

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCE- LEGAL STUDY

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ABSTRACT

Child sexual abuse is a despicable truth and increasing day by day in India. The protection of Children from Sexual Offences Act deals specifically with the sexual offences related to the child. As the sexual offences against the children has been increased rapidly these days there is a need to aware the family of the victimized children and the victim about the sexual harassment and laws, relief available for them against such offences. This article attempts to study and discuss the salient features of the POCSO Act which provide the safest atmosphere and protection from offences with harsh punishment.

INTRODUCTION

The objective of the Act is to protect the interest of the children from sexual offences. It also impose the duty on a person who has an apprehension of crime can report. The Protection of Children from Sexual Offence Act, 2012 got the presidential assent on June 19, 2012 and notified in the Gazette of India June 29, 2012. It prevails whole of the India except Jammu and Kashmir. This Act was passed by the parliament to provide special protection and care to children from various sexual offences.

There is no discrimination on the basis of the gender of the child. According to the definition of child under this act 'CHILD' means any person below the age of 18.

The Act expounds different forms of sexual abuse, including penetrative and non- penetrative assault, as well as pornography, harassment of the child etc. There are some unique features of this Act firstly it provides constitution of special juvenile courts and appointment of Special Public Prosecutor. Before enactment of this Act, trials took unnecessarily long time to dispose of the matter but Protection of Children from Sexual Act strongly recommends disposing the case with in 1 year. Second point is to discuss that this Act provide the support from police administration. Woman police officer who is below the rank of sub inspector will record the statement of a girl child and it insures the presence of the parents, relatives and guardian of the girl victim and also medical examination will be conducted by female doctor.

DEFINITION OF SEXUAL OFFENCE

Sexual offence includes both sexual assault and sexual harassment both terms are well defined under the Indian Penal Code,1860 as well as under the Protection of Child from Sexual Offence Act,2012

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DEFINITION UNDER BLACK'S LAW DICTIONARY

I. SEXUAL ASSAULT

These are the advances physically of one person from another in a sexual way that can lead to a sexual assault.¹

II. SEXUAL HARRASMENT

Harassment in the workplace or discrimination where unwelcome and unwanted advances are made to a person by one or more other employees. The comments are of a personal nature and often sexual in style and manner.²

DEFINITION UNDER INDIAN PENAL CODE, 1860

1. SEXUAL ASSAULT

Section 354: Assault or criminal force to woman with intent to outrage her modesty.

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.³

2. SEXUAL HARRESMENT

Section 354A : Sexual harassment and punishment for sexual harassment.

1. A man committing any of the following acts—
 1. physical contact and advances involving unwelcome and explicit sexual overtures; or
 2. a demand or request for sexual favours; or
 3. showing pornography against the will of a woman; or
 4. making sexually coloured remarks, shall be guilty of the offence of sexual harassment.
2. Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.
3. Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.⁴

¹Available at: <https://thelawdictionary.org/sexual-assault/>(last visited feb22/2019).

²Available at: <https://thelawdictionary.org/sexual-harassment/>(last visited feb22/2019).

³ Indian Penal Code, 1860.

⁴Ibid.

KEY PROVISIONS OF THE POCSO ACT

At the starting point preamble of the act clearly says that this Act was enacted for the purpose of the protection of the child from sexual assault, sexual harassment, pornography etc. same can be inferred from these sections

Section 3 of the POCSO Act defines penetrative sexual assault,

A person is said to commit “penetrative sexual assault” if-

- (a) He penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) He inserts to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) He manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) He applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.⁵

Section 4 of the POCSO Act

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.⁶

SEXUAL ASSAULT AND ITS PUNISHMENT

Section 7 of the POCSO 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.⁷

Section 8 of the POCSO Act

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.⁸

SEXUAL HARASSMENT AND ITS PUNISHMENT

⁵ Protection of Children from Sexual Offence Act, 2012.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

Section 11 of the POCSO Act

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

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

Explanation- Any question which involves "sexual intent" shall be a question of fact.⁹

Section 12 Punishment of sexual harassment

Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.¹⁰

AGGRAVATED FORM OF THE SEXUAL OFFENCE

Section 5 of this Act also recognizes the Aggravated form of sexual assault. According to this when a Police Officer, Public Servant, Staff of a Hospital, Educational Institution and Religious Institution commit sexual assault, Member of Security Forces the Act becomes stricter. We can say that the act become more concerned when the protector is the perpetrator.¹¹

Section 6

If any person commits Aggravated sexual assault, shall be punished with imprisonment of ten years which may extend to imprisonment for life and also liable for fine.

Section 9

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

Section 9 talks about Aggravated Sexual Assault and its punishment given under section 10 under which shall not be less than five years but may extend to seven years.¹²

USING CHILD FOR PORNOGRAPHIC PURPOSE

Section 13

whoever, uses a child in any form of media (including 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), for the purposes of sexual gratification, which 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, shall be guilty of the offence of using a child for pornographic purposes.

Explanation this section also clarifies that the term “use a child” includes involving a child through any technological medium.

