCT of Delhi*<sup>2</sup>, the Supreme Court held that an adult person with the mental age of a child cannot be treated as a victim under the Protection of Children from Sexual Offences Act.

In this case, the victim/ survivor aged 38 years had the mental age of a 6-8 year old child, and it was argued that the person accused of physically assaulting her must also be booked under POCSO Act, not only to recognize the severity of the offence committed by him, but also to ensure that the provisions of child-friendly procedural safeguards could be utilized by her, and to enable her to seek compensation under the POCSO Act.

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<sup>1</sup>(2013) 7 SCC 263

<sup>2</sup> (2017) 7 S.C.R. 924

This appeal was dismissed by the Supreme Court on the ground that the language of the Act was clear, and its scope could not be unduly widened by the Court. If the legislature had intended to refer to mental or physical disability, it would have done so expressly, therefore it was concluded that POCSO clearly refers to biological age.

***“Redefining Marital Exceptions in the Indian Penal Code (IPC) with Principles Under the Act”***

**Exception 2 to Section 375 of the IPC** traditionally exempted a husband from being charged with rape if the victim was his wife, provided she was not below 15 years of age. This exception implied that a husband could legally have sexual intercourse with his minor wife (aged 15 to 18).

On the other hand, The Act criminalizes all forms of sexual offences committed against children (defined as persons under 18 years of age), irrespective of the consent or the relationship between the victim and the offender, with no exception for marital relationships.

Dichotomy of Contradictory Protection Thresholds: While the IPC set the age of protection at 15 years in marital cases, the POCSO Act extended it to all persons under 18 years, including married minors.

This created legal ambiguity when dealing with cases involving married girls aged 15-18, as their situation fell under a legal grey area where the Act criminalized the act, but the IPC provided immunity to husbands.

### ***Impact of the Supreme Court Judgment in Independent Thought v. Union of India***

In the case of *Independent Thought v. Union of India*<sup>3</sup> the Supreme Court considered the question whether sexual intercourse between a man and his wife aged between 15 to 18 years is an offence or not? To resolve the aforementioned dichotomy, the Supreme Court read down Exception 2 to Section 375 IPC to state that sexual intercourse with a wife below 18 years of age constitutes rape.

This aligned the IPC with the Act, ensuring uniform protection for all minors irrespective of their marital status.

Under the Bharatiya Nyaya Sanhita (BNS), 2023, this judgment has been incorporated as **Explanation 2 to Section 63** which now provides that Sexual intercourse or sexual Acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

### **Determining the Age of a Child**

#### ***The Importance of Age in Legal Cases***

Age plays a crucial role in determining criminal liability, particularly in cases involving children in conflict with the law and minor victims. It influences both the trial procedure and the severity of the punishment. However, in the entire Act, there is no provision laying down procedures for adjudicating and evaluating the age of such a child.

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<sup>3</sup> (2017) SC 4904

### ***Procedure for Age Verification***

**Section 34 of the Act** merely prescribes procedure in case of commission of offence by child and determination of age by Special Court.

However, Section 34 of the Act clearly stipulates that if any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

Though the manner and procedure for adjudicating the age of a child has not been prescribed under the Act, JJ Act gives us some valuable insight. **Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the Juvenile Justice Act)** outlines the procedure for determining the age of a child in conflict with the law. In *Jarnail Singh v. State of Haryana*<sup>4</sup>, the Supreme Court addressed a doctrinal gap by extending the procedure for determining the age of a child in conflict with the law to also include minor victims of crimes.

### ***Strict Proof of Age Determination***

According to **Section 94 of the Juvenile Justice Act**, whenever a person is brought before the Child Welfare Committee (Committee) or Juvenile Justice Board and there are reasonable doubts about their age, the Committee or Board must determine the age by examining evidence. The first priority is given to a school-issued date of birth certificate, and if unavailable, a birth certificate issued by the Municipal Authority. If neither document is available, the age is determined through an ossification test or any other modern medical method, as directed by the Committee or Board. The Supreme Court explicitly held that this process applies equally to determining the age of minor victims.

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<sup>4</sup> (2013) 7 SCC 263

In *P Yuvaprakash vs State*<sup>5</sup> the court reiterated that in cases where there is a dispute regarding a person's age under the Act, **courts must follow the procedures outlined in Section 94 of the Juvenile Justice Act.**

- School transfer certificates and admission register extracts are not the primary requirements as per Section 94(2)(i).
- Section 94(2)(iii) of the JJ Act specifies that the mandatory documents for determining age are the school's date of birth certificate or a matriculation or equivalent certificate from the relevant examination board.
- If these documents are unavailable, then the birth certificate issued by the Corporation, Municipal Authority, or Panchayat should be used.
- Only if these documents are not available should the age be determined using an "ossification test" or any other current medical age determination test as ordered by the relevant authority, such as a Committee, Board, or Court.

### ***Redefining 'Proof of Age' Standards in Child Pornography Cases***

Shifting focus from rigid documentation to emphasizing the significance of apparent age in child pornography cases, recently the Kerala High Court in *Parkhasarathi M. vs. state of Kerala*<sup>6</sup> held that “strict proof of age is not required for models in child pornography cases, and the Court can proceed based on the apparent age of the model. Judicial notice can be taken when the model appears to be an infant or toddler, while expert opinions may be sought in marginal cases or when the model appears closer to 18 years.”

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<sup>5</sup> (2023) (SC) 538

<sup>6</sup> (2024) (Ker) 240

While taking a flexible stance, the court held that “the prosecution is not obligated to establish the identity of the model or provide strict proof of age in all cases, as doing so would defeat the purpose of the statute. The provisions of Section 15 of the Act and Section 67-B of the IT Act must be interpreted from the perspective of societal interest, ensuring effective enforcement of child protection laws.”

### ***Inherent Challenges in Medical Age Determination***

The absence of documents and inconsistencies in various records are quite common. In such cases, courts often rely on medical evidence. However, this approach is not without challenges, as medical tests, such as bone ossification tests, are inherently inconclusive. These tests account for a **margin of error of two years on either side**.

In simpler words, if the age of the victim has been determined by the ossification test and the age of the victim comes out to be almost on the brink of majority, then upper side of the age has to be taken.<sup>7</sup> This is in line with the adversarial principle of criminal justice followed in India where benefit of doubt goes in favour of the accused.

### ***Judicial Recognition of "Margin of Error" Principle***

Recently in *Court on Its Own Motion vs State Of NCT Of Delhi*<sup>8</sup>, the Delhi High Court held that the principle of “margin of error” is to be applicable in determining the age of the victim. In such cases of sexual assault, wherever, the court is called upon **to determine the age of victim** based on "bone age ossification report", **the upper age given in "reference range" be considered as age of the victim**.

In India's adversarial legal system, which operates on the presumption of the accused's innocence, the burden of proof lies with the prosecution, and the case

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<sup>7</sup> Bashir Ahmad v. The State (Delhi HC decided on 13 September 2023)

<sup>8</sup> 2024 (Del) 740

against the accused must be established beyond a reasonable doubt. If any doubt arises, the benefit of that doubt must go to the accused. Meaning thereby, if there is an element of doubt, such benefit has to go to the accused.


**While determining the age of the accused, in any case the endeavour of the defence would always be to seek the margin of error on the "lower side" in age estimation, as it could classify the accused as a juvenile in conflict with the law, thereby granting them certain protections, including leniency in sentencing.**


**However, when the issue pertains to the victim's age as determined by an ossification test, it is a settled principle of law that the benefit of doubt at all stages, other things being equal, goes in favour of the accused. Thus, the established legal principle is to assume the upper limit of the age range when granting the benefit of doubt to the accused.** This principle ensures that, all else being equal, the accused receives the benefit of any uncertainty regarding the victim's age.


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## CHAPTER II:

### SEXUAL OFFENCES AGAINST CHILDREN

#### Category of Offences

Sections 5 to 15 of the Act defines sexual offences against children and provides for their punishment. The offences which are covered under these provisions are as follows-

- Penetrative sexual assault
- Sexual Assault
- Sexual harassment
- Pornography

#### Punishment Framework

The Act provides a minimum as well as a maximum punishment for every offence. In the case of *State of UP v. Sonu Kushwaha*<sup>9</sup>, the Supreme Court held that it is mandatory to award a minimum sentence to the convict for the offence. The Act does not provide any discretion to the Magistrate with regard to awarding minimum punishment.

The aggravated form of these offences have also been defined under the Act with alleviated punishments.

Further, in all these offences, consent of the child is irrelevant in line with the settled principles of jurisprudence.

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<sup>9</sup> 2023 (SC) 502

### **Penetrative Sexual Assault- Section 3**

#### ***Definition-***

Section 3 of the Act defines the offence of penetrative sexual assault. The gist of the offence lies in the word ‘penetration’. The Act of penetration is an essential ingredient for this offence.

According to section 3 of the Act,

*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.*

The four clauses to section 3, i.e. clause (a), (b), (c) and (d) describe all the Acts which are included in the offence of penetrative sexual assault. It may be noted that the Acts in the clauses are not confined to the restricted and technical meaning of the term penetration which literally means “entering or making your way through something”. Clause (d) broadens the scope of penetration by including Acts other than penile-vagina penetration. It also includes application of mouth to the penis, vagina, and anus, urethra of the child or making the child to do the same with some other person.

***"Thigh Gap Controversy": Kerala High Court's Interpretation of Non-Traditional Penetrative Acts***

In *Santhosh vs. State of Kerala*<sup>10</sup> the question arose before the Kerala High Court that whether penetration to “any part of the body of such woman” as mentioned in section 375(c) of the Indian Penal Code, brings within its ambit a penile sexual Act committed between the thighs held together, which do not qualify to be called an orifice?

The court held that “the expression “cause penetration into the vagina, urethra, anus or any part of body of such woman” as used therein, requires wider interpretation so as to include any orifices naturally present or any part of the body manipulated to simulate a penetration and have the effect/sensation of an orifice. The word manipulation by itself includes an artificial creation. The effect of manipulating the thighs to be held tightly together is 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.

