



Critical Analysis of Cross-Examination of Child Witnesses under POCSO, 2012

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1) Abstract

Under an adversarial legal system, any witness's evidence is subject to scrutiny from the opposing lawyer in a process known as cross-examination. Cross-examination was designed to serve two main functions:

(1) to elicit favorable evidence by having the witness agree with facts supporting the cross-examining lawyer's case and

(2) to weaken the opposing side's case by discrediting unfavorable evidence or the person who provided it.

Cross-examination is considered to be an important part of the criminal justice system; in fact, many experts have argued that it is the primary means by which the truth in any case emerges. Over the past three decades, widespread concern has been raised about children's ability to cope with a legal system that was designed by adults, for adults, especially cross examination.

For example, research suggests that children's experiences within the criminal justice system can have marked and prolonged negative effects on their education, mental health, and beliefs about re-engaging with the legal process. In fact, many child complainants of sexual offences who have testified in court are so unsettled by the adversarial process that they say they would not report being a victim again.

Considering the above circumstances, the burden on a child witness testifying their trauma, becomes even worse. In Court, the prosecution has to rely on the child witness's testimony to persuade the Court that the accused is guilty. This description of facts must remain childlike, yet evidentiary requirements of the offence must also be satisfied, thus leading to numerous probing and intrusive methods of questioning. Nevertheless, we find that in such cases the defense contests the prosecution assertion that a child would not deceive the Court, leading to further character analysis of the child. Defense lawyers use several strategies to establish that the child is not really a child, and in the ultimate analysis, the childhood of the legal subject is questioned.

Hence, on the one hand, the law assumes that the child should be protected, but categorically pushes them to the brink of making the procedure of penalizing their perpetrators, harrowing. Thus the author believes that the process of providing testimony by child witnesses has to be analysed for lacunaes. Cross examination of these

witnesses tends to intimidate the child witnesses inspite of numerous restrictions in the form of the judge reading out cross examination questions, as well as block aggressive cross examinations.

Through this doctrinal research, the author aims to critically analyse the existing systematic mechanisms and their flawed implementation and bring forth organizational recommendations for effective and better implementation of POCSO Act, 2012.

KEYWORDS: Child Witness, Cross- examination, evidentiary value, Implementation, POCSO Act, 2012.

2) Appreciating The Testimonies Of Children

Members of the legal profession firmly believe that cross-examination isa critical technique of discerning the truth, and that cross-examination will not pose any challenges for a witness who is telling the truth, however this assumption is false.

Children and adolescents are acutely aware that reporting sexual abuseto someone (even someone close to them) will often result in them being disbelieved, admonished, chastised, blamed, or even punished. It's no mystery, then, that youngsters delay or refuse to disclose abuse. When children or adolescents are disbelieved or asked to stay quiet about the abuse, thus the consequences on their psychological well-being are severe. They may experience emotional or behavioural difficulties as a result of the abuse, which,when viewed through a legal lens, puts them at danger of being disbelieved.

For example, if a child does badly in academics post-abuse, or refuses toobey to the rules and regulations, they are regarded as children who are 'bad' or are 'difficult', thus their account cannot be believed.

When they eventually contact a responsible authority to report the abusethey have experienced, the system frequently responds with suspicion or mistrust, and this becomes the children's lived experience. The awful realities that many of these Although a minor witness is considered competent to testify in the criminal justice system, the trial courts are obliged to use discretion and caution when considering their testimony.

In *Dattu Ramrao Sakhare v. State of Maharashtra*¹, the Supreme Court held,

“[t]he only precaution which the Court should bear in mindwhile assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of beingt utored.”

In *Golla Yelugu Govindu v. State of Andhra Pradesh*², the Supreme Court observed:

“[T]he decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack ofintelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision ofthe trial court may, however, be disturbed

¹ Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341.

² Golla Yelugu Govindu v. State of Andhra Pradesh, (2008) 16 SCC 769.

by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

Thus, in an effort to record children’s evidence and accord justice, the criminal justice system may and does indeed further traumatize the child/adolescent.

When a child is the victim of sexual abuse, he or she is subjected to a variety of traumas. The abuse itself is one type of trauma; however, the life- altering events that occur following disclosure or discovery are a different form of trauma in itself. Navigating through the criminal justice system could be the final nail in the coffin of terrible experiences that can leave a kid scarred for life, especially if the adolescent has been subjected to secondary victimisation. Intra-familial abuse is unique in that the child already has a relationship with the abuser (e.g., father, uncle, grandfather, etc.) and the abuser takes use of that trust to harm the child. In exchange for affection, attention, and/or presents, the abuser participates in sexual behaviour with the kid which is out of step with the child's developmental level, causing the child's perception of sexual activity to be skewed.

This is called “traumatic sexualization”. The child or teenager is torn between trusting the person who is abusing them and being puzzled about their relationship becoming sexualized. Once the child has consented to the abuse, the perpetrator holds the child responsible for the abuse and so coerces the child into secrecy and silence. The adolescent feels imprisoned in the vicious cycle of abuse once the pattern of abuse has been established. Ultimately, the child experiences betrayal, as someone who was meant to protect him/her has violated that trust³.

The POCSO Act takes into account this very dynamic and has mandated reporting as part of the law, under *Section 19(1)*. The Model Guidelines under *Section 39, POCSO Act, 2012* states:

“... [t]he nature of sexual abuse, the shame that the child victim feels and the possible involvement of a parent, family friend or other close person, makes it extremely difficult for children to come forward to report sexual abuse. This is why the law provides for mandatory reporting, placing the responsibility to report not on the child but on a surrounding adult who may be in a better position to help.”

