

HANDBOOK FOR PUBLIC PROSECUTORS
ISSUES UNDER THE POCSO ACT: A COMPILATION
OF LEGAL CASES AND FACTS



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About the Handbook

This handbook is meant for enhancing the capacities of Public Prosecutors who deal with cases of child sexual abuse. It covers a set of topics that affect investigation and trial in cases of sexual violence against children as also the rights of the victims guaranteed in law. Relevant judgements of the Supreme Court of India and various High Courts have been compiled and presented for the benefit of Public Prosecutors, hoping that special laws like the POCSO Act receive special attention and the case law shared is used for ensuring child-sensitive handling of the victims and their cases.

HAQ: Centre for Child Rights has been supporting individual cases of child abuse and exploitation since the year 2002. With time, the number of requests for support has only increased. Over the last six years, HAQ has reached out to over 800 child victims of sexual abuse with legal aid and psychosocial support. Psychosocial support provided through the project comprises “restorative care” that is integral to “access to justice”.

Data presented in the said document is based on the evidence derived as part of the action research work undertaken by HAQ during the period - January 2013 – September 2019.

We thank Dhanpal for meticulous data entry, collation and checks that allowed us to add some data insights into this document. We are also grateful to Advocate Chandra Suman and Advocate Ashish Kumar to help with some of the critical judgements highlighted in the document.

Bharti Ali
Co-Founder & Executive Director

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LIST OF ABBREVIATIONS

| | |
|---------------------------------|--|
| % | per cent |
| & | and |
| ACP | Assistant Commissioner of Police |
| AIR | All India Reporter |
| ALLMR | ALL MAHARASHTRA LAW REPORTER |
| BomCR(Cri) | Bombay Cases Reporter (Criminal) |
| Cr. Rev. | Criminal Revision |
| CR.L.P. | Criminal Leave Petition |
| CrPC | Criminal Procedure Code |
| Cri LJ | Criminal law Journal |
| CrI | Criminal |
| CrI. A. | Criminal Appeal |
| CrI. MP (M) | Criminal Miscellaneous Petition |
| CRL. REF. | Criminal Reference |
| CRL.M.C. | Criminal Miscellaneous Case |
| CrI.Rev.P. | Criminal Revision Petition |
| CWC | Child Welfare Committee |
| Delhi Witness Protection Scheme | Delhi Witness Protection Scheme, 2015 |
| DHC | Delhi High Court |
| DLSA | District Legal Services Authority |
| DLT | Delhi Law Times |
| DSP | Deputy Superintendent of Police |
| Ex. | Exhibit |
| FIR | First Information Report |
| FSL | Forensic Science Laboratory |
| GLT | Guwahati Law Times |
| HAQ | HAQ: Centre for Child Rights |
| i.e. | such as / that is |
| IEA | The Indian Evidence Act, 1872 |
| IPC | Indian Penal Code |
| IO | Investigating Officer |
| JCC | Journal of Criminal Cases |
| JCR | Jharkhand Cases Reporter |
| JJ Act, 2000 | Juvenile Justice (Care and Protection of Children) Act, 2000 |
| JJ Act, 2015 | Juvenile Justice (Care and Protection of Children) Act, 2015 |
| JJ Rules, 2007 | Juvenile Justice (Care and Protection of Children) Rules, 2007 |
| JJ Rules, 2016 | Juvenile Justice (Care and Protection of Children) Model Rules, 2016 |
| JT | Judgement Today |
| KHC | Karnataka High Court |
| MLC | Medico-Legal Case |
| MLJ | Madras Law Journal |

| | |
|-------------|---|
| Ms. | Miss |
| NCT | National Capital Territory |
| No. | Number |
| Ors. | Others |
| para | Paragraph |
| POCSO Act | The Protection of Children from Sexual Offences Act, 2012 |
| POCSO Rules | The Protection of Children from Sexual Offences Rules, 2012 |
| PW | Prosecution Witness |
| Ref. | Reference |
| Rs./INR | Rupee |
| S.L.P. | Special Leave Petition |
| S/o | Son of |
| SC | Supreme Court |
| SCALE | Supreme Court Almanac |
| SCC | Supreme Court Cases |
| SDPO | Sub-Divisional Police Officer |
| SHO | Station House Officer |
| SLSA | State Legal Services Authority |
| TIP | Test Identification Parade |
| U.S.A. | United States of America |
| u/s | Under Section |
| UN | United Nations |
| v. | versus |
| VWDC | Vulnerable Witness Deposition Complex |
| WP | Writ Petition |

CHAPTER 1

DELAY IN REGISTRATION OF FIR

There is a need for a change in the functioning of the criminal justice system when dealing with a special law meant to protect children...

In a case of sexual assault of a 10 year old by a neighbour, a delay of two days in registration of the FIR was used by the court to infer that the accused was being falsely implicated and hence deserved anticipatory bail.

Questions for consideration:

- *Should delay in registration of FIR in cases of sexual crimes against children really matter?*
- *Can children be expected to report sexual abuse immediately?*
- *Can families be expected to file a criminal case immediately when most accused are persons known to the child/family and several other factor such as social stigma, shame and guilt that weigh on the child/family's minds continuously?*

In this chapter, some of these issues have been explored in detail to suggest how the prosecution and lawyers representing child victims need to approach the arguments around delay in registration of FIR

Things to know and understand

The First Information Report (**FIR**) is one of the most pertinent documents in our country's criminal system as it lays down the foundation of any criminal procedure right from the beginning of the investigation and collecting evidences. Thus, it is a set principle that delay in registering the FIR delays the initiation of the investigation and the criminal procedure. ***In addition to that, in practice, the delay in FIR also becomes the most probable defence for the accused with the possibility of improvisation and addition in the real turn of events. However, it is not possible or convenient for a victim to report to the police immediately and get an FIR registered, especially in when it comes to sexual offences committed against children.***

FIR is a written document prepared by the police upon the receipt of the information regarding the commission of a cognizable offence. The provision of lodging FIR has been mentioned under Section 154 of the Code of Criminal Procedure (CrPC) which states that:

“154. Information in Cognizable Cases:

*(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf
....”*

After the Criminal Law Amendment Act, 2013, a new proviso has been added to the aforesaid Section, which states that:

“In the event that person against whom an offence under section 354/354A/354B/354C/354D/376/376A/376B/376C/376D/376E/509 of the IPC is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person’s choice, in the presence of an interpreter or special educator, as the case may be.”

New questions that emerge:

- *Does delay in filing of FIR become a probable defence for the accused?*
- *Can the victim in all cases file an FIR immediately upon commission of offence?*
- *Are there any factors i.e. social stigma, closeness of the accused to the victim etc. that could be the cause for the delay in lodging of FIR?*

What we often forget...