Therefore, when the body of the victim is manipulated to hold the legs together for the purpose of simulating a sensation akin to penetration of an orifice; the offence of rape is attracted. When penetration is thus made in between the thighs so held together, it would certainly amount to “rape” as defined under Section 375. But due to lack of evidence as to the age of the victim, which was a serious lapse on the part of the prosecution, made the charges under the provisions of the Act, unsustainable.”

***The Gender-Inclusive Intent of the Act***

In *Sundari Gautam vs. State of NCT of Delhi*<sup>11</sup>, the accused was a female. It was argued that the offence of “penetrative sexual assault” as defined in section 3 of the Act can never be made-out against a woman, since a plain reading of the definition

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<sup>10</sup> 2023 KHC 674

<sup>11</sup> 2024 (Del) 893

in section 3 shows that it only, and repeatedly, uses the pronoun “he”; meaning thereby that the intent of the Legislature was only to make a man liable for the offence under section 3 of the Act.

It was held that this Act is a gender-neutral Act and a woman can be put to trial for committing aggravated penetrative sexual assault. Further, the court drew a comparison between Section 375 IPC and Section 3/5 of the Act. Section 375 IPC specifically refers to a ‘man’; whereas the opening line of Section 3 of the Act refers to a ‘person’.

The court further held that Section 3(a), (b), (c), (d) includes the insertion of any object or body part or the manipulation of any body part of the child to cause penetration; or the application of the mouth within the ambit of penetrative sexual assault. Thus, the court said that it would therefore be completely illogical to say that the offence contemplated in those provisions refers only to penetration by a penis.

***Punishment: Section 4***

**Section 4** of the Act provides punishment for the offence of penetrative sexual assault.

- The offence is punishable with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine. ***[Section 4(1)]***
- If the offence is committed against a child below the age of six years, then punishment shall be imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine. ***[Section 4(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.

***[Section 4(3)]***

### **Aggravated Penetrative Sexual Assault- Section 5**

The offence of penetrative sexual assault becomes aggravated in nature depending upon certain factors. Section 5 of the Act lists down these factors from clauses (a) to (u). For the sake of convenience, these factors have been classified into certain categories and discussed as follows:

Offence of penetrative sexual assault become aggravated depending upon the following factors:

- If the accused is
  - Police officer, Member of the armed forces or security forces, and commits the offence of penetrative sexual assault, either within the limits of area where he is posted, in the premise of any station house in case of a police officer, or any area under the Command of Armed forces is case of member of armed forces, in the course of duties or otherwise, where the person is known or identified as a police officer or member of the armed force, as the case may be ***[Section 5(a) and Section 5(b)]***.
  - Public servant. ***[Section 5(c)]***
  - The person is 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, and 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.

***[Section 5(d)]***

- The person is on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital. ***[Section 5(e)]***
- The person is on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution. ***[Section 5(f)]***
- There are more than one person involved, i.e. gang penetrative sexual assault is committed.

**(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). ***[Section 5(g)]***

- 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. ***[Section 5(n)]***
- The person is on the ownership, or management, or staff, of any institution providing services to the child. ***[Section 5(o)]***
- The person is in a position of trust or authority of a child. ***[Section 5(p)]***

- The person 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. **[Section 5(t)]**
- Manner / Circumstances of Penetrative Sexual Assault
  - Commission of offence using deadly weapons, fire, heated substance or corrosive substance. **[Section 5(h)]**
  - Commission of offence more than once or repeatedly. **[Section 5(l)]**
  - Commission of offence and attempt to murder the child. **[Section 5(r)]**
  - Commission of offence in the course of communal or sectarian violence or during any natural calamity or in similar situations. **[Section 5(s)]**
  - Commission of offence and the child is made to stripe or parade naked in public. **[Section 5(u)]**
- If the child (victim) is
  - Mentally and physically disabled, and the offence has been committed taking advantage of such disability. **[Section 5(k)]**
  - Below twelve years of age. **[Section 5(m)]**
  - The child is pregnant and the offence is committed knowing the child is pregnant. **[Section 5(q)]**
- If as the consequence of offence
  - grievous hurt or bodily harm and injury or injury to the sexual organs of the child has been caused **[Section 5(i)]**
  - Child is physically incapacitated, or becomes mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 (14 of 1987) or impairment of any kind so as to render the child unable to

perform regular tasks, temporarily or permanently is caused.

***[Section 5(j)(i)]***

- The child, if female, becomes pregnant. ***[Section 5 (j)(ii)]***
- The child is inflicted 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.

***[Section 5(j)(iii)]***

- Death of the child is caused. ***[Section 5(j)(iii)]***

#### ***Punishment for Aggravated Penetrative Sexual Assault***

**Section 6** provides for the punishment of aggravated penetrative sexual assault as follows:

- Rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.
- Fine shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

#### **Sexual Assault- Section 7**

**Section 7** of the Act defines the offence of sexual assault. The gist of the offence is touch without penetration with sexual intent. Here, the provision expressly provides that the touch shall be with sexual intent for the act to constitute an offence under



this section. This implies that merely touching the specified body parts of the child will not be sufficient to constitute an offence under this section.

For example, an unintentional touch while travelling in a bus or train, touching a child by taking care of his daily routine, examination by a doctor or medical intervention as a part of physiotherapy or any other diagnosis involving contact with private parts of a child. The touch should be intentional and the intention should be to gratify the sexual desire of the accused.

According to section 7 of the Act,

*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.*

### ***The Supreme Court's Stand Against the 'Skin-to-Skin' Limitation***

While reversing a controversial judgement of the Bombay High Court which held that 'skin-to-skin' contact is necessary for the offence of sexual assault under the Act, the Supreme Court in the case of the ***Attorney General for India v. Satish***<sup>12</sup> held that the term 'physical contact' for the purpose of offence under the Act cannot be restricted to 'skin-to-skin'. Contact through clothes with sexual intent will amount to the offence of sexual assault under section 7 of the Act. The court observed that limiting the interpretation of the terms 'touch' and 'physical contact' under Section 7 of the Act to mean only "skin-to-skin contact" would result in an overly restrictive and impractical reading, leading to an absurd understanding of the provision.

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<sup>12</sup>2021 SC 1076

In the instant case, the accused was acquitted by the Bombay High Court because it was unclear whether the breast of the victim child was pressed after removing her top or with top on. The SC reversed this judgement and convicted the accused.

### ***Punishment for Sexual Assault: Section 8***

Section 8 of the Act provides the punishment for committing the offence of 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.*

### **Aggravated Sexual Assault- Section 9**

The factors due to which sexual assault becomes aggravated in nature have been enumerated under section 9 of the Act from clauses (a) to (v).

The factors are similar to those in case of aggravated penetrative sexual assault except the following two differences-

- There is an additional factor under clause (v) which says-  
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
- Factors regarding consequence of offence, i.e. pregnancy of female child or death of child as provided under section 5(j) (ii) and section 5(j) (iv) respectively have been omitted here in case of aggravated sexual assault because penetration is a prerequisite for pregnancy.

### ***Punishment for aggravated Sexual Assault: Section 10***

Section 10 of the Act provides for the punishment of aggravated sexual assault as follows:

*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.*

### **Sexual Harassment-Section 11**

Section 11 of the Act provides for the offence of sexual harassment. The offence does not involve any form of touching or physical contact between the person and the child. According to section 11 of the Act, the following Acts, if committed with sexual intent constitute the offence of sexual harassment.

- (i) uttering any word or makes any sound, or makes any gesture or exhibiting 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) Making 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) Showing any object to a child in any form or media for pornographic purposes; or
- (iv) repeatedly or constantly following or watching or contacting a child either directly or through electronic, digital or any other means; or
- (v) threatening 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) Enticing a child for pornographic purposes or giving gratification therefore.


Like the offence of sexual assault, in this case as well, unintentional commission of any of the Acts described above will not amount to any offence under the provision. The intention, too, shall be specifically sexual.

The explanation appended to section 11 provides that any question which involves “sexual intent” shall be a question of fact.


### ***Punishment for Sexual Harassment: Section 12***


Section 12 of the Act provides the punishment for sexual harassment which is as follows-


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.

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## **CHAPTER III:**

### **USING CHILD FOR PORNOGRAPHIC PURPOSES AND PUNISHMENT THEREFOR**

#### **Use of Child for Pornographic Purpose- Section 13**

##### ***Offence:***

The offence of using a child for pornographic purpose has been provided under section 13 of the Act. According to this section, the offence of using a child for pornographic purposes is committed if a person uses a child in any form of media, for the purposes of sexual gratification. It includes-

- (a) Representation of the sexual organs of a child;
- (b) Usage of a child engaged in real or simulated sexual Acts (with or without penetration);
- (c) The indecent or obscene representation of a child.

The form of media for this offence includes- Programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution.

#### ***Punishment for using child for pornographic purpose- Section 14***

Punishment for using a child for pornographic purposes has been provided under section 14.

**Section 14(1)** provides punishment for using a child for pornographic purpose and section 14(2) provides the punishment if in addition to using child for pornographic purpose, the person directly takes part in the Act by committing an offence under

section 3 or section 5 or section 7 or section 9 by directly participating in such pornographic Acts.

*Punishment under section 14(1):*

- In case of first conviction, imprisonment for a term which shall not be less than five years and shall also be liable to fine and
- In case of second or subsequent conviction with imprisonment for a term which shall not be less than seven years and also be liable to fine.

*Punishment under section 14(2):*

- Punishment as provided under section 14(1) of the Act, and
- Punishment for offence/s which the person has committed by directly participating in the Act, i.e. punishment under section 4, section 6, section 8 and section 10 for offence/s committed under section 3 or section 5 or section 7 or section 9, respectively.