The child's sense of powerlessness often adds to the child's anguish and symptoms. These factors are at the root of the intra-psychic processes that lead to delayed disclosure, as well as the psychological symptoms that the child may experience but go unnoticed, and why they eventually become hostile. It cannot be stressed enough that those who abuse children are frequently in positions of trust and power, and can manipulate children and teenagers, as well as their families, so that the abuse is not revealed until much later, or even if it

³ D.Finkelhor, A. Browne, The traumatic impact of child sexual abuse: a conceptualization, *The American Journal of Orthopsychiatry*, 55(4), 530–541 (1985).

is, no one believes them. In Maharashtra, the accused was known to the victim in 77% of the cases studied⁴. In fact, when the abuse is revealed or reported, the secondary trauma can have a substantial influence on the child's or adolescent's mental health, with long-term consequences. Children's disclosures of abuse are frequently received with scepticism and incredulity, thus this abandonment by the adults who are supposed to safeguard the child (whether it's a non-offending parent, a teacher, or even a law enforcement officer) has major consequences for the child and indeed the system as well⁵. In fact, Dr. Summit said,

“[W]hatever a child says about the sexual abuse, she is likely to reverse it. Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the bedrock of fears and threats underlying the secrecy are true⁷.”

When considering the influence of disclosure/discovery on survivors of abuse, the non-offending parent's response and support appear as the most constant component. It is critical for the survivor's mental health and healing⁶. Given this, the courtroom setting and the manner in which the child is questioned in court have a huge impact on whether the child will articulate the terrible events that have transpired or will become antagonistic and hostile⁷. Although Section 33(6), POCSO Act has explicitly states that character assassination of the child must not be allowed, it nonetheless happens as seen in the *State v. Somashekhara*⁸, where it was argued by the defence that a virgin would bleed during a rape and in the absence of bleeding, the allegations of penetrative sexual assault were not made out⁹. In another case from Maharashtra¹⁰, where the victim had allegedly been raped by her father on multiple times, she was repeatedly questioned about her friendships with boys in order to undermine her credibility¹¹.

Thus, when children/adolescents are victims of abuse, it is critical to keep the above-mentioned variables in mind so that their words can be comprehended in the context of their traumatic experience.

3) Delay In Disclosure – Is The Child To Be Blamed?

Although delay in disclosure has been highlighted in the earlier section, it warrants further discussion. Courts and law enforcement frequently interpret a child's or adolescent's delay in disclosing information as a reason to mistrust their story. What made the adolescent/child wait? Why didn't the child or adolescent immediately inform their mother? There are a variety of reasons why a child might not immediately report abuse. Some of these factors are described in more detail below.

⁴ Centre for Child and The Law, Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra, National Law School of India University Bangalore, 66 (2017).

⁵ R.Summit, The Child Abuse Accommodation Syndrome, Child Abuse and Neglect, 177–193 (1983).

⁶ Id. at 14.

⁷ Ceci, S., Bruck, M, Battin, D., The suggestibility of children's testimony. In False memory creation in children and adults. Mahwah, NJ: Erlbaum, pp. 169–201, (2000).

⁸ State v. Somashekhara, Spl. C No. 74/ 2014 decided on 29.04.2016.

⁹ Id. at 82.

¹⁰ State v. Harsh Gupta, Spl. C. No. 146/2014 decided on 22/12/2016 (Thane).

¹¹ Centre for Child and The Law, supra note 9, at 18-19.

Firstly, children/adolescents frequently fear being held accountable for the abuse or being blamed because they invited the assault in some way, and this is one of the most significant deterrents to children/adolescents not reporting abuse and so this one of the biggest deterrents for children/adolescents not to report abuse.

Secondly, many children/adolescents place blame on themselves, resulting in embarrassment and shame, which contributes to the delay in children reporting abuse to a trusted adult¹².

Thirdly, another key reason for the delay in disclosure is "grooming." There is little resistance to grooming, and this is often used against the youngster, as in the case of *State v. Thumyhanghrim Hmar*¹³, where the accused was the victim's paternal uncle who had stepped in to care for her when her father passed away¹⁴; and in *State v. Kailas Jayram Karawanje*¹⁵, where the accused was the victim's cousin¹⁶.

Fourthly, the abuser frequently employs various forms of coercion to keep the child from reporting the abuse. This can take the form of psychological coercion, in which the abuser tells the child that if other family members find out about the abuse, they will send the abuser away or the family will break up, and the child will be held responsible. The abuser may also threaten the child by telling him or her that they would be put to a hostel or that no one will believe them. These are some of the child's deepest fears, and when the abuser exploits these fears, exposure is postponed until the abuser is discovered through other ways. It is important to remember that sexual abuse is nearly often inflicted by someone close to the child, and so the abuser has a lot of power over the child and is well-versed in the child's environment.

According to Crime in India, 2016, in cases of rape under Section 376, Indian Penal Code and penetrative sexual assault under Sections 4 and 6, POCSO Act, the offender was known to the victim in 94.6% cases¹⁷. This is also borne out by Centre for Child & the Law from National Law School of India University's (Bengaluru) studies as per which the perpetrator was known to the victim in majority of the cases¹⁸. The abuser may also tell the child that no one in the family believes them or that the child is guilty in some manner. The abuser's mind games with the child can often have long-term consequences for the child's psychological well-being. The balance of power in the case of children/adolescents is frequently skewed in favour of the adult. As a result, children and teenagers are afraid of not being believed or being blamed for the abuse, which is often the case. If the child does not keep quiet, the abuser may employ physical coercion by physically harming the child or threatening the child or another loved family member (for example, the child's mother or sibling) with physical harm about the abuse¹⁹. Children who are very young or who have intellectual disabilities lack the

¹² Pipe M.E., Goodman, G.S., Elements of secrecy: Implications for children's testimony, Behavioral Sciences & the Law, 9(1), 33–41 (1991).

¹³ State v. Thumyhanghrim Hmar, Spl C. No.(POCSO) 4 of 2015 decided on 04.07.2015 (Assam).

¹⁴ Centre for Child and The Law, Study on the Working of Special Courts under the POCSO Act, 2012 in Assam, National Law School of India University Bangalore, 48 (2016).