Sexual abuse of children remains shrouded in shame, guilt, family honour and hence is seldom reported. Besides, because of the history of “justice delayed being justice denied”, families have very little faith in the legal system.

For children, it is even more difficult to speak out and share as very few have the ‘vocabulary’ to describe what has happened to them. Besides shame, fear remains a major factor. More often than not the abuser is a known person, whom the child trusts and even loves.

The normalisation of abuse in society has become so endemic that it is only when the abuse is perceived to be gruesome and serious, involving penetration or bodily touch, that both children and families pay attention and speak up or report. This is unfortunately true of not just families, but also caregivers, police and other authorities.

Time and again, the Supreme Court and various High Courts, through their judgments, have set some grounds to justify the delay in registration of *FIR* in cases of sexual offences.

Delay in registration of FIR may be justified in light of the evidence and circumstances of the case

The Supreme Court, in **Ramdas & Ors. v. State of Maharashtra**, (2007) 2 SCC 170, has observed that:

“In the light of the totality of the evidence, the court has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them.”

With satisfactory explanation to the delay, the prosecution’s case cannot be discarded or disbelieved merely on the grounds of delay in FIR

‘Delay in filing of FIR cannot be used as a ritualistic formula to doubt the authenticity of the prosecution evidence’

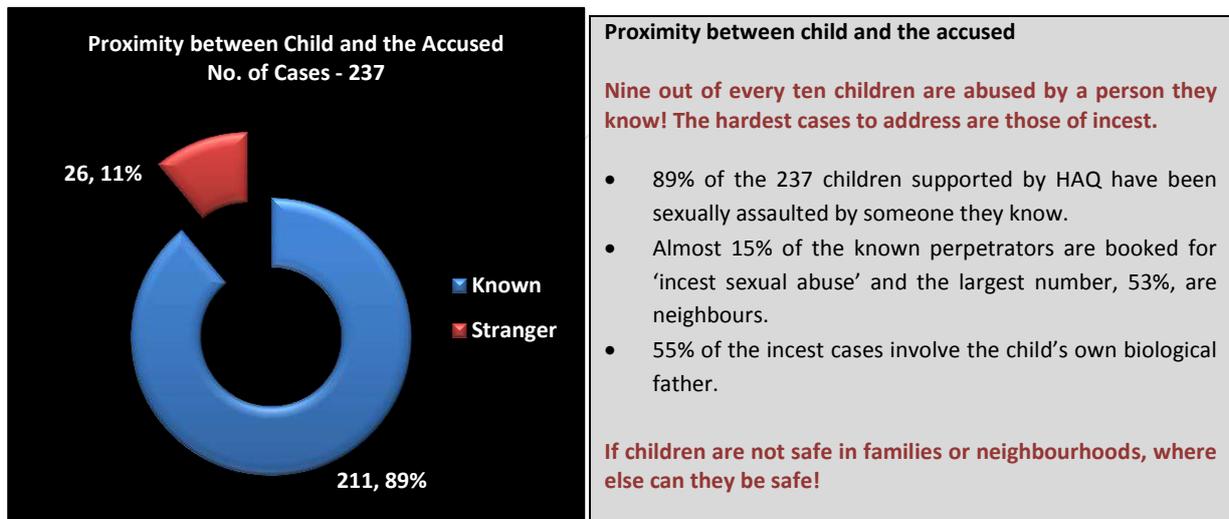
In the case of **State of Himachal Pradesh v. Gian Chand**, (2001) 6 SCC 71, the Supreme Court has rightly held that delay in filing of *FIR* cannot be used as a ritualistic formula to doubt the authenticity of the prosecution evidence. When an explanation for delay is offered it is the duty of the courts to analyse if the same is satisfactory or not. In the event the prosecution fails to establish the reason for delay in lodging of the *FIR*, it should be checked whether there is a possibility of embellishment or exaggeration in the version of the prosecution.

“12. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.”

Delay per se cannot be a mitigating circumstance for the accused

In the case of **State of Himachal Pradesh v. Shree Kant Shekari**, AIR 2004 SC 4404 the Supreme Court reiterated the aforesaid findings rendered in the case of *State of Himachal Pradesh v. Gian Chand* (supra) and further held that in any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved.

Other reasons behind the delay in lodging of FIR include social context of the victim, community pressure imposed on her, her dependence on accused (mostly in incest cases)



- Source: Factsheets based on ongoing study of 237 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2019.

In the case of **State of Karnataka v. Manjanna**, AIR 2000 SC 2231, the Supreme Court placed importance on understanding the social context with respect to the delay in lodging of FIR. Relying on the judgment of **State of Punjab v. Gurmit Singh and Ors.**, 1996 Cri LJ 1728, the Supreme Court observed that:

“15. ... In our opinion, there was no delay in the lodging of the FIR either and if at all there was some delay, the same has not only been properly explained by the

prosecution but in the facts and circumstances of the case was also natural. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of the sexual intercourse offence is generally lodged...”

Thus, social stigma, community pressure, dependence on the perpetrator are considered valid explanations to the delay in registration of FIR in cases of child sexual abuse. This has been further upheld by a division bench of the Hon’ble Supreme Court of India in **Deepak v. State of Haryana**, (2015) 4 SCC 762 and recently by the Hon’ble High Court of Sikkim in **Sancha Hang Limboo v. State of Sikkim**, III (2018) CCR 295.

In the case of **Jnanedar Nath Das v. State**, 2016 (1) JCC 414, the mother of the victim, aged about 5 years old, had reported the incident in March 2013 regarding the incident of aggravated sexual assault upon the child in winter season. The child, in her statement under Section 164 CrPC and her chief and cross-examination was found to be consistent and her version was even corroborated by other witnesses as well. Keeping in mind the vulnerable age of the child victim and circumstances, the High Court of Delhi examined the social aspects/reasons behind the delayed reporting an offence of sexual assault by the victim.

On the point of delay in FIR, the High Court held that:

*“12...Delay in lodging the FIR is inconsequential. The victim, a child aged around five years was a student in the school. She was to take her exam there. It needs a lot of courage to report such an incident against the Principal or her relatives. **In large number of cases, children are abused by persons known to them or who have influence over them. The victims often keep mum due to social stigma, community pressure or total dependency on the perpetrator etc. Parents choose not to report such crimes to protect the child from social stigma.**”*

Other compelling circumstances with respect to delay in lodging of FIR

In the case of **Tulshidas Kanolkar v. The State of Goa**, (2003) 8 SCC 590 the accused had taken advantage of the victim’s underdeveloped mental faculties and raped her on multiple occasions. The victim unaware of the actions and because of her mental state, could not convey the accused’s wrongdoings immediately. When her parents saw the victims swollen legs, she was taken to the hospital where the fact of her pregnancy was disclosed. The defence questioned the delay in lodging of FIR.