Punishment is also define under section 14 of the Act under which person will be liable for life imprisonment and fine also.¹³

Section 15 of the act talks about the storage of pornographic material involving a child. According to this section if any person who stores pornographic material for commercial purpose involving a child will be liable for imprisonment of either description which may extend to three years or with fine or both¹⁴

SALIENT FEATURES OF THE ACT:

1. The POCSO ACT, 2012 was established to protect the children from sexual offences. The act defines the CHILD as “any person below the age of 18 years”¹⁵ and considers the best interest and welfare of the children as supreme. This act also ensures healthy physical, emotional, intellectual and social development of the child.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

2. This Act is gender neutral. It was held in *Jabbar v. State*, that the Protection of Children from Sexual Offences (POCSO) Act, 2012 is a gender-neutral law. Each and every child under the age of 18 is covered under it. The Bench comprising of Justice S.P. Garg and J. C. Hari Shankar stated that the POCSO Act does not discriminate between a male and a female child victim as sexual offences. The Bench further held that, “*The jurisprudence that has developed, with respect to the testimonies of girl-victims, as witnesses would, therefore, apply, so far as the POCSO Act is concerned, mutatis mutandis to boy-victim*”.¹⁶
3. The changes prescribe the rigorous punishment including death penalty; due to the lack punishment for committing aggravated penetrative sexual assault crime on a child the Union Cabinet approves the amendments under POCSO ACT, 2012 for the protection of the children from sexual offences.
4. The amendments are also brought in section-9 of the POCSO Act, 2012 to protect children from sexual crimes in times of natural calamities and disasters and in cases where children are administered, in any way, any hormone or any chemical substance, to attain early sexual maturity for the purpose of penetrative sexual assault.
5. Section-14 and Section-15 of the POCSO Act, 2012 are also amended to address the threat of the child pornography. It is proposed to impose fine for not demolishing/or deleting/ or reporting the pornographic material involving a child. The person can be penalized with jail term or fine or both for transferring/propagating/presenting such material in any manner except for the purpose of reporting as may be prescribed and for use as evidence in court. Penal provisions have been made more rigorous for storing/possessing any pornographic material in any form involving a child for commercial purpose.

NEED OF THE ACT

The main purpose to enact this act is to provide the safest atmosphere and protection from offences with harsh punishment. Here, there is no doubt that we have numbers of enactments under which children are protected but there is no hard and fast rule relating to their protection. Those acts do not talk directly about the confidentiality of the victim child and do not ensures that how much time trial can take. Protection of Child from Sexual Offences Act, 2012 covers sexual assault which is sexual and aggravated sexual assault, Penetrative and aggravated penetrative sexual assault and using of child for the purpose for child pornography even abetment is also define under this act.

1. The POCSO Act, 2012 provide the special juvenile courts under section 28 to establish child friendly atmosphere by allowing parents, guardians and relatives of the victim child. It has been lead

¹⁶AIR 2018.

down under section 38 that, the proceedings should be conducted **in-camera** keeping in mind principle of “best interest of child”.

2. If there is an apprehension of commission crime any person including a child can inform either to Police Officer or Special Juvenile Police Unit.
3. Under POCSO Act 2012, if a member of media /hotel/lodges/hospital/club having any information relating to the offence. They are under obligation to report SJPU or police (section 20).
4. If a child is mentally or physically disabled, the magistrate may take help of specialist or other person who is familiar to the victim child (section 26).
5. The evidence of the victim child should be record within the 30 days from the date of taking cognizance and the trial shall be disposed of within the period of 1 year.

PROCEDURAL COMPLIANCE:

1. Cognizance By The Special Court

According to the section 33(1) of POCSO Act, special court is empowered by the section 33(1) of the POCSO Act to take the cognizance of the case filed either on complaint or police report. It is the duty of police that they must bring the matter directly to the special court instead of commencing committal proceedings before the Magistrate because it provides the speedy trial to the child victim. In *AlakhAlokSrivastva v. Union of India and others* there was two Petition filed by Mr. Srivastava, first, the treatment of an eight years old female child victim who was raped by her cousin and the second for speedy trial and monitoring of the trials. It was stated by Mr. Srivastava that there number of registered (under POCSO Act) cases which are pending more than one year. Under this case some guidelines are provided relating to the early disposition of the cases and the dignity of the victim child.¹⁷

2. Questioning From Children

Section 33(2) of the POCSO Act restrains the public prosecutor and the defence prosecutor to raise the question to the child directly. All questions at the time of cross examination and examination-in-chief must be conveying through the special court judge. Section 33(6), POCSO Act, stated that special court should not allow direct questioning or aggressive questions from the victim child also dignity of the child should be maintained during the trial proceedings.