¹⁵ State v. Kailas Jayram Karawanje, Spl. C. No. (POCSO) 47 of 2014, decided on 26.08.2015 (Ratnagiri).

¹⁶ Centre for Child and The Law, supra note 4 at 94.

¹⁷ National Crime Records Bureau, Crime in India 2016: Table 3A.4 Offenders relation to victims of rape (2016).

¹⁸ According to CCL-NLSIU's Studies, the perpetrator was known to the victim in 75% cases in Andhra Pradesh, 78% cases in Assam, 80% cases in Delhi, 70% cases in three districts in Karnataka, and 77% cases in Maharashtra.

¹⁹ S. Oz, The „wall of fear“: The bridge between the traumatic event and trauma resolution therapy for childhood sexual abuse survivors, Journal of Child Sexual Abuse, 14(3), 23–47 (2005).

essential communication skills to discuss the abuse, which could be another reason for the delay in disclosure or discovery. Judges must be aware of these variables in order to properly comprehend the setting in which the abuse occurred and, as a result, the child's behaviour in that environment.

Lastly, one cannot be divorced from the socio-cultural elements that influence how abuse is perceived and reported in our nation, and which might lead to delays in reporting, non-reporting, or even recantation after reporting. In countries like India, where the victim (or, in children's situations, the victim's mother) is frequently blamed and shamed, and where the desire to protect "honour" and keep family secrets is vital and embedded in the family's culture, the victim is frequently left without any social support²⁰.

Although it is clearly prohibited under the POCSO, 2012, naming, humiliating, and blaming the victim is a frequent practice in India. What's more concerning is that it appears to have affected judgments as for instance, in the case of *State of Maharashtra v. Ramkishor Sharma*²¹ wherein the child's personal relationships and her mother's second marriage and abortion were considered while evaluating their credibility as witnesses.

After surviving sexual assault, children are frequently expected to behave in a certain way. This is frequently interpreted as a sign or even proof that the abuse has occurred as in the case of *State v. Kailas Jayram Karawanje*²² where the court doubted the victim's testimony, because the victim had not disclosed the abuse by her cousin to her grandmother and no evidence was brought on record that she was sad and quiet after the incident²³. In *State v. Avinash Gupta*²⁴ the victim girl had gone ahead with a class after her step-father sexually abused her, causing the Special Court to question why she had not informed her mother immediately about the incident and thereby concluded that her conduct was not "natural."²⁵ In the absence of "appropriate victim behaviour" or "normal victim behaviour," the youngster is disbelieved and pushed deeper into self-blame, behavioural, and emotional issues. The qualities and kind of abuse, their own age and comprehension of abuse, the degree of closeness to the abuser, if the abuser is in a position of power, whether they have a supporting family, and other factors all influence how each victim reacts to abuse. As a result, casting doubt on the abuse based on such a fallacy would be an injustice to the child victim. Most importantly, the fact that the child did not behave in the way we expected does not undermine the fact that he or she was abused.

Child sexual abuse can have an immediate, short-term and long-term impact on the child's development in all areas²⁶. Between the actual abuse, reporting it to law authorities, and the recording of the testimony, there could be a significant time gap. Thus, during the trial process or, in the instance of delayed disclosure, even

²⁰ J.E. Korbin, Culture and child maltreatment: Cultural competence and beyond, *Child Abuse & Neglect*, 26, 637–644 (2002); D. Carson, J. Foster, A. Chowdhury, *Child Sexual Abuse in India: Understanding and Impacting Individuals, Families, and Socio-Cultural Systems*, Saarbrücken: LAP Lambert Academic Publishing (2015).

²¹ *State of Maharashtra v. Ramkishor Sharma*, Spl. C. No. (POCSO) 84/2013 decided on 27.02.2015 (Pune).

²² *State v. Kailas Jayram Karawanje*, Spl. C. No. (POCSO) 47 of 2014, decided on 26.08.2015 (Ratnagiri).

²³ Centre for Child and The Law, *Supra* note 4 at 95.

²⁴ *State v. Avinash Gupta*, SC No. 135/13 decided on 30.9.2015 in Delhi Report, pp.103-104.

²⁵ Centre for Child and The Law, *Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi*, National Law School of India University Bangalore, 103-104 (2016).

²⁶ J.N. Briere, D.M. Elliott, Immediate and long-term impacts of child sexual abuse, *The Future of children*, 4(2), 54–69 (1994); S.P. Seshadri, Short term and long terms effects of child abuse, In *Managing child abuse: A handbook for medical practitioners*, World Health Organisation (New Delhi) (2004).

during the recording of the 161 statement under the CrPC, the symptoms and signs that the child had in the immediate aftermath of the abuse may not be observed or evident. For example, post or during the abuse, children may experience bed wetting, sleep and appetite issues, various aches and pains, academic deterioration or unwillingness to attend school, fear, anxiety, melancholy, suicidal thoughts and/or attempts, angry outbursts, sexualized behaviour, and so on.

The above can be highlighted with the help of a case vignette. "S" is a 3.5-year-old girl who presented with a two-month history of nighttime bedwetting after gaining bladder control, clinginess to her mother, and acute fear of going to school. This was a departure from her ordinary demeanour. She enjoyed going to school, had complete bladder control, and enjoyed playing with her friends in the apartment without her mother's constant presence. Her uncle sexually abused the child two months ago. The child lost bladder control during the day on the day of the abuse (which according to the mother did not happen after 2.5 years of age). On that day, the child also slept excessively, was exceedingly fussy, and was not her regular self.

When her mother bathed her the next day after the abuse, she discovered that the child's private parts were red, and after checking with a paediatrician, the high likelihood of abuse was confirmed. After the abuse, the child had problems sleeping for the next ten days. The redness in the private area was no longer there when the child went to the paediatrician 10 days after the abuse, and the youngster had regained bladder control throughout the day. Bedwetting only at night, clinginess to the mother, and refusal to go to school due to fear were the symptoms she exhibited when she came to us for consultation two months after the abuse.