While deciding the said case, the Supreme Court took into consideration the facts due to which the delay occurred and stated that *'the unusual circumstances satisfactorily explained the delay in lodging of the first information report'*. Due to the victim's underdeveloped mental faculties, the victim *'was totally unaware of the catastrophe which had befallen to her'*, however, this does not weaken the prosecution's version.

"5. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle."

In cases of sexual crimes, particularly incest, an in depth examination into the circumstances of the victim and her/his mother, their vulnerable position, dependence on the accused, threats or any other fears become quite pertinent and crucial

In the case of **Gaya Prasad Pal v. State**, 235 (2016) DLT 264, the Delhi High Court has rightly adopted the views taken up by the Supreme Court in the case of *State of Himachal Pradesh v. Gian Chand* (supra), and examined the delay in reporting of the offence. In this case, the prosecutrix (a minor girl) was being sexually abused by her step father since she had turned 11 years. There had been several incidents of sexual assault, but in one incident, the step father committed aggravated penetrative sexual assault upon the minor girl due to which she got pregnant. The matter came to light when the minor girl was taken to the doctor for a check-up and upon conducting the ultrasound, her pregnancy was discovered. It was then that the FIR was lodged. The trial court, after conducting the trial and examining all the evidences, convicted the step father for the offences committed under Section 376/354 of the Indian Penal Code (IPC) and Section 6 of The Protection of Children from Sexual Offences Act (POCSO Act) 2012 (POCSO Act). Thereafter, the accused filed an appeal in the High Court of Delhi challenging the judgment passed by the trial court. Although, there was the element of delay in FIR, the High Court went into the details to examine the facts and circumstances of the case. The High Court in para 22 and 23 of its judgment mentioned that:

***"22..... Indeed, there has been a delay on the part of the PW-2 (prosecutrix) in bringing the facts out but the delay in the present case has been properly explained.....
"meri mummy toot jaegi aur meri bhai ka kya hoga" (my mother would be crest fallen and what would happen to my brother), "ki agar mera papa jail jaega to meri mummy aur meri bhai ka kya hoga" (what would happen to my mother and brother if my father were to go to jail) and "main sab dukh maan leti hoon par mein mummy ko dukh mein nahi dekhna chahti" (I can take all miseries upon myself but I cannot see my mother being in misery) - coupled with her narration about the threats***

extended by the appellant to kill her (if she were to reveal) collectively are sufficient, in our opinion, to hold that the delay in reporting cannot result in the word of PW-2 being doubted as a doctored one.

*23.... Pertinent to add here that, even after the pregnancy had been detected and PW-3 was receiving counsel and advice not only from her employer (PW-4) but also from professionals engaged in such services (PW-16), there was hesitation on the part of the mother in taking recourse to legal action. **She took ten days in resolving what must have been her inner conflict before approaching the police, with the assistance of PW-4 and PW-16. This delay, in the facts and circumstances, also is no reason why the credibility of PW-2 should get adversely impacted.***

Based on HAQ's experience...

The tragedy of incest cases based on HAQ's experience over the years shows that inaction and lack of support from the mothers is the reason why cases fail to go forward in the justice system.

Incest sexual abuse, even by the biological father, cuts across class - HAQ has addressed cases from slums as well as high end gated apartment blocks. In both cases, the mothers convinced the girls to withdraw from the legal proceedings for the 'larger good of the family'.

The legal provision of mandatory reporting does not necessarily help in such cases as even children do not want their father or brother or grandfather to go to jail. What they want is an assurance that it will not happen again or they simply want the abuser to leave the house and go away.

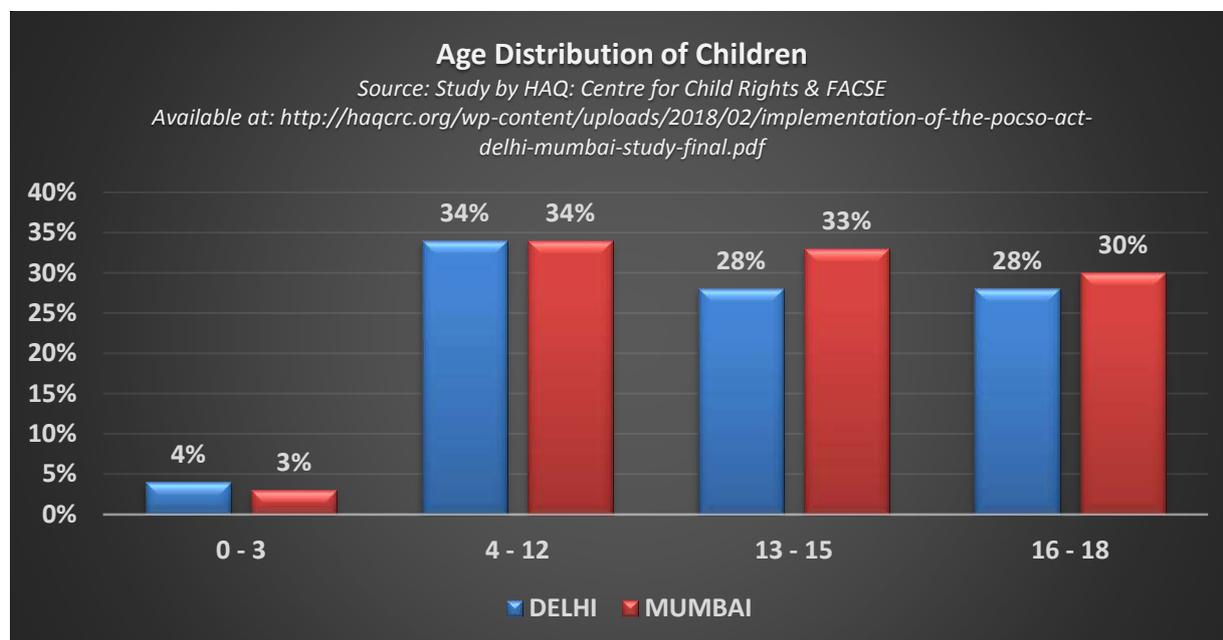
It certainly leaves us with the question as to whether mandatory reporting should necessarily mean recourse to legal action or could it also mean relief other than legal action?

The other related question is whether restorative justice practices can be adopted in such cases of incest sexual abuse where legal action is taken, and is India ready for it?

What can be said with certainty at this stage is that if a mother takes the plunge, she must be supported financially to not only sustain the legal battle, but most importantly sustain her family! Linking up such women and their families to government schemes and programmes could go a long way, provided such linking does not label them as victims.

