

INTRODUCTION

- Background
- Objective
- Why POCSO
- Who is Child Under POCSO Act ?
- Overview of the Act.
- The Protection of Children from Sexual Offences Rules, 2020

BACKGROUND

- Before the enactment of POCSO Act, there were no laws to address the sexual offences against children. The large number of sexual offences against children were neither specifically provided under any law nor they were adequately penalized.
- Before passing of this Act, sexual offences were covered under different sections of Indian Penal Code (IPC), 1860, but it did not deal specifically with sexual offences against children. There was no distinction between an adult or a child victim.(except for section 376(3) which deal with rape of a child under 16 years)
- Hence, to fill this gap the POCSO Act was passed by the legislation and came into force on 14.11.2012.
- On 14.11.2022, POSCO Act marked a decade since its enactment. Therefore this workshop on POCSO Act is especially significant today.

OBJECTIVE

- ▶ The object of the Act is provided in the very title itself. Protection of children from sexual offences. The Act seek to bring within it's ambit every kind of sexual offence and the various degrees of sexual assault. Reference to sections 3,5,7,9,11,13,16. The sexual offence thus range from assault, to aggravated sexual, sexual harassment and even includes pornography. Section 20 also casts an obligation on various sections of society such as the media, studios, photographic facilities, hotels, hospitals, clubs, etc to report such matter to the SJPU.
- ▶ The Act provides for establishment of special courts designated for trial of such offences and matters connected therewith for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences.
- ▶ To contribute to the enforcement of the rights of all children to safety, security and protection from sexual abuse

WHY POCSO?

- Child sexual abuse was prosecuted under the various sections of the Indian Penal Code, 1860 like section 375- Rape, section 354- Outraging the modesty of a woman, section 377- Unnatural offences; Section 376(3) IPC provides for punishment for committing rape against a woman under 16 years of age (does not include a male child) .IPC thus could not effectively protect children due to various loopholes including it not being gender neutral. Hence, the Protection of Children from sexual offences Act (POCSO), 2012 was enacted.
- POCSO Act, 2012 is a comprehensive law to provide
 - (i) For the protection of children from the offences of **sexual assault, sexual harassment and pornography.**
 - (ii) To safeguard the interest of the child at every stage of judicial process.
 - (iii) To protect the right of the child in view of his/her protection of right to privacy.

WHY POCSO...contd.

- POCSO Act, 2012 was enacted to make it easier for victims of sexual abuse to seek justice. The Act directs the use of more humane methods of dealing with victims and prohibits judicial victimization of children.
- The said Act provides for more stringent punishment than Indian Penal Code (IPC), 1860, to the accused engaging in unlawful sexual activity.
- POCSO Act, 2012 facilitate adequate legal machinery by setting up special courts for the trial of such offenses and matters pertaining to child sexual abuse crimes.

‘ CHILD’ UNDER POCSO ACT, 2012

- To attract the provisions of POCSO Act, 2012, it is very important that victim falls under the definition of the child provided under the POCSO Act, 2012.
- Section 2 (d) provides for the definition of the “child” as **any person below the age of eighteen years.**
- Definition of the child makes the Act gender neutral and it recognises both male and female as the victim of sexual offences. Unlike the provisions of Indian Penal Code which is gender specific and provides protection only to the female.

OVERVIEW OF THE ACT

- **Section 3 and Section 4 - Penetrative Sexual Assault and Punishment -**
Section 3 of the POCSO Act defines penetrative sexual assault and Section 4 lays down the punishment which was made more stringent by the 2019 amendment.
- Penetrative Sexual Assault means when a person penetrates his penis or any object or any part of his body or he manipulates any part of the body of the child or when he applies his mouth to the private parts of the child or makes the child to do so either to him or to any other person. Whoever commits such penetrative sexual assault shall be punished with imprisonment for a term not less than 7 years but which may extend to imprisonment for life and shall also be liable for fine.

SECTION 5 & SECTION 6

AGGRAVATED PENETRATIVE SEXUAL ASSAULT AND ITS PUNISHMENT

- An offence is treated as “aggravated penetrative sexual assault” when the penetrative sexual assault is committed by the person in the position of trust and authority of the child such as a member of security forces, police officer and public servant, by any staff, principal or the management staff of the hospital or any place of custody or care or protection.
- Whoever commits such penetrative sexual assault shall be punished with imprisonment for a term not less than 10 years but which may extend to imprisonment for life and shall also be liable for fine.