As can be observed in the above case vignette, some of the child's symptoms faded over time, while others became more noticeable. Abuse's indications and symptoms don't stay the same over time. However, it must be emphasised that the absence of these symptoms does not rule out the possibility of abuse. However, if the parents or caretakers have sought medical/psychiatric therapy for the symptoms listed above, the court must accept the reports as medical evidence and give them due weight.

4) Critical Analysis Of Existing Cross Examination Mechanisms Of Child's Testimony Influencing The Proceedings In Special Courts

Over the last three decades, there has been considerable skepticism about children's capacity to adapt with a legal system created by adults and for adults²⁷. Children's experiences in the criminal justice system, for example, have been shown to have long-term detrimental impacts on their schooling, mental health, and views about re-engaging with the legal system²⁸. In fact, many child victims of sexual offences who have testified in court say they would not report being a victim again since the adversarial process has left them feeling uncomfortable²⁹. Similarly, parents of child complainants have stated that they would not subject their children

²⁷ Pipe, M.-E., Henaghan, M., Accommodating children's testimony: Legal reforms in New Zealand, *Criminal Justice and Behaviour*, 23, 377–401 (1996).

²⁸ Eastwood, C., Patton, W., The experiences of child complainants of sexual abuse in the criminal justice system, Australia, Report to the Criminology Research Council, 68-70 (2002).

²⁹ Id. at 55.

to the judicial procedure again, and that they would counsel other parents to do so as well³⁰. Even legal professionals generally consider the legal process to be traumatic for children³¹, and would not want their own children to participate in it³².

Many jurisdictions have undertaken adjustments to make the adversarial process more child-friendly in response to these concerns. Removing corroboration requirements, judicial warnings about the unreliability of children's testimony, reducing trial delays, allowing the use of support people, allowing children to take a simplified oath, and allowing children to testify via special measures such as closed-circuit TV or from behind a screen are just a few of the reforms³³.

Despite these advancements, many experts argue that certain components of the adult justice system continue to obstruct children's full participation in the courtroom. Although attempts have been made to make direct-examination methods more developmentally appropriate for children, the process of cross-examination has remained unchanged. It goes without saying that being cross-examined is a painful experience for any witness.

Even expert witnesses and police officers find the cross-examination process exhausting and perplexing³⁴. Children, on the other hand, are likely to be disturbed by the challenges that cross-examining lawyers bring to their accuracy, credibility, and motivation, because this form of verbal confrontation goes well beyond what they are accustomed to³⁵. In fact, the majority of child complainants regard cross-examination as extremely upsetting; the most frightening part of the trial, according to many, is cross-examination and the demeanour of defence lawyers³⁶.

During cross-examination, the types of questions posed differ significantly from those used in other parts of the judicial process³⁷. They also differ markedly from best practice guidelines for questioning children³⁸. In fact, cross-examination has been described as a how not to guide to asking children questions³⁹.

4.1 Questions That Challenge Credibility

One goal of cross-examination is to weaken the opposing lawyer's case by discrediting unfavorable evidence, or the witness who provided it. There are a number of ways that this might be achieved.

³⁰ Alaggia, R., Lambert, E., Regehr, C., Where is the justice? Parental experiences of the Canadian justice system in cases of child sexual abuse, *Family Court Review*, 47, 634–649 (2009).

³¹ Cashmore, J., & Bussey, K., Judicial perceptions of child witnesses. *Law and Human Behavior*, 20, 313–334 (1996).

³² Eastwood, C., Patton, W., Stacy, H., Children seeking justice. Surviving child sexual abuse and the criminal justice system, *Queensland Journal of Educational Research*, 16, 158–182 (2002).

³³ Bala, N., Child witnesses in the Canadian criminal courts: Recognizing their capacities and needs, *Psychology, Public Policy and Law*, 5, 323–354 (1999).

³⁴ Flin, R., Hearing and testing children's evidence. In G. S. Goodman & B. Bottoms (Eds.), *Child victims, child witnesses: Understanding and improving testimony*, New York: Guilford Press, 279–299 (1993).

³⁵ Lyon, T. D., Applying suggestibility research to the real world: The case of repeated questions, *Law and Contemporary Problems*, 65, 97–126 (2002).

³⁶ *Id.* at 85.

³⁷ Davies, E., Henderson, E., Seymour, F., In the interests of justice? The cross-examination of child complainants of sexual abuse in criminal proceedings. *Psychiatry, Psychology, and Law*, 4, 217–229 (1997).

³⁸ *Id.* at 235.

³⁹ Henderson, E., *Persuading and controlling: The theory of cross-examination in relation to children, Children's testimony: A handbook of psychological research and Chichester, England: John Wiley & Sons, 279 (2002).*

Accusations of poor eyewitness ability: One way that defense lawyers challenge children's testimony is by challenging their perceptions or understanding of the alleged event, their memory for details of the event, or their ability to communicate their recollections to the court⁴⁰. For example, the lawyer might imply that the witness could not have observed the event in the forensic practice, way it was originally recounted⁴¹. In a study conducted by researchers⁴², they examined court transcripts in which 26 children gave evidence in cases of alleged sexual abuse. In over one third of these transcripts, lawyers accused children of having mistaken the identity of their alleged abuser.

In one transcript, for example, the defense lawyer suggested that the child could not have seen the offender's face due to poor lighting in the room. The strength of a child's memory for the alleged event may also be questioned during cross-examination by highlighting the delay between the alleged event and a child's disclosure⁴³ or between the disclosure and the trial⁴⁴. During cross-examination, lawyers also challenge children's credibility by highlighting inconsistencies in their testimony.