3. Child Friendly Atmosphere

Section 33(4) of the POCSO Act, provides child friendly atmosphere by allowing their family members, guardians or it may be a relative of the child on whom the child has trust or feel comfort and confident. Special court must be located in separate building or in separate place so that the child

feel protected from the crowd as well as from the offenders which are there in the courtrooms or complex for their trial. *Sakshi v. Union of India* [AIR 2004 SC 3566], Apex court lead down the following directions related to the crimes against children:

- There should be some arrangements or screen where victim or witnesses do not see the face or body of the accused.
- At the time of cross examination if the question related direct to the incident. It should be given in writing to the presiding Judicial Officer of the court who may convert into a language which is not aggressive or which should not harm the dignity of the victim child.
- Victims of child abuse or rape should be allowed for reasonable breaks during trial.¹⁸

4. Permitting The Break During The Trials

Section 33(3), POCSO, requires that if there is a need or child is not able to give response during trial, frequent gap should be allowed to take rest. It is necessary that the judge should be trained to ask indirectly questions related to the incident and special

5. Repeated Visits to Court

Generally, all examinations are done in a single day but when it comes to know that the numbers of cases are pending in front Special courts and it has been mentioned that there are number of cases where child has to be called again and again. It is the duty of the Special court to ensures that each and every case which comes before the Special Court should be bind up with in the period of 1 year from the date of filing the case.

6. Compensation for victims

It is stated that the victim of the child crime should be compensated by the court. Recently Supreme Court has adopted the guide lines given by NALSA under which compensation amount is between 4 lakh to 7 lakh it is stated that the every victim should be compensated as POCSO Act is gender neutral. Bench of Justices S. Abdul Naseer Deepak Gupta, Madan B Lokur said that the centre no rule should be framed under the Protection of Children from Sexual Offences Act, 2012 “We are of the opinion that the NALSA compensation scheme should function as the guidelines for special courts [under the POCSO Act] to award compensation to victims of sexual abuses until rules are formalized by the central government,” and also says that the scheme providing compensation should not be misused.¹⁹

JUDICIAL PRONOUNCEMENT

With the passage of time juvenile justice system has developed and able to create child friendly environment into the court so that cases of sexual assault and other crimes against children can bring in front of judicial

¹⁸ Available at: <http://ncpcr.gov.in/showfile.php?lang=1&level=2&&sublinkid=1676&lid=1680> (last visited at 04-04-2019).

¹⁹ Available at: <https://scroll.in/latest/893311/compensation-scheme-for-rape-and-acid-attack-victims-will-also-be-extended-to-pocso-cases-rules-sc> (last visited at 12-04-2019).

system for the purpose of providing justice and There are number of cases which deals with sexual offences against child under POCSO Act, 2012.

In *state v. Devendersingh*²⁰ victim aged about 13 years at about 6:00 to 6:30pm was returning to her house from friend's house. When she was returning to her home, accused met her and dragged her behind the marriage pandal which was set up in the park. Accused started sexually assault her when prosecutrix started shouting then certain persons gathered at marriage pandal and rescued his from the clutch of the accused. It was held that the accused committed the offence of sexual assault defined under section 7 and 8 of POCSO Act and held liable under section 376 and 511 of Indian Penal Code.

All the offences which are introduced under the POCSO Act are non bailable offences but sometimes it all depends upon the facts and discretion of the magistrate. In *Devendrabansraj Singh v.State of Maharashtra*²¹ father being accused under sections 6,10 and 12 of the Protection of Child from Sexual Offence Act, 2012 under 354-A, 376(2)(f) and (i), 506, 509 of the Indian Penal Code, 1860 in this case the teacher of the prosecutrix disclose that she is being molested from past 4-5 years and was raped by her father when she was in 7th standard. The application was rejected. In *P. Shanmugavel Ra v. State*²²under which question was raised related to the qualification of the Special Public Prosecutor. The first accused Shanmugavel Raj in special case filed a petition before the trial court under which he claim that Tmt B.R Mehala who was acting as a Special Public Prosecutor is not legally entitled or not qualified for this case. It was held that some provisions of the Protection of Children from Sexual Offences Act, 2012 are salient provisions and each and every person appointed as a Special Public Prosecutor under section shall be deemed to be a Public Prosecutor within the meaning of section 2 (u) of the Act. In *Tuke Ram and another v. State of Maharashtra*²³Bombay High Court differentiate between "consent" and "passive submission" and held that the defendants were guilty of crime custodial rape and the consent given by girl was not voluntary because threat of policeman was very serious on her.

CONCLUSION

The right and offences relating to the child are rarely recorded in our Indian society sometimes their own family members and relatives suppress the matter of offence relating to the child and most shocking is that there are number of cases where their own family members involved in such crimes. Our Centre and State government should implement this law by creating effectual machinery to check the crimes against children and should draw up some guidelines to inspect the educational institutions and other institutions time to time. The POCSO Act remains unimplemented law due to the lack of knowledge and awareness. This Act

²⁰ AIR 2014.

²¹ AIR 2017.

²² AIR 2013.

²³ AIR 1979.

needs more publicity through media and other platform. Justice Verma Committee Report, conclude that “there is an urgent need to audit the performance of all institutions of governance and law and order”. This Act is ‘specific’ in nature as it only deals with the child who is below the age of eighteen the act also talk about the Special Courts and Special Police as the Act is protective in nature. As there are number of cases where we address horrific child abuse in Indian society, here our judiciary system plays a vital role through their effective judgment.