CHAPTER 2

AGE DETERMINATION OF THE PROSECUTRIX/VICTIM OF CRIME



**Age distribution of children by Gender
 Delhi & Mumbai Combined**
 Source: Study by HAQ: Centre for Child Rights & FACSE
 Available at: <http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>

| Age group | Females | Females as % of all children | Males | Males as % of all children |
|----------------|------------|------------------------------|-----------|----------------------------|
| 0 to 3 years | 33 | 3.8 | 3 | 0.3 |
| 4 to 12 years | 273 | 31.7 | 34 | 3.9 |
| 13 to 15 years | 241 | 28.0 | 20 | 2.3 |
| 16 to 18 years | 247 | 28.7 | 10 | 1.2 |
| Total | 794 | 92.2 | 67 | 7.8 |

Questions for consideration:

- Does the age of the victim matter in cases of sexual abuse?
- What are the parameters used by the courts to determine age of the victim?
- Has the law evolved? Are those parameters still valid in today's time?

What is age determination and why is it relevant under the POCSO Act?

Age determination is the backbone of all criminal matters involving children as victims or as children in conflict with the law. Age of the prosecutrix /victim is crucial to establish the criminal liability of the accused under POCSO Act. Access to justice thus depends on not just the outcome of age determination, but also the process of age determination.

Generally, in cases of crimes against children, the prosecution as well as the accused try to prove the age of the prosecutrix on the basis of voter I-card, family ration card, school records, birth certificate issued by local bodies or on the basis of oral testimony of victim or his/her parents, or the age disclosed to the police or doctors, and these days even on the basis of Aadhar Card.

In this scenario, it is natural for the prosecution as well as the accused to press upon the documents that suit them. In the light of the fact that the Indian parents are not so literate or serious about the date of birth of their children, and birth certificates are often not available, age determination through other means becomes critical.

The matter becomes more complicated, when the trial court rejects the documents on grounds of discrepancy regarding the date of birth in various documents and orders for the medical examination of the victim for age determination. The medical examination for the determination of age not being a perfect science, adds to the confusion, as it does not provide the exact age of the person concerned. Instead, it gives the age of a person in ranges varying from one to two years or even more, depending on the technology used e.g. more than 14 and less than 16, or more than 16 and less than 18, or more than 18 and less than 25, etc. The Supreme Court and various High Courts, time and again through their judgments, have clarified the issue of age verification of the victim, which is discussed in the later part of this chapter.

During the course of the present chapter, we will be going over the important aspects related to age determination in POCSO cases.

Does the POCSO Act provide for provisions with respect to determination of age?

As we are dealing with issues of age determination of the victims of crime under the POCSO Act, it becomes relevant to look into the provisions under the said act dealing with age determination. **Section 34 (2) of the POCSO Act** requires the Special Court to satisfy itself about the age of the child and record in writing its reasons for arriving at a conclusion in this regard.

34. Procedure in case of commission of offence by child and determination of age by Special Court-

(i) ...

(ii) **If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.**

(iii)

The question which now arises is that on what basis will the Special Courts satisfy itself on the age of the victim?

As the provision of Section 34(2) of the POCSO Act does not mention the manner in which the special courts shall determine the age of the victim, it becomes relevant to refer to statutes which are similar (in intent and essence) to the act in question. In this regard, it is pertinent to examine the rules of statutory interpretation, which provide that statutes must be read as a whole in order to understand the words in their context. Problem arises when a statute is not complete in itself i.e. the words used in the statute are not explained clearly. ***Where a statute is not exhaustive, or where its language is ambiguous and uncertain, for the purpose of ascertaining the object that the legislature had in view in using the words in question, an external aid reference may be looked into.¹ Extension of this rule of context permits reference to other statutes in pari materia i.e. statutes dealing with the same subject matter or forming part of the same system.***

Relying on the aforesaid statutory rules of interpretation, it may be stated that the Special Courts may satisfy itself using certain external aid to determine the age of the victim by relying on the practice followed by the courts through its judgments before the implementation of the POCSO Act, or on the laws specifically relating to children/juveniles.

In the case, **State of Punjab v. Okara Grain Buyers Syndicate Ltd., Okara**, AIR 1964 SC 669, the Supreme Court held that when two pieces of legislation are of differing scopes, it cannot be said that they are in *pari materia*. However, it is not necessary that the entire subject matter in the statutes should be identical before any provision in one may be held to be in *pari materia* with some provision in the other.²

Since Section 34 (2) of POCSO Act requires Special Court to satisfy itself about the age of the child and record in writing its reasons for arriving at a conclusion in this regard, the Special

¹ Justice A.K. Srivastava, Judge, Delhi High Court, 'Interpretation of Statutes', *J.T.R.I. Journal*, First Year, Issue 3, July - September, 1995, <http://www.ijtr.nic.in/articles/art21.pdf>

² Refer Generally Singh G.P., Principles of Statutory Interpretation, 221 (Wadhwa and Company, Nagpur, Tenth Edition, 2006)

Court may satisfy itself on the basis of practice established through law and interpretation of statutes.

Two important judgements need to be referred to while addressing the question of what should be the basis and procedure for determining the age of a child victim of crime. These are:

- **Jarnail Singh v. State of Haryana**, (2013) 7 SCC 263 - the process of age determination as per Juvenile Justice (Care and Protection of Children) Act, 2000 (“**JJ Act, 2000**”) is applicable to victims of crime as much as children in conflict with the law
- **Ashwini Kumar Saxena v. State of Madhya Pradesh**, AIR 2013 SC 553 - no roving inquiry

Age determination as per JJ Act is applicable to victims of crime as much as children in conflict with the law

The question of age determination was largely addressed in the context of children in conflict with the law and for a long time ambiguity prevailed over how to determine the age of a child who is a victim of crime. The said issue was settled for the first time by the Supreme Court in the case of **Jarnail Singh v. State of Haryana**, (supra).

In this case, the accused tried to prove that the child victim of sexual abuse was more than 16 years of age, based on her and the doctor’s statement. The Supreme Court placed reliance on the certificate of the school of a child victim studying in the 3rd standard of the child victim and declared her to be less than 15 years on the date of commission of offence.

For the first time, the Supreme Court made reference to Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules, 2007 (“**JJ Rules, 2007**”) and stated **“on the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000.”**

Further, reiterating Rule 12(3) of JJ Rules, 2007 in Para 20 of the Jarnail Singh judgement (supra), the Supreme Court held that though the said rules generally apply in the case of determining the age of a child in conflict of law, the same should be applied even for a child who is a victim of crime.

“Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our

view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix”.