During cross-examination, lawyers also attempt to discredit children's evidence by emphasizing their potential for suggestibility⁴⁵. Because children are questioned – formally and informally – many times during the legal process, defense lawyers might argue that children's allegations against the defendant are the product of suggestive questioning by parents and professionals rather than an accurate account of an actual event.

Accusations of dishonesty: During cross-examination, a lawyer might also directly challenge the child's honesty by attacking his or her character or by portraying him or her in a negative light⁴⁶. A lawyer might try to argue that the child has some bias or motive for making an allegation⁴⁷. For example, in 65% of the transcripts reviewed by researchers, the cross-examining lawyer suggested that the child had an ulterior motive for alleging sexual abuse; the primary motive put forward was to gain revenge on a person whom the child did not like. Attention-seeking and deflecting attention from one's own inappropriate behavior was also raised as possible reasons why a child would erroneously allege abuse. For example, The Report⁴⁸ in the case of a 14-year-old girl who was accused during cross-examination of making a false abuse allegation to cover up rebellious behavior such as smoking, breaking curfew, and unsanctioned interactions with males.

A lawyer might also describe prior episodes of dishonest conduct, or suggest that the witness's general character is untrustworthy. Many children who undergo cross-examination are directly – and often repeatedly – accused of lying⁴⁹. It is also common for lawyers to suggest that a child's behavior during the alleged abuse (e.g.,

⁴⁰ Eichelbaum, T., *Cross-examination, Mauet's fundamentals of trial techniques*, Auckland, New Zealand: Oxford University Press, 199–247 (1989).

⁴¹ Hampton, N. J., Wild, J., *Cross-examination & Introduction to advocacy*, Wellington, New Zealand: New Zealand Law Society, 233–264(2000)

⁴² Davies E., *Supra note 37 at 208.*

⁴³ Elliot, D. M., Briere, J, *Forensic sexual abuse evaluations of older children: Disclosures and symptomatology*, *Behavioural Sciences and the Law*, 12, 261–277 (1994).

⁴⁴ Eastwood, Patton, *Supra note 99 at 79-82.* 110 Davies E., *Supra note 100 at 215-220.*

⁴⁵ *Id.* at 247-250.

⁴⁶ Eichelbaum, *Supra note 40 at 227-230.*

⁴⁷ Brennan M, *The discourse of denial: Cross-examining child victim witnesses*, *Journal of Pragmatics*, 23, 71 -91(1995).

⁴⁸ Westcott H. L., Page M, *Cross-examination, sexual abuse, and child witness identity*, *Child Abuse Review*, 11, 137–152 (2002).

⁴⁹ Brennan M, *Supra note 47 at 85.*

absence of protest) and the disclosure of the abuse (e.g., delay in disclosure) is incongruent with behavior that might be considered appropriate or expected in such situations⁵⁰. These arguments are highly similar to arguments commonly used in cases involving adult rape complainants¹²⁰.

Leading and suggestive questions: In addition to challenging their honesty, motives, and credibility, cross-examining lawyers also ask specific kinds of questions that might pose particular problems for children. While open-ended questions (e.g., *can you tell me everything that happened?*) are associated with a high degree of accuracy¹²¹ and have therefore emerged as the gold standard for interviewing children, these types of questions have been described as disastrous during cross-examination because they allow the witness to provide information that could harm the cross-examining lawyer's case. Instead, because the primary goal of cross-examination is to control the dialogue with the witness⁵¹, the bulk of the questions that are asked are leading¹²⁴; that is, they suggest a desired response⁵²

Complex questions: The kinds of questions that children are asked during cross-examination are often linguistically complex. On the broadest level, cross-examining lawyers often jump from topic to topic without warning so that the witness is unaware of the line of questioning⁵³. This technique is specifically designed to be confusing; legal text books recommend that, to assist in comprehension and recall, lawyers address topics with their own witnesses in a logical and chronological order, but they are encouraged to use indirection when questioning witnesses from the opposing side.

Cross-examination questions are also characterized by complex grammatical structures, including multifaceted questions, negative rhetorical questions and embedded clauses⁵⁴. These questions are often difficult for adults to follow, but they may be completely incomprehensible to a child whose language skills are still developing. Cross-examination questions may even be objectively ambiguous or nonsensical⁵⁵. In turn, children will often attempt to answer a nonsensical question, even when they recognize that the question is silly; they are particularly likely to do so when questions require only a yes or no answer, as is typical during cross-examination.

Finally, cross-examination questions often request highly specific information about the alleged event or perpetrator. For example, children are often asked questions about time, frequency, duration, directions, and measurement. These questions are often beyond children's developmental reach. Developmental differences in memory are also likely to make recall of specific details difficult for children. Children tend to focus on

⁵⁰ Davies E., Supra note 37 at 215-220.

⁵¹ Krulewitz, J. E., Nash, J. E., Effects of rape victim resistance, assault outcome, and sex of observer on attributions about rape, *Journal of Personality*, 47, 557-574 (1979).

⁵² Cassel, W. S., Bjorklund, D. F., Developmental patterns of eyewitness memory and suggestibility: An ecologically based short-term longitudinal study, *Law and Human Behavior*, 19, 507-532 (1995). 122 Eichelbaum, Supra note 103 at 204.

⁵³ Hanna, K., Davies, E., Henderson, E., Crothers, C., Rotherham, C., Child witnesses in the New Zealand criminal courts: A review of practice and implications for policy, Auckland, New Zealand, Auckland University of Technology Institute of Public Policy, 55-70 (2010).

⁵⁴ Brennan M, Supra note 47 at 67-70.

⁵⁵ Zajac, R., Hayne, H., I don't think that's what really happened: The effect of cross-examination on the accuracy of children's reports, *Journal of Experimental Psychology: Applied*, 9, 187-195 (2003). 130 Hughes, M., Grieve, R., On asking children bizarre questions, *First Language*, 1, 149-160 (1980). 131 Waterman, A. H., Blades, M., Spencer, C., Interviewing children and adults: The effect of question format on the tendency to speculate, *Applied Cognitive Psychology*, 15, 521-531 (2001).