Section 7 and Section 8 – Sexual Assault and Punishment

- Whoever with the sexual intent “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”.
- Whoever commits such penetrative sexual assault shall be punished with imprisonment for a term not less than 10 years but which may extend to imprisonment for life and shall also be liable for fine.

SECTION 9 & SECTION 10- AGGRAVATED SEXUAL ASSAULT AND PUNISHMENT

- “Aggravated Sexual Assault” is said to be committed when the penetrative sexual assault is committed by the person in the position of trust and authority of the child such as a member of security forces, police officer and public servant, by any staff, principal or the management staff of the hospital or any place of custody or care or protection.
- Whoever commits such penetrative sexual assault shall be punished with imprisonment for a term not less than 5 years but which may extend to 7 years and shall also be liable for fine.

SECTION 11 & SECTION 12- SEXUAL HARASSMENT and PUNISHMENT

- When a person with a sexual intent utters a word or makes any sounds or gesture or displays or expose any part of the body, with the intention that the child would hear the sound or sees the part of the body is said to commit the offence of sexual harassment.
- Using a child for pornographic purposes or showing any object to the child in any form or media for pornographic purpose is also a punishable offence under this Act.
- Whoever commits sexual harassment upon a child is punished with imprisonment for a term which may extend to 3 years and shall also be liable for fine.

SECTION 17 and 18 ABETMENT OF AND ATTEMPT TO COMMIT AN OFFENCE

- Person instigating, Engaging or intentionally aiding a child by wilful misrepresentation, coercion, by fraud or deception etc in order to commit any offence is said to have abetted an offence.
- Whoever abets any of the offences provided under this Act,
 - (i) If the act abetted is committed in consequences of abetment, shall be punished with punishment provided for the offence.
 - (ii) Whoever attempts to commit any offence under this Act or cause such offence to be committed and in such attempt does any act towards the commission of an offence shall be punishable with imprisonment for a term one- half of the longest term of imprisonment provided for that offence

- Section 19 of POCSO makes it compulsory for anyone, including authorities such as hospitals, to inform the police in case they come across any incident of alleged sexual assault on a minor, or those below 18 years, irrespective of consent. As per the law, consent of a minor is immaterial and the police is bound to register an FIR against the “accused”.
- The Supreme Court in the case of **State of Maharashtra vs Dr. Maroti s/o Kashinath Pimpalkar**, CrA 1874 of 2022 observed that non-reporting of sexual assault against a minor child despite knowledge is a serious crime. non-reporting of such a crime as serious and in view of the position obtained from a conjoint reading of Sections 19 (1) and 21 of POCSO Act, such persons are also liable to be proceeded with in accordance to law.

REVERSE BURDEN OF PROOF

- Section 29 of POCSO Act enumerates specific offences under the Act on which the Special Court shall presume that the accused has committed, abetted or attempted to commit the offence, unless the contrary is proved. This is in contravention of the “innocent until proven guilty” principle.
- A reverse onus clause is one that places the burden of proof on the accused rather than on the prosecution. The court held that a conviction merely on the basis of presumption would violate an individual’s right to life and right against self-incrimination, both of which are constitutionally guaranteed fundamental rights. Presuming the innocence of an accused forms the cardinal principle of criminal jurisprudence. However, law in an exceptional circumstances presume the guilt of an accused.

- The Section has adequate built-in safeguards to prevent the misuse and misapplication of the provision.
- The **Kerala High Court in Justin@Kenith v. Union of India** WP (C) No. 15564 of 2017 (U) upheld the constitutionality of reverse onus clause under the POCSO Act and stated that presumption of an guilt of an accused commences only once the prosecution has proved ‘foundational facts’ of the case. Foundational facts in a POCSO case include – proof that the victim is a child, that the alleged incident has occurred, and whenever physical injury is caused, supporting it with medical evidence. Thus, only once the court is confident that the alleged act took place does it presume the guilt of the accused and the accused can then rebut this presumption.