**Punishment for storage of pornographic material involving child- Section 15**

In addition to using a child for pornography, storage of pornographic material involving a child is a punishable offence under section 15 of the Act.

The offence is punishable under the following three categories-

***Under section 15(1):***

Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall

be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

Three necessary ingredients for this offence are-

- Storing or possessing pornographic material involving child
- Failure to delete or destroy or report the same to designated authority
- Intention to share or transmit child pornography

Punishment:

- In the case of first conviction, fine not less than five thousand rupees
- In the case of second or subsequent conviction, fine not less than ten thousand rupees

***Viewing ‘Child Sexual Exploitative Content’: Rooted in Intent***

Although there is a distinction between the act of consuming child sexual exploitative material and the act of directly engaging in the sexual abuse of children, recently, in *Just Rights for Children Alliance vs. S. Harish*<sup>13</sup>, the Supreme Court held that **mere storage of child pornographic material, without deleting or without reporting the same, would indicate an intention to transmit.**

Further, the Court determined that the accused's failure to delete, destroy, or report the material provided prima facie evidence of the foundational facts required to invoke the statutory presumption of culpable mental state. Therefore, merely because the child pornographic material was deleted before FIR registration, it cannot be said that no offence is made out. The court held that Section 15(1), Section 15(2) and Section 15(3) of POCSO Act are independent of each other. If a

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<sup>13</sup> 2024 (SC) 728

case does not fall within one sub-section that does not mean that it does not fall within the entire Section 15.

In this case, the court also suggested the Parliament amend the term ‘child pornography’ with the term ‘child sexual exploitative and abusive material’.

***Under section 15(2):***

Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.

Following are the two necessary ingredients for this offence are-

- Storing or possessing pornography material involving a child
- Such storage or possession is for transmitting or propagating or displaying or distributing in any manner and at any time except for reporting or using it as evidence in Court

Punishment: Imprisonment of either description which may extend to three years, or with fine, or with both.

***Under section 15(3):***

Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine.



Following are the essential ingredient for this offence is-

- Storage or possession of pornographic material involving a child in any form, and
- Such storage or possession is for commercial purpose

Punishment: The punishment provided is-

- In case of first conviction, imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both
- In case of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine.

### **Difference between offences under section 15(1), section 15(2) and section 15(3)**

The primary difference between the offences under section 15 as discussed above is with respect to the intention for such storage or possession of pornographic material involving a child. The common ingredient across offences under the three subsections is that no Actual transmission is required but only an intent to do so. Thus, offence under section 15 is an 'inchoate crime'. The primary objective for making inchoate crimes punishable is the prevention of harm by intervening at an early stage, i.e. before the potential damage is caused.

In case of offence under section 15(1), the Actus Reus that is penalised is the 'mere possession', failure to delete, destroy or report any child pornography that was stored or in possession of any person with an intention to share or transmit the same. The phrase 'failure to delete' reflects that the original intent for the

presence of child pornography was not for the purpose of transmission, but the subsequent failure to delete was with an intent to transmit it.

In case of offence under section 15 (2), the use of the words “any manner” makes it clear that in addition to the storage or possession of such pornographic material, there must be something more to show either

- (I) the Actual transmission, propagation, display or distribution of such material OR
- (II) The facilitation of any transmission, propagation, display or distribution of such material, such as any form of preparation or setup done that would enable that person to transmit it or to display it. Thus, Section 15(2) would cover both Actual transmission, propagation, display and distribution of any child pornography as-well as the facilitation of any of the abovementioned Acts.<sup>14</sup>

Under section 15(3), the storage or possession is for the ‘commercial purpose’. The words “any commercial purpose” indicate that the storage or possession must be with an intention to generate or acquire any monetary gain or any other form of valuable consideration, irrespective and regardless of whether such monetary gain or valuable consideration is actually generated or acquired.<sup>15</sup>

### **Summary of Offences and Punishment**

Following is a tabular representation of all the offences and their respective punishment we have discussed so far-

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<sup>14</sup> JUST RIGHTS FOR CHILDREN ALLIANCE vs. S. HARISH, 2024 LiveLaw (SC) 728

<sup>15</sup> *ibid.*

(LI stands for Life Imprisonment in the table)

Offence	Definition Section	Punishment Section	Term of Imprisonment		Fine
			Minimum	Maximum	
Penetrative Sexual Assault	3	4	10	LI	and Fine (Just and Reasonable; paid to victim)
Age of child below 16 years			20	LI (Natural life)	and Fine (Just and Reasonable; paid to victim)
Aggravated Penetrative Sexual Assault	5	6	20 (Rigorous)	LI (Natural Life) or Death	and Fine (Just and Reasonable; paid to victim)
Sexual Assault (Only touch without any penetration)	7	8	3	5	and Fine
Aggravated Sexual Assault	9	10	5	7	and Fine
Sexual Harassment	11	12	-	3	and Fine

Using child for pornography	13	14	5	-	and Fine
Second or subsequent conviction			7	- (Maximum term of imprisonment to be according to section 14(2), i.e. for other offence committed while using child for porn)	and Fine
Punishment for storage of pornographic material		15			
<ul style="list-style-type: none"> <li>Storage or possession with failure to delete, destroy or report with an intent to share</li> <li>Storage or possession</li> </ul>		15(1)	-	-	Min fine: Rs 5000 Max fine: Rs 7000

on with intent to transmit share etc.		15(2)	-	3	<i>or Fine or both</i>
<ul style="list-style-type: none"> <li>Storage or possession for commercial purpose</li> </ul>		15(3)	3	5	<i>or Fine or both</i>
Second or subsequent conviction			5	7	<i>or Fine or both</i>

### Relevancy of Consent

The Protection of Children from Sexual Offences (POCSO) Act unequivocally disregards the consent of the victim in all cases. It implies that if a minor and an adult indulge in a sexual activity, then despite it being a consensual act, the adult would be liable for the offence of sexual assault as the consent of minor party is of no consideration for the purpose of liability under the Act.

But imagine a 17-year-old boy fell in love with a 16-year-old girl and both indulge in a consensual sexual intercourse. Since both are minors and legally

incapable of giving consent, it raises a complex question: Who would be held liable under the law?

### ***Addressing Romantic Relationships Among Minors***

The irrelevance of consent for the purpose of POCSO Act has become a nuanced issue in cases of romantic relationships involving two adolescents. Technically speaking, if there is a consensual sexual intercourse between two minors, it is generally observed that the minor boy is treated as an offender while the minor girl is treated as a victim despite the Act being completely gender-neutral.

Thus, the absolute irrelevance of consent in case of minor sexual relationships poses an institutional challenge to the justice delivery system. In fact, even if the minor gives a statement to the effect that the sexual relationship was consensual, it is of no use because of presumption provided under the POCSO Act against the accused and irrelevance of consent of minor victim under the penal law. Hence, this is a grey area of law which lacks any precedent in this regard.

### ***Challenging the Notion of Consent***

The **Madras High Court** faced a similar situation in the case of ***Sabari v. The Inspector of Police and Ors.***<sup>16</sup> and **suggested the following amendments** which can be made in the Act through legislation-

- The age of 'Child' under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18.
- Any consensual sex after the age of 16 or bodily contact or allied Acts can be excluded from the rigorous provisions of the POCSO Act and such

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<sup>16</sup> 2019 Mad 18850

sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself.

- The Act can be amended to the effect that the age of the offender ought not to be more than five years or so than the consensual victim girl of 16 years or more. This will ensure that the vulnerable age of the victim girl cannot be taken advantage of by a person who is much older and crossed the age of presumably infatuation or innocence.

Similarly, in *Vijayalakshmi & Anr. v. State & Anr.*<sup>17</sup> the Madras High Court, again facing a similar situation of consensual sexual intercourse between two minors observed that, “...*Punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender was never the objective of the POCSO Act.*”

The increasing exposure of adolescents through social media is impacting the way of their thinking by making them more curious towards their surroundings. This makes them susceptible to attempt new things without being fully aware of the repercussions. The increasing number of consensual sexual activities among minors is only a superficial aspect of this new challenge which needs the attention of the society. The lack of clarification in the legislation regarding such relationships needs immediate resolution through legislative Action.

### ***Supreme Court's Stance on Better Protection Mechanisms***

In a recent suo moto judgment *In Re: Right to Privacy of Adolescents*<sup>18</sup>, the Supreme Court while setting aside the judgment passed by Calcutta High Court and its controversial remarks such as adolescent girls should control their sexual

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<sup>17</sup> 2021 Mad 317

<sup>18</sup> 2024 (SC) 587

urges, wherein the High Court had acquitted a young man aged 25 years who engaged in sexual activity with a minor girl, observed that the State failed to take care of the victim. The apex Court further issued directions to all States/Union Territories to strictly implement the provisions of the POCSO Act and the Juvenile Justice (Care and Protection) Act, 2015 (JJ Act) to ensure the welfare of such victims.

Emphasising the responsibility of the stakeholders, the court observed that Section 29 of JJ Act, 2015 gives Child Welfare Committee (CWC) exclusive authority over cases involving children in need of care and protection. The CWC is required to take immediate action like taking cognizance of the case, conducting inquiries into the child's well-being and ensuring their rehabilitation and protection by virtue of Section 30(vi) of JJ Act, 2015. Section 30(xiii) of JJ Act, 2015 specifically mandates the CWC to take action for the rehabilitation of sexually abused children (who are automatically considered as children in need of care and protection).

Section 36 of JJ Act, 2015 requires the CWC to prepare a SIR (Social Investigation Report) or pass an order within 15 days. If it finds that the child has no family support, it must arrange for the child's placement in a suitable facility until they turn eighteen years of age. The court emphasised upon Section 39 of JJ Act, 2015 which sets the ultimate goal of the Act as the rehabilitation and social integration of children based on an individual care plan. Section 30(xii) of JJ Act, 2015 casts a duty upon CWC to take suo moto cognizance of such cases and reach out to children in need of care and protection instead of waiting for the child to be produced before it.