(and therefore remember) different information about an event than do adults⁵⁶. Furthermore, peripheral details are less likely to be encoded and are more susceptible to suggestion than central information.

4.2 How Do Children Respond To Cross-Examination Questions?

One way that researchers have attempted to understand how children perform under cross-examination is by examining their ability to comprehend the types of questions that are typically posed. For example, researchers⁵⁷ analyzed over 5000 questions from court transcripts of child sexual abuse complainants, and asked children of the same age to repeat individual questions verbatim. Children's performance on this task was compared to their ability to reproduce questions created by teachers and counselors.

Children's ability to reproduce the cross-examination questions so that the questions maintained their original meaning was lower than their ability to do so for the two other question types. In fact, children were most likely to repeat the cross-examination questions in a manner that made no sense whatsoever. Some attempts to repeat cross-examination questions resulted in questions that were semantically and syntactically correct, but were altered in terms of meaning.

In a similar study⁵⁸, it showed children and adolescents a short video and then interviewed them about it with questions phrased in either lawyerese (i.e., questions containing negatives, double negatives, multiple parts, difficult vocabulary, or complex syntax) or in a simplified form. Consistent with other research models⁵⁹, children under 10 years of age found it very difficult to replicate lawyerese questions verbatim. Furthermore, while 5–7-year-olds found it difficult to retain the meaning of either simple or complex questions, the 9- and 10-year-olds were more likely to retain the meaning of simple questions than complex questions. Interestingly, over 90% of children correctly identified whether or not they had understood simple questions, but when participants believed that they had understood the questions in „lawyerese“ form, only 54% of participants were correct, indicating that children do not necessarily know when they have misunderstood what they are being asked⁶⁰.

In other studies, researchers have used court transcripts to ascertain how actual child witnesses respond to cross-examination. For example, researchers examined transcripts in which 5–13-year-old sexual abuse complainants gave evidence. In the cases that were examined, children undergoing cross-examination seldom requested clarification, often answered questions that were ambiguous or didn't make sense, and showed high rates of compliance with leading questions. Notably, 75% of the children changed at least one aspect of their testimony during cross-examination; many made considerably more than one change, and some retracted their allegations altogether. Many of the changes that children made were preceded by a leading question that challenged the child's credibility (e.g. but that's not really what happened, is it?).

⁵⁶ Nelson, K., Monologue as representation of real-life experience: Narratives from the crib, Harvard University Press, 27-76 (1989).

⁵⁷ Brennan M, Supra note 47 at 67-70.

⁵⁸ Perry, N. W., McAuliff, B. D., Tam, P., Claycomb, L., Dostal, C., Flanagan, C., When lawyers question children: Is justice served?, Law and Human Behavior, 19, 609–629 (1995).

⁵⁹ Brennan M, Supra note 47 at 85.

⁶⁰ Markham, E. M., Realising that you don't understand: A preliminary investigation, Child Development, 48, 986–992(1977).

4.3 The Effect Of Cross-Examination On The Accuracy Of Children's Reports

One reason that cross-examination continues to play such an important role in criminal trials with both children and adults is that many members of the legal profession firmly believe that cross-examination is a vital means of ascertaining the truth; many also firmly believe that cross-examination will not pose any problems for a witness who is telling the truth. But is this actually the case?

A number of laboratory studies have now cast doubt on the assumption that cross-examination leads to more accurate accounts from children. In the first study of this kind, researchers asked 8- and 12-year-old children and adults to watch a film clip of a simulated child abduction.

The next day, each participant was asked 10 direct examination and 10 cross-examination questions about the film. Participants in all age groups were less accurate in response to the cross-examination questions than in response to direct examination questions. The 8-year-olds' overall accuracy rate (41%) was lower than that of the adults and the 12-year-olds (61% and 65%, respectively), although this difference only reached marginal levels of significance. Turtle and Wells findings came as little surprise to many researchers, who had long suspected that cross-examination could exert a detrimental effect on children's accuracy. Because the authors did not provide any detail about the questions that were asked of their participants, however, it is impossible to assess whether their cross-examination questions were an accurate reflection of courtroom questioning.

More recently, researchers have used court transcripts to develop a standardized laboratory analogue of cross-examination. In the first study of this kind, researchers took 5- and 6-year-old children on a surprise trip to the police station and then interviewed them twice about their experiences. The first interview, a basic analogue of direct examination, took place 6 weeks after the event. This interview consisted of a free recall phase followed by four yes-no questions. Consistent with legal processes in numerous jurisdictions around the world, where an early forensic interview is videotaped and later used in place of direct evidence in court, this interview was videotaped. Eight months later, the children were shown their videotaped direct examination interview and were then interviewed with an analogue of cross-examination. The aim of the cross-examination interview was to talk children out of their direct examination responses to the four yes-no questions, irrespective of accuracy. To do this, the interviewer asked four sets of questions; one for each response. In each question set, the cross-examining interviewer first confirmed the child's direct examination response (e.g., In the video, you said that you got to try on handcuffs, didn't you?), and then asked a series of relevant and irrelevant questions, many of which were leading, complex, multi-part, ambiguous, or nonsensical (e.g., The handcuffs would have been pretty heavy, were they?). Next, the interviewer presented the child with a reason for disbelieving the child's earlier response (e.g., I don't think that you did get to try on handcuffs. I think someone just told you to say that. That's what really happened, isn't it?). Several reasons for disbelief were used; most of these were taken directly from court transcripts, while some were based on statements that adults often make when challenging children. The primary dependent measures in the study¹⁴⁶ were whether or not children changed their original responses, and whether any changes that they made were directed towards or away from the truth. As in the courtroom, the vast majority of the children (85%) changed at least one aspect of their earlier reports under

cross-examination. In fact, 33% of children changed all of their previous responses. Moreover, these changes were by no means limited to correcting earlier mistakes. In fact, children were just as likely to change a correct response as they were to correct an error. Overall, cross-examination questioning was detrimental to children's accuracy; in fact, the accuracy of children's cross-examination responses did not differ significantly from chance (50%). This finding held even when only considering the large number of children whose initial reports were 100% accurate.