The rule laid down in *Jarnail Singh v. State of Haryana* gets reiterated in:

- **Mahadeo S/o Kerba Maske v. State of Maharashtra and Anr.**, (2013) 14 SCC 637
- **State of Madhya Pradesh v. Anoop Singh**, (2015) 7 SCC 773

Mahadeo S/o Kerba Maske v. State of Maharashtra and Anr., (2013) 14 SCC 637

In the said case, the school leaving certificate (issued by the school from where the child victim completed her 5th standard) as well as the transfer certificate (issued by per primary school) showed the child’s date of birth as 20.05.1990. The date of commission of the offence was 20.09.2005. Hence, as per the said documents, the prosecutrix was 15 years 4 months at the time of commission of offence. On the other hand, during her evidence before the court, the doctor, who medically examined the child victim, mentioned that on examination she could state that the age of the child victim could have been between 17 to 25 years. The accused argued that the statement of doctor should be taken into consideration and the prosecutrix should be treated as a major on the date of commission of the offence. The Supreme Court made a reference to Rule 12 of JJ Rules, 2007 and in its para no. 10, 11 and 12 held that:

“10. We can also in this connection make a reference to a statutory provision contained in the Juvenile Justice (Care and Protection) Rules, 2007, whereunder Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12 (3) of the said Rules, it is stated that in every case concerning a child or juvenile in conflict with law, the age determination enquiry shall be conducted by the Court or the Board or, as the case may be, by the committee by seeking evidence by obtaining:

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school); first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

11. Under Rule 12 (3) (b), it is specifically provided that only in the absence of alternative methods described under 12 (3) (a) (i) to (iii), the medical opinion 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 be rightly followed by the Courts for the purpose of ascertaining the age of a victim as well.

12. In the light of our above reasoning, in the case on hand, there were certificates issued by the school in which the prosecutrix did her Vth standard and in the school leaving certificate issued by the said school under Exhibit 54, the date of birth of the prosecutrix has been clearly noted as 20.05.1990, and this document was also proved by PW-11. Apart from the transfer certificate as well as the admission form maintained by the primary school Latur, where the prosecutrix had her initial education, also confirmed the date of birth as 20.5.1990. **The reliance placed upon the said evidence by the Courts below to arrive at the age of the prosecutrix to hold that the prosecutrix was below 18 years of age at the time of the occurrence was perfectly justified and we do not find any good grounds to interfere with the same.**”

State of Madhya Pradesh v. Anoop Singh, (2015) 7 SCC 773

In the said case there were three documents showing different age of the prosecutrix. As per the birth certificate, the date of birth was 29.08.1987 and as per middle school certificate, the date of birth was 27.08.1987. Further, as per ossification test report the age of the prosecutrix was more than 15 years but less than 18 years. The trial court ignored the 2 days’ difference in the birth certificate and school certificate and considered the prosecutrix a minor on the date of commission of offence. However, the High Court rejected both the certificates and considered the ossification test and presumed that the girl was more than 18 years of age at the time of the incident. In appeal, the Supreme Court in its judgment relied on its earlier judgment of *Mahadeo S/o. Kerba Maske v. State of Maharashtra and Anr.* **Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for.** The Supreme Court thus stated:

“in the present case, we have before us two documents which support the case of the prosecutrix that she was below 16 years of age at the time the incident took place. These documents can be used for ascertaining the age of the prosecutrix as per Rule 12(3)(b). The difference of two days in the dates, in our considered view, is immaterial and just on this minor discrepancy, the evidence in the form of Exts. P/5 and P/6 cannot be discarded. Therefore, the Trial Court was correct in relying on the documents.”

Age inquiry cannot be a roving inquiry

The Supreme Court in its judgment of **Ashwini Kumar Saxena v. State of Madhya Pradesh**, AIR 2013 SC 553, discussed issue of ‘age inquiry’ and held that every Court/Board/Committee is not expected to go beyond the documents/certificates mentioned under the JJ Rules, 2007 and conduct a roving inquiry to examine the correctness of the certificates/documents produced. Further, the court stated that Section 7A of the JJ

Act, 2000, obliges the court only to make an inquiry with respect to the determination of age and not an investigation or a trial. The Court also stated that the age inquiry is an inquiry under the JJ Act, 2000 and not an inquiry under the CrPC Only in cases wherein the documents/certificates are *prima facie* found fabricated or manipulated, the Court, Board or Committee needs to go for medical report for determination of age. The relevant paragraphs of the said judgment are reiterated hereunder for ease of reference:

“27. Section 7A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the J.J. Act. Criminal Courts, JJ Board, Committees etc., we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. Statute requires the Court or the Board only to make an 'inquiry' and in what manner that inquiry has to be conducted is provided in JJ Rules....

28. Rule 12 which has to be read along with Section 7A has also used certain expressions which are also be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasize the fact that what is contemplated in Section 7A and Rule 12 is only an inquiry.....

36. Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination.....

42. Legislature and the Rule making authority in their wisdom have in categorical terms explained how to proceed with the age determination inquiry..... Further, it is also evident from the Rule that if the assessment of age could not be done, the benefit would go to the child or juvenile considering his / her age on lower side within the margin of one year.”

Conducting age inquiry in the absence of birth certificate of the prosecutrix:

In **K. Muthu Mariappan v. The State Represented by the Inspector of Police**, 2015 (3) MLJ (CrI) 429, the Madras High Court held that in the absence of the prosecutrix's birth certificate, an age inquiry can be conducted by relying on other documents/certificates that prove her date of birth.

In the present case, the Court held that the certificates submitted by the prosecution i.e. school matriculation certificates (in the absence of the birth certificate), which contain the date of birth of the prosecutrix, are public documents and will not lose their value at least as a corroborative piece of evidence for want to examination of the person who gave the information regarding date of birth. The said document would duly corroborate the evidence of the prosecutrix to prove her date of birth.

*“13. It is true that the primary evidence to prove the date of birth of the individual may be preferably the birth certificate. But, it cannot be said that in the absence of the birth certificate, the date of birth cannot be proved. It can be proved by other means. However, when the age of the individual is not disputed, the question of proving the same does not arise at all. It is the settled law that a fact in issue or any relevant fact, or any fact relevant to the issue, which is disputed by the adverse party alone needs proof. If it is not disputed, there is no need to lead any evidence in proof of the said admitted fact. In this case, PW-2 has stated, in chief examination, that her date of birth is 16.05.1998. But, during the cross-examination, the same has not been disputed at all. Thus, the evidence of PW-1 in respect of the age of PW-2 remains unchallenged. **The certificates, viz., EX-P5 to EX-P7, are public documents, which contain the date of birth of PW-2. Assuming that these documents do not have substantive value for want of examination of the person, who gave the information regarding the date of birth to the school at the time when PW-2 was admitted, even then, these documents will not lose their value at least as corroborative piece of evidence and they would duly corroborate the evidence of PW-2 to prove her date of birth.....”***

The new law on age determination

It is pertinent to note that the JJ Act of 2000 and JJ Rules of 2007 have been replaced by the new Juvenile Justice (Care and Protection of Children) Act, 2015 (“**JJ Act, 2015**”) and the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (“**JJ Rules, 2016**”) respectively.