DETERMINATION OF AGE OF CHILD

- **Section 34** of the POCSO Act provides for procedure in case of offence by child and determination of age by Special Court. According to Section 34 (1) of the POCSO Act where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015.
- **Section 94 and Rule 12** of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for brevity hereinafter referred to as the JJ Act) provides for presumption, determination of age of child and the procedure of such determination. The Hon'ble Supreme Court in *Jarnail Singh v. State of Haryana (2013)* has held that Rule 12 of the JJ Rules, 2007 is also applicable in determining the age of a child who is a victim of a crime.

- **Section 94(2)(iii)** of the JJ Act provides that in case the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee of the Board or, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-
 - i) The date of birth certificate from the school, or matriculation or equivalent certificate from the concerned examination Board, if available and in the absence thereof;
 - ii) The birth certificate given by a corporation or a municipal authority or a panchayat;
 - iii) and only in the absence of (i) and (ii) above shall age be determined by a ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

- The Hon'ble Supreme Court in *Mahadeo v. State of Maharashtra (2013)* has held that, “Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3) (a)(i) to (iii), the medical option can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can rightly be followed by the Courts for the purpose of ascertaining the age of a victim as well.”
- The Hon'ble High Court of Sikkim in *Mangala Mishra @Dawa Tamang @Jack v. State of Sikkim (2018)* has held that if in the first instance the date of birth from the school or Matriculation Certificate of the child is unavailable then resort can be taken to a Birth Certificate given by a Corporation or a Municipal Authority . It is only thereafter that the Prosecution can rely on the Ossification test.

- In *Brij Mohan Singh v. Priya Brat Narain Sinha* (1965) the Hon'ble Supreme Court has held that for determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents.

Required Legal Parameters to be established for proof of documents mentioned under Section 94 of the JJ Act, 2015

- **Section 74** of the Indian Evidence Act defines what public documents are which includes documents forming the acts, or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country and public records kept in any State of private documents.
- **Section 35** of the Indian Evidence Act requires the following conditions to be fulfilled before a public document can be held to be admissible-
 - The document must be in the nature of an entry in any public or other official book, register or record;
- It must state a fact in issue or relevant fact; and

- The entry must be made by a public servant in discharge of his official duties, or in performance of his duties. [*State of Bihar v. Radha Krishna Singh & Ors (1983)*]
- Such entries must however be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty. [*Mangala Mishra v. State of Sikkim (2018)*].

Difference between Admissibility and probative value of a document

- In *Madan Mohan Singh and Ors v. Rajni Kant and Anr* (2010) 9 SCC 209 the Hon'ble Supreme Court has held that a document may be admissible but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. Such documents may be admissible under Section 35 of the Indian Evidence Act but the Court has a right to examine their probative value.
- In *Updesh Kumar v. Pratihvi Singh* (2001) and *State of Punjab v. Mohinder Singh* (2005), the Hon'ble Supreme Court has held that if a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61 of the Indian Evidence Act by examining the person having

special means of knowledge, authenticity of date, time, etc., mentioned therein.

- The Supreme Court has explained in a catena of judgments that even if the entry has been made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

EXPERT'S OPINION

- **Who is an expert?**

Section 45 of Indian Evidence Act, 1872: Opinions of persons especially skilled upon points, like that of science are called expert.

- **What is DNA?**

“...means: Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine.”

Opinion of DNA Experts: Its Admissibility

- Indisputably, the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872.
- So far as DNA evidence is concerned, there is no specific regulation or guidelines regarding its admissibility. Therefore, discretionary power regarding its admissibility is upon the Court and it's the Court who decides whether the DNA evidence is accurate and proper.
- Admissibility of DNA evidence depends upon a question *whether the method of collection and testing is proper or not.*

Negative DNA Test Report in Sexual Offences

- In leading case of *Sunil vs. State of Madhya Pradesh* Apex Court observed “...a positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e., favoring the accused or if DNA profiling had not been done in a given case, **the weight of the other materials and evidence on record will still have to be considered.** It is to the other materials brought on record by the prosecution that we may now turn to.”
- *Swamy B. v. State*, Karnataka HC held, negative DNA analysis would not absolve the petitioner in entirety for the offences so alleged. Paternity may have been in doubt due to the analysis. **The alleged act has not at all happened cannot be the inference that can be drawn due to a DNA sample coming in favor of the petitioner...**