The Court specifically called for the implementation of Section 19 of the POCSO Act which provides for the reporting of the offences.



## **INTERPLAY BETWEEN JUVENILE JUSTICE ACT, 2015 AND POCSO ACT**

Another issue which arises from the aspect discussed above is that when both the victim and the accused are minors, there is a potential overlap between the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act). The application of the law depends on the specific circumstances of the case, but the JJ Act generally takes precedence for the trial of the accused, as it is a welfare-based legislation focused on rehabilitation rather than punishment. Even though the charges would have been framed under POCSO Act, the 'minor-accused' will be tried under its provisions as a "child in conflict with the law."

If there is any inconsistency between the two laws, the **JJ Act overrides the POCSO Act** as per Section 1(4) of the JJ Act, 2015, ensuring protection and rehabilitation for children in conflict with the law.

Similarly, in case an accused has committed an offence against a minor belonging to SC or ST community, charges are framed under both the POCSO act, 2012 and the SC and ST (Prevention of Atrocities) Act, 1989. The question then arises is in case of inconsistency, whether the provisions of POCSO Act or the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, will prevail as both legislations are special. The answer to this is that the provisions of the POCSO Act will prevail because of two reasons-

First, the POCSO act has been enacted later in time than the SC and ST (Prevention of Atrocities). Second, the POCSO act contains special provisions for the protection of minor victims from emotional and psychological effects of a judicial trial.

Similarly, in another situation, if the accused is a minor then his trial will be conducted as per the provisions of the Juvenile Justice (Care and Protection) of Children Act, 2015, no matter under which legislation the charges have been framed.

## **CHAPTER IV:**

### **ABETMENT OF AND ATTEMPT TO COMMIT AN OFFENCE**

**Sections 16 to section 18** of the Act incorporate provisions for abetment of an offence and its punishment; and attempt to commit any offence under the Act and its punishment.

#### **Abetment**

##### ***Definition- Section 16:***

Section 16 of the Act defines the term abatement which is similar to that of abetment under section 107 of the Indian Penal Code (Section 45 of the Bharatiya Nyaya Sanhita), with only an additional explanation applicable specifically to children.

Section 16 provides abatement in three forms, which are as follows-

- (i) Abetment by instigation
- (ii) Abetment by conspiracy
- (iii) Abetment by intentional aiding

Explanation 1 provides meaning of the term ‘instigation’ as follows-

A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation 2 provides the meaning of ‘abetment by intentional aiding’ as follows-

Whoever, either prior to or at the time of the commission of an Act, does anything in order to facilitate the commission of that Act, and thereby facilitates the commission thereof, is said to aid the doing of that Act.

Explanation 3 provides another form of abetment, i.e. to achieve the consent of a person having control over another person, for the purpose of committing an offence under the Act-

Whoever employ, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that Act.

***Punishment for Abetment- Section 17:***

Section 17 of the Act provides punishment for abetment as follows-

Whoever abets any offence under this Act, if the Act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.

**Attempt**

***Punishment for Attempt- Section 18***

Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any Act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

## **ADDITIONAL PROVISIONS REGARDING PUNISHMENT**

### **Alternate Punishment- Section 42:**

Section 42 of the Act provides the punishment to be awarded in cases where an act falls under two distinct offences, one under the provisions of the Act and another under specified provisions of the Indian Penal Code (now the Bharatiya Nyaya Sanhita) which is a general substantive law.

The offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code, whichever provides for punishment which is greater in degree.

Sometimes, an act or omission committed by an offender may violate provisions of both the POCSO Act, which deals with offenses against children, and other laws, such as:

- Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A-376E, 509 of the IPC, which cover various crimes like sexual harassment, voyeurism, human trafficking, rape, and related offenses.
- Section 67B of the IT Act, 2000, which prohibits the online transmission or publication of sexually explicit material involving children.

If the act is punishable under both the POCSO Act and the IPC (or the IT Act), the offender will be punished under the law that provides the greater degree of punishment.

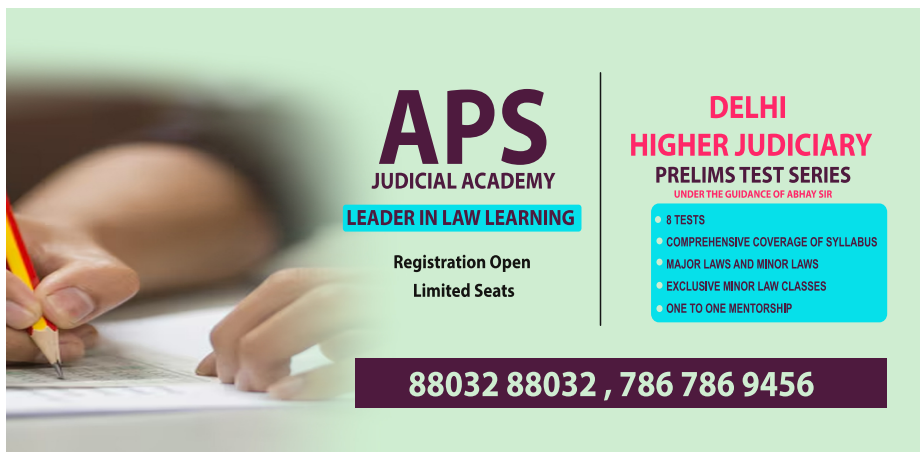
### Exceptions- Section 41:

Section 41 of the Act provides a situation under which any Act committed which would otherwise be an offence under section 3 to section 13 (describing sexual offences against children) of the Act will not be an offence.

According to section 41 of the Act, sections 3 to 13 of the Act do not apply when:

- A child undergoes a medical examination or treatment,
- And such examination or treatment is done with the consent of the child's parents or guardian.

The rationale behind providing this exception is that medical examinations and treatments may sometimes involve physical contact that, if taken out of context, could appear similar to acts criminalized under Sections 3 to 13. This provision acknowledges that such actions, when performed for the child's health and well-being and with parental or guardian consent, are legitimate and do not constitute sexual offenses. Hence this exception ensures that legitimate medical procedures are not mistakenly categorized as acts of sexual assault or abuse under the POCSO Act.



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## **APPLICABILITY OF THE CODE OF CRIMINAL PROCEDURE (now the Bharatiya Nagarik Suraksha Sanhita)**

The procedural framework for cases under the Protection of Children from Sexual Offences (POCSO) Act incorporates the provisions of the Code of Criminal Procedure (now the Bharatiya Nagarik Suraksha Sanhita).

*According to section 31 of the Act, “Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court.”*

And for the purposes of these provisions:

- A Special Court is deemed to be a **Court of Sessions**.
- The person conducting prosecution before a Special Court is deemed to be a **Public Prosecutor**.

### **Overriding Effect of the POCSO Act**

An essential aspect of the POCSO Act is its overriding effect, as provided by Section 42A, which was introduced through an amendment in 2013. This section clarifies that the provisions of the POCSO Act are supplementary to existing laws and, in cases of inconsistency, they take precedence over any other law to the extent of the inconsistency.

*According to this section, “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.”*

## **Investigation and Jurisdiction Under the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**

The BNSS, 2023, provides a broad procedural framework applicable to criminal cases, including those under the POCSO Act.

Section 4(2) of BNSS, 2023 clearly specifies that all offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Section 5 of BNSS, 2023 further clarifies that nothing contained in this Sanhita shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

A conjoint reading of the above discussed provisions implies that while provisions of CrPC (BNSS) apply to POCSO cases, the specific provisions of the POCSO Act—particularly those aimed at safeguarding the privacy and dignity of child victims during trial—prevail wherever there is a conflict.

### **Guidelines for Handling Bail Applications in POCSO Cases**

The procedural handling of bail applications in POCSO cases was recently examined in *Rohit vs. State Of U.P. Thru. Secy. Home Lko*<sup>19</sup>, by the Allahabad High Court, which addressed two critical questions:

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<sup>19</sup> 2021, Allahabad High Court.

- (i) **Whether the complainant or any person on behalf of the child victim is to be made a party to the proceedings; and**
- (ii) **If any such person is to be made the opposite party in the bail application, what should be the mode of service upon such a person,** as the Court is required to ensure that the identity of the child victim is not disclosed at any time during the course of investigation or trial.

### ***Involvement of Complainants and Guardians in Bail Applications***

With regard to the first question, the court referred to **Section 40 of POCSO Act** which provides that subject to the proviso to **Section 301 of the Code of Criminal Procedure, 1973**, the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act. Furthermore, **Rules 4(13) and 4(15) of the Protection of Children from Sexual Offences Rules, 2020** provide that it is the duty of the Special Juvenile Police Unit (SJPU) or local police to keep the child and his/her parent/guardian or other person in whom the child has trust and confidence, informed about the developments including the arrest of the accused, applications filed and other Court proceedings, including the bail applications filed by the accused.

Thus, the court held that it is necessary to implead the complainant, and in case the complainant is not a family member or guardian of the child, then the family member or guardian of the child as opposite party along with the complainant in the bail applications filed before Court. It is necessary to serve notice of the bail application in every POCSO offence case upon the parent/guardian of the child.

### ***Ensuring Confidentiality of the Child Victim's Identity***

So far, the second question, regarding the manner in which notices is to be served, ensuring that identity of the child is not disclosed, is concerned, a duty is cast upon the Special Court under **Section 33(7) of the POCSO Act** to protect the identity of the child in every possible manner by every person concerned. **Section 228A of the Indian Penal Code (IPC) (now, Section 72 of Bharatiya Nyaya Sanhita, 2023)**



makes a provision of punishment for up to two years for disclosing the identity of the victim.

Therefore, in case the guardian or family member or any other person of the child is made the opposite party by name and notices are served upon them in normal course, the court observed that routine methods of serving notices might inadvertently disclose the child's identity. To mitigate this risk, the court recommended the use of prescribed formats and directed Investigating Officers and Station House Officers to ensure that identity of the child does not get disclosed in any manner whatsoever during investigation, trial or during service of notice.