Section 94 of the JJ Act, 2015 provides for the procedure to determinate the age. There is no corresponding rule in the JJ Rules, 2016 substantiating anything further on age

determination. Hence, Section 94 of JJ Act, 2015 becomes the basis for age determination for both child victims of crime and children in conflict with the law.

“94. Presumption and determination of age.

1. Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

2. 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 or the Board, 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 the 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, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

3. The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

In **Manoj Vishwakarma v. State of Chhattisgarh**, Cr. Rev. No. 138/2017, the accused filed a revision petition in the Chhattisgarh High Court as he was aggrieved by the order passed by the Special Judge under POCSO Act, which held that the applicant was not a juvenile on the alleged date of commission of the offence. The accused challenged this order and argued for his juvenility under Section 102 of the JJ Act, 2015.

The Chhattisgarh High Court allowed the petition and held that in the present case, the Special Judge had not determined the age of applicant in accordance with Section 94(2) of the JJ Act, 2015. The Court held that the Special Judge had erred by relying on the “kotwari register”, which was not a statutory document prescribed under Section 94 of the JJ Act,

2015 for the purpose of determining the age of the accused. The Court further held that, in the absence of a birth certificate or a matriculation certificate, the Special Judge should have determined the age of the accused through a bone ossification test or the latest medical age determination test.

The court noted that it is important for judges in cases involving the juvenility of the accused to keep in mind the observations made by the Supreme Court in *Abuzar Hossain @ Gulam Hossain vs State Of West Bengal*, Crl. A. No. 1193 of 2006 wherein the Supreme Court states that while determining the plea of juvenility, the court should always be guided by the objectives of the JJ Act, and ensure that the objectives are not defeated by a hyper-technical approach.

*“25. A word of caution is necessary while parting with the record. The trial Court while making enquiry into the juvenility of the accused is expected to keep in mind the pertinent observation made by Their Lordships of the Supreme Court in paragraph 39.5 of Abuzar Hossain's case (supra) that **while determining the plea of juvenility the court should always be guided by the objectives of the JJ Act and be alive to the position that the beneficent and salutary provisions contained in the JJ Act are not defeated by the hyper-technical approach and the persons who are entitled to get benefits of the JJ Act get such benefits. Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at the threshold whenever raised and keeping in mind the binding observations of the Supreme Court in Ashwani Kumar Saxena (supra) noted herein-above.**”*

Medical age determination

Two means of carrying out medical age determination

Section 94 (2) (iii) of JJ Act, 2015 states that only in the absence of date of birth certificate or matriculation certificate, age shall be determined using medical means. A Juvenile Justice Board or Committee can pass an order for medical age determination by way of the following means:

- (i) An ossification test; or
- (ii) Any other latest medical test

What is an ossification test?

It is a test that determines age based on the degree of fusion of bone. X rays of few bones are taken and then the opinion is given about proximate age in a range between 17-19 years.³

What is any other latest medical test?

Other medical tests include dental examination and opinion of the medical board based on the examination of physical features i.e. status of pubic hair, growth of sexual organs like breast, chest hair, beard etc.⁴

Is the medical opinion binding?

It is a settled position of law that medical reports on age are not binding, unless accepted by the Court of JJB or CWC. To ascertain the acceptability of medical reports, the JJB, in this context, may permit examination and cross examination of the doctors who carried out such medical tests. **Jaya Mala v. Home Secretary, Government of Jammu Kashmir and Ors.**, AIR 1982 SC 1297, **Ram Deo Chauhan v. State of Assam**, (2001) 5 SCC 714, **Baboo Pasi v. State of Jharkhand and Anr.**, (2009) (1) JCR 73 (SC), are some cases where it has been held by the Supreme Court that medical age opinion is not binding and is merely is an opinion.⁵

It is further upheld in **Rakesh v. State of M. P.**, MANU/MP/1289/2019 that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other circumstances. When the school record of the prosecutrix is available, then it is not necessary to look for any other evidence and the school record is conclusive because at the time of admission of the child, nobody could have anticipated the present situation and under Section 35 of Evidence Act, the school admission register is relevant.

While determining the age of the victim, whether the benefit of doubt in age estimated by the bone ossification test should go to the accused or victim?

Circumstances and evidence may create a situation where two views are possible, in such a situation, the Supreme Court, has held in **Arnit Das v. State of Bihar**, (2000) 5 SCC 488, that:

³ Chapter 8 – ‘Age Determination’ by Anant Kumar Asthana - “Workshop for Magistrates on Juvenile Justice (Care and Protection of Children) Act, 2015” 21st to 23rd September, 2018 at National Judicial Academy, Bhopal, Prepared by Yogesh Pratap Singh, Research Fellow, National Judicial Academy

⁴ *supra*

⁵ *supra*

“while dealing with the question of determination of the age of the accused, for the purpose of finding out, whether he is a juvenile or not, hyper technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he is a juvenile and if two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in border line cases.”

This is based on the criminal law principle that benefit of doubt must go to the accused and this holds good in cases of age determination of accused or of children alleged to be in conflict with law.⁶

A similar trend can be seen in **Shweta Gulati v. State Govt of NCT of Delhi**, Crl. Rev. P. 195/2018, wherein the Delhi High Court held that while determining the age of the victim, the benefit of doubt at all stages should go to the accused.

In the present case, the petitioners had challenged the order passed by the Child Welfare Committee (CWC) and the appellate court that had held the victim girl to be a minor. In the present case, since no document was available, a bone ossification test of the victim was conducted to determine her age. As per the report, the victim’s age was estimated to be in the range of 17 to 19 years of age. In pursuance of the report, the CWC determined the age of the victim as seventeen years for the purpose of the present case, which was accepted by the trial court.

The Delhi High Court set aside the order of the CWC and the trial court and held that the upper limit i.e. 19 years should be considered thereby giving the benefit of the doubt to the accused.

“13. The question that arises for consideration is as to whether, while determining the age of the victim, the benefit of doubt in age estimated by the bone ossification test is to go to the accused or the victim.

14. The settled principle is that the ossification test is not conclusive of age determination. It is settled that it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. The Supreme Court, in several decisions, has taken judicial notice of the fact that the margin of error in age ascertained by radiological examination is two years on either side.