The Two Finger Test

- The unscientific and traumatising two- finger test is still being used as part of medical examination in India. The test involves a medical practitioner inserting two fingers into the vagina of a rape survivor in an attempt to determine if the hymen is broken and as well to “test the laxity of the vagina”. The test is often used to declare rape survivors as “habituated to sex”. The medical evidence of past intercourse is used to cast doubt on the rape allegation either to suggest a survivor lied about the rape, to imply that the rape wasn’t harmful or to suggest the moral impropriety of the survivor and therefore her lack of entitlement to justice.
- The Honour degrading treatment and health should be of paramount consideration while dealing with gender-based violence the Hon’ble Supreme Court in *Lillu v. State of Haryana* (2013) held that rape survivors are entitled to legal recourse that does not retraumatise them or violate their physical or mental integrity or dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman

- In March 2014, the Ministry of Health & Family Welfare, Government of India issued guidelines “*Guidelines & Protocols: Medico-legal care for survivors/victims of sexual violence*” for the care of survivors/victims of sexual violence. The Guidelines specifically state that Per Vaginum examination commonly referred to by laypersons as ‘two-finger test’, must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per Vaginum examination can be done only in adult when medically indicated. However the guidelines have not been adopted across India nor have they been enforced.

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES, 2020

The POCSO Rules, 2020 lays down the procedure and measures relating to care protection and support of child victims at every stage of the judicial process in order to create a safe and child friendly environment. It also incorporates rehabilitation and payment of compensation to the victim.

- **Rule 3** mandates both the Central and State Governments to carry out appropriate awareness generation and capacity building under the Act, dissemination of information at airports, railway stations and other public places. Moreover it provides for the formulation of a ‘Child Protection Policy’. This provision is instrumental in terms of prevention as well as cure.

- **Rule 4** provides for the procedure regarding care and protection of child. The duties of the key authorities are:

1.	SPECIAL JUVENILE POLICE UNIT	<ul style="list-style-type: none">· Record information· Preliminary assessment· Report case within 24 hours· Provide medical aid to the child· Keep parents/guardian informed
2.	Child Welfare Committee	<ul style="list-style-type: none">· Placement of child if required· Provide for support persons working in the field of child rights or child protection
3.	District Child Protection Unit	<ul style="list-style-type: none">· Maintain Register with names, addresses and other contact details of interpreters, translators, experts, special educators and support persons for the purposes of the

4.	Special Court	<ul style="list-style-type: none">· Conduct in-camera trial· Ensure child friendly atmosphere· Respect dignity of the child· Maintain the anonymity of the child· Record evidence of the child within 30 days· Complete trial within 1 year
5.	Support Person	<ul style="list-style-type: none">· Maintain confidentiality of all information relating to the child· To keep the parents/guardian informed regarding the proceedings of the case· Inform the child about his/her own role in the judicial process

6.	State Government	<ul style="list-style-type: none"> · Designate a court as a special court · Appoint special public prosecutor · Create awareness about the Act · Impart training to the authorities · Frame rules and guidelines
7.	State Commission for Protection of Child Rights	<ul style="list-style-type: none"> · Monitor implementation of the Act · Reporting on the implementation of the Act by way of separate chapter in its annual report

Rule 6 of the POCSO rules provides for medical aid and care of child victim. In case the child is in need of emergency medical care then such medical care is mandatorily to be rendered in such a manner as to protect the privacy of the child and in the presence of the parent/guardian or any other person the child trusts. No legal or magisterial requisition or other documentation shall be a pre-requisite in rendering such medical care to a child by any medical practitioner, hospital or other medical facility.

Rule 7 of the POCSO Rules provides for legal aid and assistance to the child in accordance with the provisions of the Legal Services Authorities Act, 1987. For this the Child Welfare Committee is to make a recommendation to the District Legal Services Authority.

Rule 8 of the POCSO Rules for **specific relief** or immediate financial assistance in case of any contingency or essential needs, to be sanctioned and provided by the concerned Child Welfare Committee.