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## **CHAPTER V:**

### **PROCEDURE FOR REPORTING OF CASES**

The Protection of Children from Sexual Offences (POCSO) Act lays down detailed provisions for reporting offences against children. These provisions not only mandate the reporting of such crimes but also provide specific guidelines to ensure that the identity and dignity of the child victim are protected during the process. This chapter explores the legal framework for reporting offences under Sections 18 to 23 of the Act, which address the reporting procedure, obligations of certain individuals, penalties for non-reporting and false reporting, and the role of media in safeguarding child privacy.

#### **Reporting Procedure- Section 19:**

Section 19 of the Act provides the procedure for reporting offences under the Act. The procedure for reporting may be understood as follows-

- Any person (including the child), shall provide information regarding:
  - apprehension that an offence under this Act is likely to be committed
  - knowledge that such an offence has been committed

Such information shall be provided to the-

- Special Juvenile Police Unit, or
  - The local police
- 
- Every report given as mentioned above, shall be—
    - ascribed an entry number and recorded in writing;
    - be read over to the informant;
    - Shall be entered in a book to be kept by the Police Unit.

- Where the report is given by a child, the same shall be recorded in a simple language so that the child understands contents being recorded.

In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

- Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.
- The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.
- No person shall incur any liability, whether civil or criminal, for giving the information in good faith.

### ***Upholding the Mandate of Timely Reporting***

In a suo moto judgment ***In Re: Right to Privacy of Adolescents***<sup>20</sup>, the Court specifically called for the implementation of Section 19(6) of the POCSO Act. According to this provision, the Special Juvenile Police unit or the local police unit,

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<sup>20</sup> 2024 (SC) 587

on getting information about an offence against a child, should immediately report the matter to the Child Welfare Committee (CWC) as well as the Special Court within 24 hours.

### **Obligation of certain persons to report offences- Section 20:**

While section 19, through the use of word ‘shall’ makes it mandatory for any person to give information regarding apprehension- or knowledge of commission of any offence committed under the Act; section 20 puts further obligation to report any offence under the Act on certain persons by virtue of the industry they work in. The provision makes reporting of offences under the Act mandatory for personnel working in-

- Media
- Hotel
- Lodge
- Hospital
- Club
- Studio
- Photographic facilities

The personnel working here on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

### **Punishment for Non-Reporting, Non-Recording, and False Complaint:**

Reporting of offences under the Act is a mandatory obligation and non-reporting has been made punishable. Additionally, false reporting has also been made punishable.

***Punishment for non-reporting or non-recording- Section 21:***

- If a person fails to report commission of an offence under section 19(1) or section 20; or fails to record an offence under section 19(2) after information has been provided shall be punishable with imprisonment of either description which may extend to six months or with fine or with both.
- Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine. This provision incorporates the principle of vicarious liability of an in-charge of any company or institution for not reporting an offence committed by a subordinate.
- A child is exempted from any liability under this section

***Delhi High Court's Stance on Reporting Obligations Under POCSO***

Recently, while taking a nuanced approach towards reporting obligations in ***Rupi Babbar vs. State (NCT of Delhi)***<sup>21</sup>, the Delhi High Court quashed charges against a mother, who was accused of failing to report daughter's sexual assault by father. The court while noting the trauma undergone by the mother at the behest of the accused, who was her husband, observed that Section 21 of POCSO, ex facie is based upon "failure to report" and not a "delay of reporting". Every case has its own facts and circumstances, which may compel the Court concerned to adopt a procedure, not barred by law, as per the facts and circumstances. The court observed that in the present case, the mother herself was a victim.

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<sup>21</sup> 2024 Del 6485.

***Delay in Reporting vs. Ground Realities: Insights from Kerala High Court***

The **Kerala High Court** in *Hyder Ali vs. State of Kerala*<sup>22</sup> faced a situation where the police officer asked the mother of the minor victim to come the next day to give their statement regarding an offence under the Protection of Children from Sexual Offences Act (POCSO Act). The court said that while a police officer is criminally liable under Section 21 of the Act, if he does not record the offence when he receives information regarding it, in this case, there was no wilful or deliberate omission because Section 24 of the Act says that the statement of the child shall be recorded by a woman police officer, not below the rank of Sub-Inspector as far as possible and on that day no woman officer was available at the police station.

***Punishment for false complaint or false information- Section 22:***

- Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.
- Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment, which may extend to one year or with fine or with both.
- A child is exempted from any liability under this section

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<sup>22</sup> 2024 (Ker) 474

**Procedure for Media- Section 23:**

Section 23 of the Act provides the procedure to be followed by the media while reporting any offence committed under the Act in order **to maintain the privacy of the child against whom the offence has been committed.**

***Prohibitions on Disclosure:***

According to section 23 of the Act-

- 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.
- 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.

***Punishment for contravention of these provisions:***

- 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.
- 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.

### ***Supreme Court's Guidelines for Media on Safeguarding Victim's Identity Under POCSO***

In the landmark judgement of *Nipun Saxena v. Union of India*<sup>23</sup>, the Supreme Court of India determined that under Section 23 of the POCSO Act, the publisher or owner of media, studio, or photography facilities is jointly and severally liable for the actions or omissions of their employees.

The Apex Court issued the following guidelines related to this provision:

- The victim's name or any details that could reveal their identity should not be broadcasted or disclosed in any media format.
- In situations where the victim is deceased or mentally incapacitated, their identity should not be disclosed, even with the consent of their next of kin, unless specific circumstances warranting disclosure are determined by the competent authority, in this case, the Sessions Judge.
- FIRs related to offences under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB of the IPC, and POCSO violations, should not be made public.
- Victims appealing under Section 372 of the erstwhile CrPC are not obliged to reveal their identity, and their appeal will proceed as per the law.
- Documents containing the victim's identity should be kept sealed, and any public-accessible records should have the victim's name removed.
- All authorities receiving the victim's name from the investigating agency or the Court must keep it confidential, revealing it only in a sealed report to the investigating agency or Court.

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<sup>23</sup> (2019) 2 SCC 703



- An application to disclose the identity of a deceased victim or a victim with mental incapacity under Section 228A(2)(c) of the erstwhile Indian Penal Code should only be made to the concerned Sessions Judge, until the Government establishes criteria for identifying relevant social welfare institutions or organisations under Section 228A(1)(c).
- For juvenile victims under the POCSO Act, 2012, their identity can only be revealed by the Special Court if it is deemed to be in the child's best interests.
- All States and Union Territories are urged to establish at least one 'One-Stop Centre' in each district within one year from the date of the judgment in this case.

### **Supreme Court on Child Identity Disclosure Under POCSO**

In *Utpal Mandal @Utpal Mondal vs. State of West Bengal & Ans.*<sup>24</sup> the Supreme Court reiterated that the entire purpose of POCSO is to ensure that the identity of the child is not disclosed unless the Special Court for reasons to be recorded in writing permits such disclosure. This **disclosure can only be made if it is in the interest of the child and not otherwise**. One such case where disclosure of the identity of the child may be necessary can be where a child is found who has been subjected to a sexual offence and the identity of the child cannot be established even by the investigating team. In such a case, the investigating officer or the Special Court may allow the photograph of the child to be published to establish the identity. The disclosure of the name of the child to make the child a symbol of protest cannot normally be treated to be in the interest of the child.

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<sup>24</sup> 2024 (SC) 282

## **CHAPTER VI**

### **PROCEDURES FOR RECORDING STATEMENT OF THE CHILD**

The Protection of Children from Sexual Offences (POCSO) Act, 2012 ensures that the process of recording statements from child victims of sexual offences is conducted in a child-friendly and a sensitive manner. This chapter outlines the procedures laid down under Sections 24, 25, and 26 for recording such statements, ensuring the dignity and well-being of the child throughout the legal process.

#### **Recording of statement by police- Section 24:**

**Section 24** of the Act provides the procedure for police to record statement of the child as follows:

- The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.
- The police officer while recording the statement of the child shall not be in uniform.
- The police officer making the investigation shall, while examining the child, ensure that at no point of time the child comes in contact in any way with the accused.
- No child shall be detained in the police station at night for any reason.
- The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

### **Recording of statement by Magistrate:**

Procedure for recording of statement by Magistrate has been provided under section 25 of the Act which is as follows:

- If the statement of the child is being recorded under section 164 of the erstwhile Code of Criminal Procedure, 1973, the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the erstwhile Code of Criminal Procedure shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

- The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code of Criminal Procedure, upon the final report being filed by the police under section 173 of the Code of Criminal Procedure.

### **Additional Provisions Regarding Recording of Statement- Section 26:**

Section 26 of the Act provides certain additional provisions for recording the evidence of child as follows-

- The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.
- Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.
- The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special

educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

- Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

#### **Medical Examination of Child- Section 27:**

The provision for medical examination of a child has been provided under section 27 of the Act as follows-

- The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973.
- In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.
- The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.
- Where, in case the parent of the child or other person cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

## **CHAPTER VII**

### **SPECIAL COURTS**

#### **Special Courts- Section 28:**

Section 28 of the Act provides for the designation of a sessions court in each district as a ‘special court’ for the purpose of this Act. The objective of establishing special courts is to provide a speedy trial.

The Special Courts are designated by the State Government in consultation with the Chief Justice of the High Court by publishing a notification in the official gazette.

The Special Court while trying any offence under the Act shall also try any other offence with which the accused may be charged under the Code of Criminal Procedure (now the Bharatiya Nagarik Suraksha Sanhita, 2023) at the same trial.

Further, section 28(3) provides that the Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000) shall have jurisdiction to try offences under section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any Act, or conduct or manner or facilitates abuse of children online.

#### **Special Public Prosecutors- Section 32:**

- Section 32 of the Act provides for the appointment of a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.
- The Special Public Prosecutor is appointed by the State Government by publishing a notification in the official gazette.
- Any person who has been in practice as an advocate for not less than seven years is eligible to be appointed as a Special Public prosecutor.