Since the study⁶¹, researchers have turned their attention to exploring the factors that influence children's responses to this unique style of questioning. Some of these are factors over which the legal system has little or no control, but which could help to identify children who might be particularly vulnerable to cross-examination's negative effects. Others are procedural factors that could help us to generate more developmentally appropriate guidelines and practices for cross-examination.

a) **Age wise Difference in Answering Cross Examination Questions**

While children as young as 2 or 3 years old have been known to testify as witnesses in the criminal justice system, most child witnesses are considerably older⁶². In fact, the 5- and 6-year-old children who participated in the original study⁶³ represent the younger extreme of the typical child witness population. Given this, how might older children answer the kinds of questions that are commonly posed during cross-examination?

To answer this question, the study was repeated with a sample of 9- and 10-year-old children. Their performance differed from that of the 5- and 6- year-olds in several ways.

First, the older children, made fewer changes during cross-examination than did the younger children.

Second, unlike the younger children, the older children were more likely to change an incorrect answer than a correct one. These age-related improvements might reflect the development of skills that help children to accurately remember and report past events⁶⁴ (e.g., language skills) or resist social pressure. Despite age-related improvements, however, 9- and 10-year-old children's performance under cross-examination was significantly compromised. Notably, these older children still changed 43% of their correct responses, leading to a considerable decrease in accuracy⁶⁵.

b) **Individual differences in Answering Cross-Examination Questions**

Although we know that eyewitness accuracy depends largely on the way in which evidence is solicited, individual children's responses to forensic questioning still vary even when these external factors are held

⁶¹ Id. at 45.

⁶² Goodman G.S., *Supra* note 13 at 217.

⁶³ Zajac, *Supra* note 55 at 75-80.

⁶⁴ Bohannon & Stanowicz, 1988; Valian, 2006; theory of mind, Antonietti, Liverta-Sempio, Marchetti, & Astington, 2006; Eisbach, 2004; the ability to learn new concepts, Schneider & Pressley, 1989.

⁶⁵ Zajac, R., Hayne, H., The negative effect of cross-examination on children's accuracy: Older children are not immune, *Applied Cognitive Psychology*, 20, 3-16 (2006).

constant⁶⁶. Understanding some of the individual differences that might influence children's responses to cross-examination questioning is therefore crucial, so that we can identify children who might be particularly vulnerable during cross-examination.

In one study designed to assess the effect of individual differences in children's response to cross-examination questions⁶⁷, researchers examined the role of several psychosocial variables on 5- and 6-year-old children's cross-examination performance. Although cross-examination questioning was detrimental to accuracy in almost all participants, children with low levels of teacher-rated self-esteem, self-confidence, and assertiveness performed particularly poorly. Given that children who have experienced abuse also tend to obtain low scores on these types of measures⁶⁸, these findings raise a concerning possibility: that the same factors that could make children targets for abuse, or may be the consequences of it, could also make children particularly vulnerable in the courtroom.

Preliminary research examining the effect of individual differences in cognitive ability (i.e., IQ, memory, and language ability) indicates that, within the normal range of functioning, these variables contribute little to how children respond to cross-examination questions. At this stage, however, we cannot rule out the influence of cognitive variables altogether; other cognitive processes could influence children's cross-examination performance. For example, executive functions such as working memory and inhibitory control could place children at risk for suggestion in the context of highly suggestive interviews⁶⁹, as they are both directly and indirectly related to children's suggestibility⁷⁰.

Better executive functioning could allow for stronger encoding and retrieval through the suppression of irrelevant stimuli, and/or better ability to inhibit the tendency to agree with misleading suggestions. If executive functioning skills are related to cross-examination performance, then certain child populations could be particularly vulnerable. Children with ADHD, for example, are both more likely to exhibit executive functioning deficits, and at greater risk of abuse/neglect.

c) **Delay in Examination and its Effect on Child's Testimony**

In most cases, a child witness is cross-examined long after the alleged crime has occurred. In an attempt to model the effects of delays of this kind, the cross-examination interview in original analogue studies occurred 8 months after children's direct evidence was pre-recorded. In light of research showing that suggestibility increases with delay⁷¹, however, it was important to consider the possibility that eliminating the delay between

⁶⁶ Bruck, M., Melnyk, L., Individual differences in children's suggestibility: A review and synthesis, *Applied Cognitive Psychology*, 18, 947–996 (2004).

⁶⁷ Zajac, R., Jury, E., O'Neill, S., The role of psychosocial factors in young children's responses to cross-examination style questioning, *Applied Cognitive Psychology*, 23, 918–935 (2009).

⁶⁸ Howing, P. T., Wodarski, J. S., Kurtz, P. D., Gaudin, J. R. Jr., The empirical base for the implementation of social skills training with maltreated children, *Social Work*, 35, 460–467 (1990). 157 Zajac, R., Jury, E., O'Neill, *Supra* note 154 at 69–74.

⁶⁹ Karpinski, A. C., Scullin, M. H., Suggestibility under pressure: Theory of mind, executive function, and suggestibility in pre-schoolers, *Journal of Applied Developmental Psychology*, 30, 749–763 (2009).

⁷⁰ *Id.* at 760–763.

⁷¹ Zaragoza, M. S., Lane, S. M., Source misattributions and the suggestibility of eyewitness memory, *Journal of Experimental Psychology: Learning, Memory, and*

direct- and cross- examination might facilitate children's cross-examination performance.