VICTIM COMPENSATION AND REHABILITATION

- **Section 33(8)** of the POCSO Act, 2012 provides that in appropriate cases in addition to punishment, the Special Court may direct payment of compensation to the child for any physical/mental trauma caused to the child or for immediate rehabilitation.
- **Rule 9** of the POCSO Rules deals with the procedure and parameters in providing compensation to the child victim. The Special Court may in appropriate cases on its own or on an application pass an order for interim compensation to meet the needs of the child for relief or rehabilitation at any stage after registration of the First Information Report.

- **Rule 9 (3)** enlists the various parameters , factors to be considered by the Special Court in deciding such compensation such as- gravity of the offence, expenditure incurred/likely to be incurred on medical treatment, loss of educational opportunity, financial conditions.
- **Rule 9 (4) and (5)** states that after the amount is decided/granted by the Special Court, it is to be disturbed from the Victims Compensation Fund or such other scheme by the legal services authority within 30 days of receipt of such order.

Challenges to implementation of POCSO Act, 2012

Delay in reporting of the cases : It is well known that the cases of child sexual abuse are either not reported or there is a delayed in reporting. Owing to the nature of the case it is understandable the hesitancy faced in reporting such matters. Most of the case are reported only after it is found that the child is already pregnant. So fear of stigmatization is one of the main reasons for such delays. Hence the Hon'ble apex court has in a plethora of cases held that mere delay in lodging the First Information Report cannot be used as a ritualistic formula for doubting the prosecution case. [*Dildar Singh v. State of Punjab (2006)*] Kerala High court in **XXX v. State Of Kerala & Anr.** CRL.A NO. 594 OF 2021 held that the delay in reporting sexual offences should not be viewed as strictly as in other offences and that it would only become fatal in a case where the authenticity of the prosecution is uncertain.

Withdrawal of cases/ remaining silent: Often, the victims are unable to handle the overwhelming questions put forth by the police. The interview turns into an interrogation forcing the victim to withdraw or remain silent.

- **Consensual Sexual Relationship** : Sexual contact between two adolescents or between an adolescent and an adult are considered illegal under the POCSO Act 2012. There is no exception granted in the Act under which an act of sexual encounter with a person under 18 is an offence irrespective of consent or the gender or marriage or age of the victim/the accused. Delhi HC in **AK v State Govt. Of NCT of Delhi and anr.** 2022 LiveLaw (Del) 1077 held that POCSO Act meant to protect minors from sexual abuse and not not criminalize consensual romantic relationship of young adults. In Sikkim almost 70-75 % of the cases are arising out of consensual romantic relationship. The Bombay High Court on 15th November 2022 in the case **Faizan Wahid Baig vs The State of Maharashtra** granted bail to the accused after noting that the two were in a relationship and the survivor, though a minor, was capable of understanding the consequences of her act.

- **Delay in disposal** Delay in disposal of cases is also one of the hurdles in proper implementation of the POCSO Act, 2012. In Sikkim even though the disposal rate of POCSO case is much faster as compared to other states we are nevertheless faced with many of the same practical difficulties face by other courts in the country as non-availability of the victim, family due to fear of stigmatization moves away, accused absconds, witnesses unavailable, sometimes the victim has just delivered a child etc. Further although Special Courts have been set up the Special Judge presides over several other courts and tribunals, sessions, family court, fast track court, MACT, Consumer, Commercial Court, PC Act etc. Hence cannot devote time specifically to POCSO cases resulting in delay in disposal of such cases. In our state disposal of POSCO cases can range from 5/6 months to 4 years.

SUGGESTIONS

- All the stakeholders inclusive of police, medical Officers and court needs to be sensitised towards the child friendly procedures to be adopted when handling a child who is a victim of a sexual offence as provided under the POCSO Act and Rules. Our handling of the child be it at the police station, hospital, CWC office, must instill in the child a sense of security and reassurance e.g patience, friendly countenance,.....
- Panchayat members and teachers can play a significant role in protection of children from sexual abuse and exploitation. Need for protection of the child includes the need for ensuring the identity of the child is not disclosed. This need s to be adhered to at all levels, police stations, courts, hospitals, schools. e.g 1) headmaster held a meeting in the school hall 2) punishment meted out to all boys of all senior classes