15. Now the question that arises for consideration is as to whether the lower of the age or the higher of the age is to be taken. If benefit of doubt has to go to the accused then one would have to take the higher limit and if benefit of doubt has to go in favour of the prosecutrix then the lower of the two limits would have to be taken.

⁶ *supra*

16. It is also settled position of law that benefit of doubt, other things being equal, at all stages goes in favour of the accused.

17. In the present case as no document of age was available, the age has been determined by the Child Welfare Committee as 17 years based on the ossification report. The bone ossification test report has estimated the age as 17 to 19 years. So applying the margin of error principle, of two years on either side, the age could be between 15 to 21 years. In the present case even if the margin of error is not taken on the higher side, the upper limit of the age estimated by the ossification test is 19 years.

18. Giving the benefit of doubt to the accused, the age of the victim has to be taken as 19 years of age. Accordingly, the order dated 06.09.2017 passed by the Child Welfare Committee (CWC) as well as the order of the Appellate Court dated 21.02.2018 is not sustainable.”

In light of the judgment in Shweta Gulati’s case (supra), the following issues with respect to determination of age victim of crime are still open to debate:

- *Situations wherein both the victim and accused are minors, considering the principles of JJ Act, who would get the benefit of age?*
- *Further, in the event a child is a victim in one case and an accused in another, and in the absence any documentary proof of age of such child, how should the courts determine the medical age of such child in both cases?*
- *Does giving benefit of doubt to the accused deprive victims of their rights and benefits under POCSO and JJ Act?*

New and Emerging Issues

The legal framework on age determination requires a lot more strengthening. While some new and emerging issues stand addressed, a few confusions remain. Here are some of the issues and concerns that require a perusal.

Section 94 of JJ Act, 2015 is only for the Juvenile Justice Boards and Child Welfare Committees. What process are the Special Courts under the POCSO Act required to follow?

Section 94 of JJ Act, 2015 does not include the term ‘courts’ within its purview i.e. it only refers to the ‘Committee’ or ‘Board’ which creates a void for the procedure that courts needs to follow while determining the age. However, this void (in addressing the question of determination of age of victims of crime by Courts other than the Boards and the Committee) could be filled by the decision of the Supreme Court in Jarnail Singh’s case (supra) and the subsequent judgments in this regard. In addition, a holistic reading of the

laws provide a sufficient reason to apply provisions of Section 94 of JJ Act, 2015 to determine the age of the child victims of crime whose matter is pending before any criminal court of law.

Should the Courts take into consideration the mental age of a child victim with mental disability or should it follow the physical age as determined through due procedure?

In 2017, hearing an appeal in **Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.**, Criminal Appeal Nos.12171219 of 2017 [Arising out of S.L.P. (Crl.) Nos. 26402642 of 2016], the Supreme Court held that according to Section 2 (d) of the POCSO Act, the term “age” cannot include “mental” age as the intent of the Parliament was to focus on children, that is, persons who are physically under the age of 18 years.

In this case, a 38-year-old woman, suffering from cerebral palsy with a mental age of 6-8 years, was raped by a man in 2010. The victim’s mother had contended that the biological age should not be the governing yardstick and her daughter should be considered as a child because she is intellectually challenged and mentally retarded. The mother approached the apex court after high court and trial court dismissed her plea for prosecution of accused under the POCSO Act.

“73. ...it is worthy to note that the legislature despite having the intent in its Statement of Objects and Reasons and the long Preamble to the POCSO Act, has thought it wise to define the term “age” which does not only mention a child but adds the words “below the age of 18 years”. Had the word “child” alone been mentioned in the Act, the scope of interpretation by the Courts could have been in a different realm and the Court might have deliberated on a larger canvass. It is not so”.

“82. ...The Parliament, as it seems, has not included mental age. It is within the domain of legislative wisdom. Be it noted, a procedure for determination of age had been provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2000. The procedure was meant for determination of the biological age. It may be stated here that Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) defines “child” to mean a person who not completed eighteen years of age. There is a procedure provided for determination of the biological age. The purpose of stating so is that the Parliament has deliberately fixed the age of the child and it is in the prism of biological age. If any determination is required, it only pertains to the biological age, and nothing else”.

“83. The purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial

proceeding. It provides for a child friendly procedure. It categorically makes a distinction between a child and an adult. On a reading of the POCSO Act, it is clear to us that it is gender neutral. In such a situation, to include the perception of mental competence of a victim or mental retardation as a factor will really tantamount to causing violence to the legislation by incorporating a certain words to the definition. By saying “age” would cover “mental age” has the potential to create immense anomalous situations without there being any guidelines or statutory provisions. Needless to say, they are within the sphere of legislature. To elaborate, an addition of the word “mental” by taking recourse to interpretative process does not come within the purposive interpretation as far as the POCSO Act is concerned”.

“85. Needless to emphasise that courts sometimes expand or stretch the meaning of a phrase by taking recourse to purposive interpretation. A Judge can have a constructionist approach but there is a limitation to his sense of creativity. In the instant case, I am obliged to state that stretching of the words “age” and “year” would be encroaching upon the legislative function. There is no necessity”.

In a separate concurrent judgement, Justice F. Nariman agreed with the view taken by Justice Dipak Mishra that the Act defined a child as any person below eighteen years of age and **“we would be doing violence both to the intent and the language of Parliament if we were to read the word mental into Section 2(1)(d) of the Act (definition of child)”**.

CHAPTER 3

BAIL

Special laws, special courts, special systems.. YET the conventional approach to criminal justice continues to fail children!

- *When anticipatory bail is given in a case of sexual assault of a 10 year old by a neighbour, on grounds of delay of two days in registration of the FIR, and an apprehension that the accused is being falsely implicated- it calls for change in both the judicial mindset and a change in the functioning of the criminal justice system.*
- *Fifteen-year-old Suchi (name changed) and her seventeen-year-old cousin Uma (name changed) stay in a rented accommodation in West Delhi with the former's parents. Their landlord and his two friends, physically and sexually assaulted them. The accused were taken into judicial custody, but soon came out on bail. The family was forced to shift their home thrice. The accused would stalk them, verbally abuse, misbehave with them, making it impossible for the girls and their family to step out of their house.*
- *These are not the only cases where children and their families have to live in constant fear of the accused, but are also cases where their abuse and violation continues.. The psychological trauma that such children have to go through is unimaginable. This situation arises from the fact that the accused in their case are released on bail without giving them an opportunity to be heard. This has been the practice in the criminal justice system, where bail applications are perceived as a matter between the prosecution and the accused, and the system fails to see any role of the victims and their special circumstances.*

- *Source: Factsheets based on study of 126 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2018. Available at: <http://haqrc.org/wp-content/uploads/2018/04/childrens-access-to-justice-and-restorative-care.pdf-1.pdf>*

What are the powers of the special court with respect to granting of bail?