To test this hypothesis, researchers employed the same basic paradigm, but cross-examined children either 1–3 days or 8 months after their direct examination interview. Despite highly accurate initial reports, children's performance during cross-examination was very poor, even when cross- examination took place very soon after the target event. In fact, children's cross-examination accuracy scores did not differ as a function of delay. These data allow us to conclude that cross-examination questioning impairs accuracy even when it is conducted very soon after the event, before significant forgetting is likely to have taken place. Similarly, researchers observed a negative effect of cross-examination questioning a mere 24 h after participants viewed the film clip⁷².

Of course, delays during criminal investigations are not restricted to those occurring between allegation and trial. Child victims of sexual abuse, for example, may not disclose until many months or even years after the abuse has occurred⁷³. It is possible that by conducting our direct examination interviews very soon after the target event, children in our studies have been inoculated against the impact of delay. In this way, findings using short delays between each phase of the experimental paradigm might well be considered a best-case scenario of children's cross-examination performance.

d) Effect of Question type in Child's Testimony

Up to this point, the studies that we have reviewed have investigated questioning style as a within subjects factor, by comparing children's accuracy before and after cross-examination. It is important, however, to consider the possibility that children's accuracy could decrease regardless of the cross- examination questions that they were asked. Specifically, because cross- examination is never the first interview that children undergo, it is important to consider that children interviewed multiple times can be at risk of a reduction in accuracy simply by virtue of multiple interviews. To disentangle the effects of a second interview from the effects of the cross-examination questions per se, researchers included a group of children who were not cross- examined, but were merely asked the direct examination questions again. They also manipulated child age (5–6 years or 9–10 years), and the delay between direct and cross-examination (1 week or 6 months). Children's accuracy decreased irrespective of age or delay, but delay particularly impacted younger children's performance. Children's accuracy also decreased regardless of the form of the second interview, but the negative impact on accuracy was several times greater following cross-examination style interviewing. These data allow us to place responsibility for the negative effect of cross- examination chiefly, but not exclusively, on the typical types of questions asked.

Cognition, 20, 1–12 (1994).

⁷² Valentine, T., Maras, K., The effect of cross-examination on the accuracy of adult eyewitness testimony, *Applied Cognitive Psychology*, 25, 554–561 (2011).

⁷³ London, K., Bruck, M., Ceci, S. J., Shuman, D. W., Disclosure of child sexual abuse: What does the research tell us about the ways that children tell?, *Psychology, Public Policy, and Law*, 11, 194–226 (2005).

5) Critical Analysis Of Judicial Error In POC SO Cases Due To Procedural Lacunae

Consent under Section 164A CrPC – Many Courts have reasoned that the victim, (or the victim's parents, wherever applicable), did not consent for medical examination and thus a crucial evidence is not available. But what is not considered is the appreciation of the legal right of the victim to consent to medical examination⁷⁴, as per sub-clause (7) of Section 164A, CrPC and not that she was not cooperating with the prosecution.

Hospitals for medical examination – Many a time such cases are largely taken to Government hospitals only. Ideally speaking victims should be taken to any hospital, including private hospital¹⁹⁶, whichever is the nearest, so that medical care and treatment along with evidence collection is immediate and not affected or delayed. However, the victim is often transferred or referred from one hospital to another, for want of proper infrastructural facilities – including the availability of a female doctor, a doctor with special expertise/ specialist, ultrasonography, qualified counsellor, etc. What is not understood is that Section 357C, Cr.P.C, mandates every hospital to conduct such examinations, but despite this, such transfers or referrals still happen. Such practices ignore the hardships incurred by the victim due to travel, loss of confidentiality, loss of privacy, loss of support, compulsions to participate in criminal investigation, etc., despite the trauma, and fail to ensure timely medical care and examination, which is her legal right.

Voluntary reporting to hospitals – Given Section 357C Cr.P.C, Section 27 and Rule 5 of POCSO Rules, it is very clear that there is no need for police requisition⁷⁵, or a court order⁷⁶, in order to conduct a medical examination. Victims of sexual violence are however not even aware of these legal rights. From the CCL NLSIU Studies, it is observed that the medical examinations were carried out only with the police requisition. Advocacy on creating the awareness on this is a priority. This is because often, there is a delay in getting a police requisition, which is possible only after the police complaint is lodged by the victim. The victim's participation in criminal investigation is possible only after she overcomes the social pressure faced due to sexual violence, and by that time, there is often a delay in the medical care and treatment of the victim as well as loss of vital medical evidence.

6) Conclusion

Social change requires not only mobilization, but also creating and sustaining institutions capable of social engineering and transformation. This includes knowledge generation, capacity building, establishing and facilitating networks, and contributing to transformative processes aimed at bringing about changes in policy, law and programmes on child rights. The outputs of such collective wisdom and synergy is likely to culminate in a consolidated road map for the future, which in turn can have an invaluable impact on policy, law and practice related to child sexual abuse at State and National Levels. It is also a significant contribution to ongoing efforts aimed at breaking the silence about child sexual abuse, - triggering hard questions that stakeholders in

⁷⁴ Sec.164 A, Code of Criminal Procedure, 1973.

⁷⁵ Sec. 27, Protection of Children from Sexual Offences, 2012.

⁷⁶ Rule 5, Protection of Children from Sexual Offences Rules, 2020.

the Child Protection and Criminal Justice Systems- such as police, prosecutors, doctors, judges, child protection authorities/functionaries, lawyers/ legal service authorities, State Child Protection Societies, DCPUs, academic institutions, NGOs and the wider community, must reflect on and find answers. These efforts will be that much more productive if the knowledge and solidarity generated is used as a means to trigger attitudinal change, dialogue, accountability and concrete action on the ground. Ultimately, this must result in a shifting of the balance of power that is at the heart of child sexual abuse, empowerment of children aimed at preventing such abuse, and of child victims aimed at enabling them to reclaim their childhood and dignity as equal citizens.