## **PRESUMPTIONS REGARDING OFFENCES**

The basic presumption under the criminal jurisprudence is that the accused is presumed to be innocent until proven guilty and the burden to prove the guilt of the accused lies on the prosecution. The standard of this burden is generally very high i.e. to prove the guilt beyond reasonable doubt. However, under the POCSO Act, a reverse burden of proof is placed on the accused, meaning the accused is responsible for proving their own innocence.

These presumptions have been put in place to take care of a child, who has limited capacities and capabilities of appreciation and understanding mental states of others and even of himself and to lighten the burden and vulnerabilities of an already vulnerable child.

Section 29 and 30 of the Act provides two presumptions regarding commission of offences which are discussed as follows-

### **Presumption as to Certain Offences- Section 29:**

Section 29 of the Act provides for a rebuttable presumption regarding commission of the offences under sections 3, 5, 7 and section 9 of the Act. The Special Court shall presume that such person has committed or abetted or attempted to commit these offences, as the case may be unless the contrary is proved.

Thus, this provision incorporates **a radical shift from “Presumption of Innocence” to “Presumption of Guilt”**.

### **Presumption of Culpable Mental State- Section 30:**

Section 30 of the Act further provides presumption regarding the culpable mental state of the accused in offences which require a culpable mental state. The term

‘culpable mental state’ for the purpose of this section includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

The Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. The standard of proof upon the accused to negate the presumption of culpable mental state is ‘beyond reasonable doubt’ and not merely ‘preponderance of probability.’

Therefore, it is an exception to the fundamental rule that the standard of proof required from the accused is lower, based on the preponderance of probabilities rather than beyond a reasonable doubt.

#### **Obligation of the Prosecution:**

The question that arises, however, is **whether these two provisions imply that the prosecution is not required to present any evidence, given that there is already a presumption of the accused's involvement in the alleged offence?** Does this mean that it is solely the responsibility of the accused to prove their innocence beyond a reasonable doubt?

**Answer is No!** Presumptions are rules of evidence and do not negate the principle of the accused's presumption of innocence. The prosecution's obligation to prove its case beyond a reasonable doubt remains unchanged, even with the presumption in place. In *Mr. J.S. Choudhary Vs. Mr. Mahesh Bora*<sup>25</sup>, the court had clarified that “if the prosecution succeeds to prove the guilt of the accused even in that case, the accused is asked if he can rebut the prosecution's case through his defence evidence. It is a conjoint happening of two events, first the prosecution succeeds to

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<sup>25</sup> Criminal Revision Pet. No.192/2014

prove the guilt of the accused and secondly, the accused fails to rebut the veracity of the prosecution's case that he is called to face the punishment.”

Therefore, the presumption can only be applied once the prosecution has proven the foundational facts against the accused beyond a reasonable doubt. If the prosecution fails to establish these facts in relation to the allegations under the Act, the presumption in Section 29 will not be invoked against the accused. Even if the prosecution successfully proves these facts and the presumption is applied, the accused can challenge it by discrediting the prosecution’s witnesses through cross-examination, showing that the case is implausible, or by presenting evidence to rebut the presumption.

#### **Pre-Trial Consideration of Culpable Mental State in POCSO Cases is Not Permitted: Kerala High Court**

In *P.C. Varghese Muthalali vs. State of Kerala*<sup>26</sup>, *Kerala High Court* while hearing a Revision Petition impugning order where the Petition filed by the petitioner/accused to discharge him under Section 227 of the Code of Criminal Procedure was dismissed, observed that ‘culpable mental state’ of the accused in POCSO cases cannot be considered at pre-trial stage. The Court also said that after trial, when the prosecution discharges its initial burden to prove the commission of the offence/s, with essentials to constitute the same, then a reverse burden is cast upon the accused to prove that he has no ‘culpable mental state’ to commit the offence with sexual intent.”

To invoke the presumption under section 29 of the Act against the accused, the prosecution is required to establish some foundational facts of the offence based on preponderance of probabilities. These foundational facts include:

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<sup>26</sup> (2024) KER: 62763



1. The victim was a child under the age of 18 years.
2. The victim was subjected to an offence under the POCSO Act.
3. The accused committed the penetrative sexual assault or the relevant offence.<sup>27</sup>

The principle of establishing foundational facts by the prosecution was also resorted to by the Supreme Court in the case of *Just Rights for Children Alliance v. Harish*<sup>28</sup>, while upholding the conviction of the accused under section 15 of the Act.

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<sup>28</sup> 2024 (SC) 728

## **CHAPTER VIII**

### **PROCEDURE AND POWERS OF SPECIAL COURTS AND RECORDING OF EVIDENCE**

One of the primary purposes of the Act is to protect its privacy and uphold its dignity during all stages of the judicial process. The purpose has been sought to achieve by providing various provisions for child friendly procedure of trial as well as recording of statements. These provisions have been discussed as follows-

#### **Cognizance of Offence by the Special Court:**

Under the Criminal Procedure Code (now the BNSS), the jurisdictional Magistrate on receiving information of any offence as contemplated under Section 190 of the Cr.P.C. (Section 210 BNSS) may take cognizance but if such offence is exclusively triable by the Sessions Court, the Magistrate has to commit the case to the Sessions division, as given in Section 209 of the Cr.P.C (Section 232 BNSS). At the same time the Sessions Court is barred to directly take cognizance under Section 193 of Cr.P.C. (Section 213 BNSS).

However, for offences under other laws such as POCSO Act, the procedure prescribed in Cr.P.C can only be followed if such law does not provide any other procedure. We have to see whether the POCSO Act provides any other procedure for cognizance, committal or trial.

According to section 33(1) of the POCSO Act, a Special Court, which is a Court of Sessions, may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

Therefore, the Special Court has the exclusive power to take cognizance of offenses directly, without the need for a committal of the accused by a Magistrate. This

provision overrides the general procedure laid down in Section 193 of Cr.P.C. (Section 213 BNSS) which ordinarily restricts a Sessions Court from taking cognizance of an offense unless the case is committed to it by a Magistrate. Therefore, this restriction does not apply to a Sessions Court functioning as a Special Court, granting it direct cognizance powers.

***Can a Special Court treat an application under Section 175(3) BNSS (Section 156(3) Cr.P.C.) as a complaint and can take cognizance?***

Yes! The **Allahabad High Court** in *Mohd. Aarif vs. State of UP*<sup>29</sup> held that a Special POCSO Court can treat an application filed under Section 175(3) BNSS (Section 156 (3) CrPC) as a complaint case under Section 210 BNSS (Section 190 (1) (a) CrPC). It was argued in the said case that the POCSO Court had no jurisdiction to entertain the application under Section 156 (3) CrPC as a complaint case under Section 190 (1) (a) CrPC as the only option available to the POCSO Court is to direct the concerning police station to register and investigate the matter.

While referring to Section 33 of the POCSO Act, the Court noted that a Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts. Thus, on the perusal of the entire provisions of the POCSO Act, it appears that there is no bar for prosecution and cognizance in the matter related to the complaint under Section 210(1) (a) BNSS (Section 190 (1) (a) CrPC).

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<sup>29</sup> 2023 (AB) 192

## **Recording of Evidence and Trial:**

### ***No direct questions- Section 33(2):***

The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

In *Anujith vs. State of Kerala*<sup>30</sup>, **Kerala High Court** considered whether the defence counsel could put questions directly to the victim during the cross-examination if the victim has attained the age of majority during the date of examination. The High Court held that the benefit of Section 33(2) of POCSO Act to a victim cannot be denied depending upon the date of examination of the victim who faced the trauma of sexual abuse as a child. The Court observed that if the method of examination were based on the victim's age at the time of examination, the accused might use clever tactics to delay the trial. Thus, the mode of examination contemplated under Section 33(2) of POCSO Act is to be applied notwithstanding the victim crossing the age of 18 years.

### ***Frequent breaks during trial- Section 33(3):***

The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

### ***Child-friendly atmosphere- Section 33(4):***

The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

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<sup>30</sup> 2024 (Ker) 491

***No repeated testification- Section 33(5):***

The Special Court shall ensure that the child is not called repeatedly to testify in the court.

***No aggressive questioning- Section 33(6):***

The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

***Non-disclosure of identity- Section 33(7):***

The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

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

***Compensation- Section 33(8):***

In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

In *Nipun Saxena v. Union of India*<sup>31</sup>, the Supreme also clarified that NALSA's Compensation Scheme should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 until the Rules are finalized by the Central Government.

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<sup>31</sup> (2019) 2 SCC 703

Recently in *Saibaj Noormohammad v. State of Maharashtra & Anr*<sup>32</sup>, the Hon'ble Supreme Court directed Sessions Courts to grant victim compensation under Section 357-A of the CrPC (Section 396 of the Bharatiya Nagarik Suraksha Sanhita, 2023) in cases of bodily harm, particularly those involving sexual assault against minors or women.

***Time limit- Section 35:***

Section 35 of the Act provide time limit for recording the evidence and disposal of case-

According to section 35(1) of the Act, the evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

Further, according to section 35(2), the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

In the case of *Alakh Alok Srivastava vs Union of India*,<sup>33</sup> the Supreme Court held that the paramount consideration of the Act is to ensure welfare and well-being of the child victim. The Court also laid certain guidelines for the Special Courts to try the offences. Two guidelines relating to time limit of disposal of cases are as follows-

- The Special Courts should fast track the cases by not granting unnecessary adjournments and thus complete the trial in a time-bound manner.

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<sup>32</sup> 2024 (SC) 860

<sup>33</sup> AIR 2018 SUPREME COURT 2440

- The Chief Justices of the High Courts were requested to constitute a Committee of three Judges to regulate and monitor the progress of the trials under the POCSO Act. The High Courts where three Judges were not available the Chief Justices of the said courts shall constitute one Judge Committee.

***Child not to see accused at the time of testifying- Section 36:***

- The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.
- For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

***In Camera Trial- Section 37:***


To protect the dignity and psychological well-being of the child victim, section 37 of the Act provides provision of in camera trial.

**According to section 37 of the Act-**The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of Cr.P.C. (now BNSS).

***Assistance of an interpreter or expert while recording evidence of child- Section 38:***


- Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child.
- If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child.


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## **CHAPTER IX**

### **MISCELLANEOUS**

The Protection of Children from Sexual Offences (POCSO) Act, 2012, is a specialized law designed to address cases of child sexual abuse. The Act ensures that the interests of the child are protected at every stage of the judicial process by introducing child-friendly mechanisms for reporting incidents, recording evidence, conducting investigations, and expediting trials through designated Special Courts.

Professionals working in this field play a vital role in facilitating the healing process for affected children. Section 39 of the Act specifically outlines guidelines for children to receive assistance from experts, as stated:

#### **Role of Professionals in Child Victim Support**

##### ***Guidelines for child to take assistance of experts, etc.- Section 39:***

Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for the use of non-governmental organizations, professionals, and experts or persons with knowledge of psychology, social work, physical health, mental health, and child development to be associated with the pre-trial and trial stage to assist the child.”

##### ***Objectives of Support Persons Under the Act***

The primary goal of support persons under the Act is to provide emotional and psychological assistance to child victims during legal proceedings while ensuring their well-being and protection. These individuals play a critical role in helping children navigate the legal system and provide the necessary support to help them testify effectively. Rehabilitation of the victim is equally crucial to ensure their safety and recovery.

As per sub-rule (8) of Rule 4, a support person is assigned by a Child Welfare Committee to assist the child throughout the investigation and trial. Additionally, any individual assisting the child during the pre-trial or trial stages under the Act can fulfil this role.

### ***Supreme Court's Directions on Support Persons***

In fact, recently in ***Bachpan Bachao Andolan v. Union of India***<sup>34</sup>, the Supreme Court issued detailed directions for framing guidelines on the appointment of ‘support persons’ under the Act. The Supreme Court directed states to assess the ‘support persons’ ecosystem, involving authorities like SCPCR and DCPU, to ensure proper selection, training, and remuneration aligned with qualifications. Emphasis was placed on victim support, periodic training, robust reporting mechanisms, SOP creation, and institutional roles to uphold dignity and justice for victims.

### **Right of child to take assistance of legal practitioner- Section 40:**

This section provides guidelines for the involvement of legal experts and professionals, to assist children during the pre-trial and trial stages of a case. The family or guardian of the child has the right to engage a legal practitioner of their choice to represent the child in any matter under the Act.

The proviso appended to the section further provides that if the family or the guardian of the child are unable to afford legal counsel, the Legal Services Authority shall provide a lawyer to them.

This ensures that the child's interests are adequately safeguarded and represented during the legal proceedings.

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<sup>34</sup> 2023 (SC) 667

## **PUBLIC AWARENESS AND MONITORING THE IMPLEMENTATION OF THE ACT:**

### **Public Awareness about the Act - Section 43:**

The Central Government and every State Government, shall take all measures to ensure that—

- (a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;
- (b) The officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act.

### **Monitoring of implementation of the Act**

Section 44 of the Act puts an obligation upon The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 in way as may be prescribed.

### **Rule-Making Power**

Under section 45 of the Act the Central Government has power to make rules for carrying out the purpose of this Act. Consequently, Protection of Children from Sexual Offences Rules, 2020 are currently in operation.

## **Court Upholds Non-Compounding of POCSO Offences and Emphasizes Children's Welfare in POCSO Cases**

In *Rajeev Dagar v. State*<sup>35</sup> the petitioner, estranged from his wife, alleged that their two children, a 9-year-old daughter (X) and a 6-year-old son (Y), were sexually assaulted by his brother-in-law during 2013-14. Despite filing complaints with the police in 2013 and 2014, no action was taken. The children gave statements and testified before the Special Court supporting the allegations. Subsequently, the petitioner and his wife entered into a settlement agreement, where the petitioner agreed to withdraw the POCSO complaint in exchange for custody of the children. However, the petitioner later alleged that his wife and his brother-in-law deceived him into withdrawing the complaint.

The petitioner approached the High Court, claiming procedural lapses under the POCSO Act and arguing that the Special Court lacked the authority to allow the withdrawal of the complaint after taking cognizance, particularly as it disregarded the children's testimonies.

Dismissing the plea, the court ruled that offenses under the POCSO Act, being non-compoundable, cannot be resolved through mediation or settled via mediated agreements. The court further noted with equal concern that a mediated settlement agreement had been executed between the parties, in which the husband and wife had agreed to resolve their matrimonial disputes, despite there being allegations of sexual abuse of minors. The Court laid **emphasis on prioritizing the welfare and best interests of the children** involved in the dispute.

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<sup>35</sup> 2024 (Del) 275

## **SPECIAL MCQ FOR PRACTICE**

- 1. Under the Protection of Children from Sexual Offences Act, 2012, which came into force in November, 2012, 'child' means a boy or girl below the age of:**

  - A. 15 Years
  - B. 16 years
  - C. 17 Years
  - D. 18 years
- 2. The purpose of POCSO Act 2012 is to protect the children from-**

  - A. Sexual Assault.
  - B. Sexual harassment.
  - C. Pornography.
  - D. All of the above.
- 3. Who of the following police officers is generally empowered to record statements of a child under Section 24 of the Protection of Children from Sexual Offences Act, 2012?**

  - A. Constable
  - B. Any woman police officer
  - C. Woman police officer not below the rank of Sub-Inspector
  - D. Woman police officer not below the rank of Deputy Superintendent of Police
- 4. What is maximum punishment for aggravated penetrative sexual assault?**

  - A. Death sentence
  - B. Life imprisonment
  - C. A or B
  - D. A and B

**5. In which of the following cases the Supreme Court held that “An adult person with the mental age of a child cannot be treated as a victim under POCSO Act”?**

- A. Eera Vs State NCT of Delhi.
- B. Santhosh v. State of Kerala.
- C. Ved Prakash Sangwan vs Union Of India
- D. Sabu Joseph A J vs State of Kerala.

**6. Sexual harassment is provided under which section of POCSO Act, 2012?**

- A. Section 7.
- B. Section 9.
- C. Section 11.
- D. Section 13.

**7. What is the punishment provided in the event of a second or subsequent conviction for using a child for pornographic purposes?**

- A. Shall not be less than imprisonment for 5 years.
- B. Shall not be less than imprisonment for 7 years and fine.
- C. Shall not be less than imprisonment for a term of 10 years and fine.
- D. None of the above.

**8. The POCSO Act derives its validity from which Article of Constitution of India?**

- A. Article 15 (1)
- B. Article 15 (2)
- C. Article 15 (3)
- D. Article 15 (4)

**9. Section 2 (da) of POCSO Act was added in which year?**

- A. 2015
- B. 2019
- C. 2012
- D. 2020

**10. Special court is provided under which section of the POCSO Act?**

- A. Section 28
- B. Section 22
- C. Section 24
- D. Section 26

**11. A child is taken to a doctor with a complaint of an earache. The doctor asks to undress and then touches private parts of the child. It is an offence of-**

- A. Sexual assault.
- B. Aggravated sexual assault.
- C. Sexual harassment.
- D. None of the above.

**12. What is the punishment provided for sexual harassment under POCSO Act?**

- A. Imprisonment which may extend to 3 years and fine.
- B. Imprisonment which may extend to 5 years and fine.
- C. Imprisonment which may extend to 7 years and fine.
- D. Imprisonment which may extend to 10 years and fine.

**13. Which of the following pairs is incorrect?**

- A. Section 9: Aggravated sexual assault.
- B. Section 10: Punishment for aggravated Sexual assault.
- C. Section 13: Use of a child for

- pornographic purposes.
- D. Section 15: Punishment for using a child for pornographic purposes.
- A. Lakhvir Singh v. State of Punjab.
- B. Sanjeev Kumar Gupta Vs State of UP.
- C. Shivani Kaushik v. Union of India.
- D. Devarshi khanna v. Authorised Officer

**14. According to POCSO Act, a sexual offence must be reported to-**

- A. Special juvenile police unit.
- B. Local police.
- C. Either (A) or (B).
- D. None of the above.

**15. In which of the following judgments the Apex Court held that the date of birth as suggested in the matriculation certificate could not be accepted as an authentic and credible source of documentary evidence?**

**16. Which of the following statements is incorrect in relation to section 26 of POCSO Act?**

- A. The statement must be recorded as spoken by the child
- B. Statements must be recorded in presence of the child's parents, or the person whom the child has trust
- C. (A) and (B) both
- D. None of the above



17. **According to the POCSO Act, who may permit disclosure of the identity of the child in interest of the child?**
- A. District court.
  - B. Special court.
  - C. High court.
  - D. Such permission cannot be granted.
18. **Punishment for false complaint and false information is provided under which section of POCSO Act?**
- A. Section 21.
  - B. Section 22.
  - C. Section 23.
  - D. Section 24.
19. **Which section punishes failure to report or record an offence under POCSO Act?**
- A. Section 21
  - B. Section 20
  - C. Section 22
  - D. Section 23
20. **According to Section 25 of the Protection of Children from Sexual Offences Act, 2012, statement of a child under Section 164 of the Code of Criminal Procedure to be recorded by the Magistrate—**
- A. Shall be recorded in presence of the advocate of the accused
  - B. Shall not be recorded in presence of the advocate of the accused
  - C. Shall be recorded in presence of the investigating officer
  - D. Shall be recorded in presence of woman Police Officer

**21. Which of following conditions, as per provisions of the Protection of Children from Sexual Offences Act, 2012, has to be adhered to while examining or recording statement of the child-**

- A. The statement of child shall be recorded at the residence of child or the place where the usually resides or the place of his choice
- B. The police shall not be in uniform.
- C. The investigating officer shall ensure that at no point of time the child comes in contact in any way with the accused
- D. All the above

**22. What is the minimum punishment for penetrative sexual assault?**

- A. 5 years
- B. 10 years
- C. 7 years
- D. 20 years

**23. In which of the following judgments it was held that sexual intercourse with minor (below 18 years) wife is rape?**

- A. Independent thought Vs Union of India 2017
- B. Indra Sarma vs V.K.V.Sarma
- C. Vijaya Verma vs State Nct. of Delhi & Anr
- D. Mrs. Savita Bhanot Vs Lt. Col. V.D Bhanot

**24. The definition of "domestic relationship" in the POCSO act shall have the same meaning as assigned to it in :**

- A. Clause (f) of section 2 of the Protection of Women from Domestic Violence Act, 2005
- B. Clause (f) of section 2 of the Protection of Children from Sexual Offences Act, 2012
- C. Clause (f) of section 2 of the Juvenile Justice Care and Protection Act
- D. All of the above

**25. Which of the following statement is incorrect about Sexual assault under POCSO Act?**

- A. It does not involve penetration.

- B. Sexual intent is a necessary ingredient.
- C. It is non-penetrative but touch based offence.
- D. None of the above.

**26. Which section provides for the right to legal assistance to victim/ parents, guardian or complainant through a counsel of their choice?**

- A. Section 36.
- B. Section 37.
- C. Section 39.
- D. Section 40.

**27. According to section 17 of the POCSO Act, the punishment provided for abetment is-**

- A. Minimum 3 years, which may extend to 5 years and fine.
- B. Minimum 5 years, which may extend to 7 years and fine.

- C. Minimum 10 years, which may extend to 20 years and fine.
- D. Punishment provided for that offence.

**28. If the house-keeping personnel come across pornographic pictures of a child in a hotel room. They must notify this to-**

- A. Local police
- B. SJPU
- C. Child
- D. Either (A) or (B)

**29. Which section has laid down the provision that while reporting information about sexual offence against a child, the media should ensure that the child's identity is not disclosed?**

- A. Section 23.
- B. Section 24.
- C. Section 25.
- D. Section 26.

**30. What is the maximum punishment for giving false complaints or false information?**

- A. 2 months
- B. 3 months
- C. 6 months
- D. 1 year

**31. 'Culpable mental state' includes:**

- A. Intention
- B. Motive
- C. Knowledge of a fact
- D. All of the above

**32. The statement of child shall be recorded:**

- A. At the residence of the child.
- B. At a place the child usually resides.
- C. At the place of his choice.
- D. Either A or B or C.

**33. Punishment for attempt to commit an offence :**

- A. Imprisonment for a term which may extend to one half of the imprisonment for life
- B. One-half of the longest term of imprisonment provided for that offence
- C. One-fourth of the imprisonment for imprisonment for life
- D. Both a and b

**34. If the director of an orphanage is aware that a child has been sexually abused by the warden, but he did not report the matters to the police. In such a case, what is the maximum punishment he is entitled to according to the POCSO Act?**

- A. Imprisonment which may extend to 1 year and fine
- B. Imprisonment which may extend to 6 months and fine
- C. Imprisonment which may extend to 1 year, or with fine
- D. Imprisonment which may extend to 6 months or with fine

**35. What is the punishment provided for a false complaint by a child?**

- A. No punishment shall be imposed
- B. Maximum 6 months imprisonment
- C. Only fine
- D. None of the above

36. **No order under Section 46 shall be made after the expiry period of \_\_\_\_ from the commencement of this Act :**
- A. One year
  - B. Two years
  - C. Six months
  - D. Three months
37. **Under which of the following provisions, will the special court presume that the accused had attempted or committed or abetted the said offence?**
- A. Section 4,5,6.
  - B. Section 5,6,7.
  - C. Section 5,7,9.
  - D. Section 3,5,7,9.
38. **All the trials shall be conducted by the Special Court:**
- A. *In camera*
  - B. In an Open Court
  - C. Either (A) or (B) depending upon the sensitivity of the matter.
  - D. Either (A) or (B), depending upon the choice of the complainant.
39. **The obligation for undertaking measures to ensure wide publicity of the Act is upon:**
- A. State Government.
  - B. Central Government.
  - C. Either (A) or (B).
  - D. (A) and (B) both.
40. **The time period for recording evidence of the child from the time of taking cognizance of the offence by the Special Court is:**
- A. 30 days
  - B. 45 days
  - C. 60 days
  - D. 90 days

41. In which of the following cases was it held that “even if a minor survivor in sexual assault case turns hostile, under POCSO Act the onus is on the accused to establish innocence.”
- A. Court on its motion Vs State
  - B. Imaam Shamin Khan Vs State of Maharashtra
  - C. Reena Jha & another Vs. UOI
  - D. None of the above
42. In proceedings before the Special Court, in case of doubt whether a person is a child or not, such question shall be determined by:
- A. Juvenile Justice Board
  - B. A Medical Practitioner appointed by the State Government on this behalf
- C. Special Juvenile Police Unit.
- D. Special Court.
43. Trial under POCSO Act, shall be completed within.....of date of taking cognizance.
- A. 6 months
  - B. 1 year
  - C. 2 months
  - D. 90 days
44. When did the POCSO Act come into force?
- A. 20th June 2012.
  - B. 14th November, 2012.
  - C. 9th November, 2012.
  - D. 11th November, 2012.
45. Which one of the following pairs is correct?
- A. Penetrative Sexual assault: Section 3.
  - B. Aggravated Sexual assault: Section 5.

- C. Aggravated penetrative Sexual assault: Section 6.
  - D. Sexual assault: Section 8.
- 46. **Under Section 39, professional experts are to be associated to be assisting the child with :**
  - A. Pre-trial stage
  - B. Trial stage
  - C. Post trial stage
  - D. Both a and b
- 47. **Which of the provisions shall not apply in the case of medical examination or medical treatment of a child :**
  - A. Sections 4, to 13
  - B. Sections 4, to 14
  - C. Sections 3, to 13
  - D. None of the above
- 48. **Section 42 of the POCSO act provides for:**
  - A. Alternate punishment
  - B. Act not in derogation of any other law
  - C. Public awareness of the Act
  - D. None of the above
- 49. **The National Commission or the State Commission, referred to in section 44 (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the :**
  - A. Juvenile Justice (Care and Protection) Act
  - B. Commissions for Protection of Child Rights Act, 2005
  - C. Both a and b
  - D. None of the above



50. A villager brought his 14 year old girl with a skin problem to a God Man who proclaims to have healing powers. The God man takes her inside the room and sexually assaults her and his wife guards the door knowing fully well that he is assaulting the child. In this case-

- A. Father of girl will be regarded as an abettor
- B. Wife of the god man will be regarded as an abettor.
- C. Only the god man will be regarded as an abettor.
- D. None of the above.

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## ANSWER KEY: POCSO ACT MCQs

- |       |       |       |
|-------|-------|-------|
| 1. D  | 19. B | 36. A |
| 2. D  | 20. A | 37. A |
| 3. C  | 21. B | 38. B |
| 4. A  | 22. D | 39. D |
| 5. A  | 23. B | 40. A |
| 6. C  | 24. A | 41. D |
| 7. B  | 25. A | 42. A |
| 8. C  | 26. D | 43. B |
| 9. B  | 27. D | 44. D |
| 10. A | 28. D | 45. B |
| 11. A | 29. D | 46. B |
| 12. A | 30. D | 47. A |
| 13. D | 31. C | 48. D |
| 14. C | 32. D | 49. C |
| 15. B | 33. D | 50. A |
| 16. D | 34. D | 51. B |
| 17. B | 35.   |       |
| 18. B |       |       |



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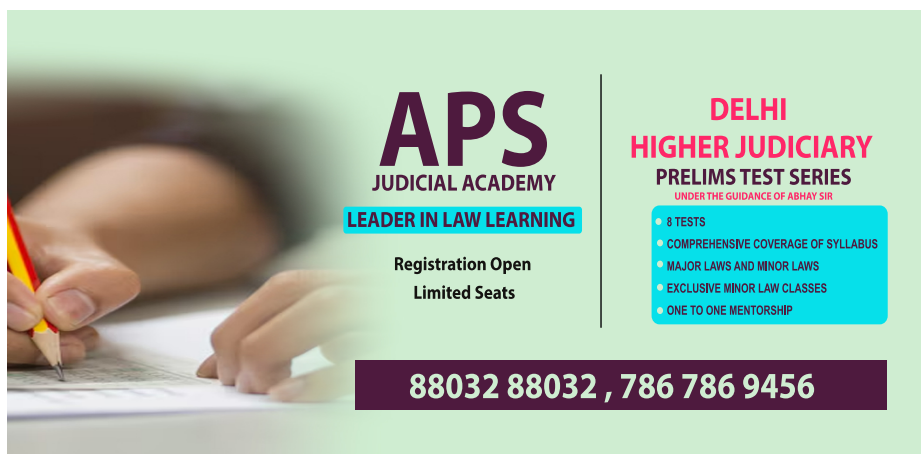
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### SUBJECTIVE QUESTIONS

1. Discuss the salient features of POCSO Act
2. What are the types of offences provided under the POCSO Act? Also discuss the punishment provided for them.
3. What are the rules with regard to reporting of offences under POCSO Act? What is the penalty for failure to report an offence under the POCSO act?
4. Discuss the provisions regarding recording of statements of children under the POCSO act? Is there any difference when the police are recording and when the Magistrate is recording?
5. “The POCSO Act is essentially based on the principle of reverse burden.” How far do you agree with this statement? Elucidate with the help of relevant legal provisions.
6. How is evidence of a child recorded during trial under the POCSO Act? What precautions does the special court need to take?
7. What is the procedure to be followed by the Police on receiving information in accordance with section 19(1) of the POCSO Act with respect to an offence that has been committed?



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