According to the Black's Law legal dictionary, the term '**bail**' has been defined as – '*an order of the competent court or a magistrate court that a person accused of committing an offence be released from the judicial custody on the discretion of the Court on certain terms and conditions as the Court deems fit*'.

The CrPC under Section 437, 438 and 439 details the provisions related to bail. While Section 437 provides for grant of bail from magistrate court, Section 438 talks about grant of

bail to a person apprehending his/her arrest for commission of alleged offence. Section 439 of the CrPC confers special powers of High Court or Court of Sessions regarding bail.

Section 439: Special powers of High Court or Court of Session regarding bail:

(1) *A High Court or Court of Session may direct-*

(a) *that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;*

(b) *that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:*

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) *A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.*

Provisions relating to bail under the Criminal Law Amendment Act, 2018

No anticipatory bail can be granted under Section 438 of the CrPC in the following cases:

- rape - Section 376 of the IPC
- rape of a minor below the age of twelve years - Section 376 AB of the IPC
- gang rape of a minor below the age of twelve years - Section 375 DB of the IPC
- gang rape of a minor below the age of sixteen years - Section 376 DA of the IPC

High Court or Court of Sessions to give 15 days' notice to the Public Prosecutor about a bail application filed by the accused:

A second proviso is added to sub-section (1) of Section 439 of the CrPC requiring the High Court or the Court of Session to give notice of the bail application to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application in all cases of rape of minors below the age of twelve years and sixteen years, including gang rape.

No bail application can be heard in the absence of the informant or any person authorised by her/him:

A new Sub Section (IA) has been added to Section 439 of the CrPC, which mandates presence of informant or any person authorised by him at the time of hearing application for bail to a person accused of rape of girls of age less than sixteen years.

What are the factors to be considered by the court while granting bail to the accused?

It is pertinent to note that POCSO Act is a special act enacted with the objective to protect children from sexual assault. Section 30 of the POCSO Act states that there is presumption of culpable mental state unless rebutted in accordance with law. In **Anwari Begum v. Sher Mohammad**, 2005 AIR SC 3530 the Supreme Court observed that as a general rule the court has to consider following factors while granting bail:

- (i) *The nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence;*
- (ii) *Reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant and;*
- (iii) *Prima facie satisfaction of the court in support of the charge.*

Despite recognising that children who are sexually abused are in a vulnerable situation - and hence the provision of Special Courts and Special Public Prosecutors and Right to Legal Representation by a lawyer of one's choice.

An analysis of reasons given by the Special Courts for granting bail points to the conventional manner in which such matters are dealt. The major grounds that emerge for granting bail are:

- *Prolonged custody of accused*
- *Age/illness of the accused or a family member of the accused*
- *Lapses on the part of the investigating agency / IO*
- *Accused being falsely implicated / contradiction in child's statements*
- *Forthcoming examination to be taken by the accused*

- *Source: Factsheets based on study of 126 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2018. Available at: <http://haqcrc.org/wp-content/uploads/2018/04/childrens-access-to-justice-and-restorative-care.pdf-1.pdf>*

Threat Analysis to a Witnesses and their family Members and use of the Witness Protection Scheme, 2018 is yet to become a norm while granting bail!

In most of cases the accused is granted bail on the basis of the following grounds:⁷

- (i) Investigation has been concluded, and during custody accused cooperated with the investigating agency.
- (ii) No useful purpose will be served by detaining the accused in jail.
- (iii) Offence is triable by Magistrate and is not of serious nature.

⁷ *"Pro-Prosecution Case Law on Custody and Bails"*; Mitter Sain Meet; Second Edition 2012; Published by SVP, National Police Academy, Hyderabad.

- (iv) Accused has spent considerable time in jail. Conclusion of trial will take a long time.
- (v) Large number of adjournments have been taken by the prosecution to complete the evidence or to conclude the trial.
- (vi) Accused is only a conspirator or abettor or has played a minor role in the commission of offence.
- (vii) Accused was not initially named in the FIR His name figured in the statement of the witnesses recorded later on. His involvement in the crime is doubtful.
- (viii) There are major contradictions in FIR and statements made by witnesses under Section 161 CrPC
- (ix) Chances of fleeing of accused or tampering with evidence or influencing the witnesses are remote.
- (x) Co-accused has been released on bail. Allegations levelled against accused are identical. On the basis of parity, accused is also entitled to bail.
- (xi) Accused is young or old.
- (xii) Accused has status in society.
- (xiii) Accused is sick.
- (xiv) Accused resides separately from the other (main accused).
- (xv) Proper identification parade was not arranged to get the accused identified from the witness.
- (xvi) Only evidence against the accused is extra judicial confession of co-accused which is not admissible in evidence.

However, the Supreme Court and various High Courts, from time to time, through their judgments, have laid down other grounds for grant or denial of bail to the accused during trial.

Guidelines to be followed while granting bail

In the case of **Prahlad Singh Bhatti v. NCT Delhi**, AIR 2001 SC 1444, the Supreme Court has laid down certain guidelines, which the Courts need to consider while deciding on bail:

- (i) Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;**
- (ii) Nature and gravity of the charge;**
- (iii) Severity of the punishment in the event of conviction;**
- (iv) Danger of accused absconding or fleeing if released on bail;**
- (v) Character, behavior, means, position and standing of the accused;**
- (vi) Likelihood of the offence being repeated;**
- (vii) Danger of, course of justice thwarted by grant of bail;**
- (viii) Prima facie satisfaction of the court in support of the charge.**

Dealing with this aspect, the High Court of Delhi, in the case of **Central Bureau of Investigation vs. Birendra Kumar Singh @ Virendra Kumar Singh @ Pandit**, 207 (2014) DLT 680 (referring the case of **Kalyan Chandra Sarkar v. Rajesh Ranjan**, (2004) 7SCC 528) observed and stated that:

*“9. ...Hon'ble Apex Court referred to the following principles relating to grant or refusal of bail as stated in **Kalyan Chandra Sarkar v. Rajesh Ranjan**, (2004) 7 SCC 528:*

*11. **The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind....”***

Whether the gravity of offence and long incarceration already undergone by the accused are factors to be considered by the court while hearing a bail application?

In the case of **Kalyan Chandra Sarkar v. Rajesh Ranjan** (supra), where the Supreme Court, in para 14, rightly pointed out that:

*“14....This Court also in specific terms held that condition laid down under Section 437(1)(1) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, **the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail.**”*

In the case of **Central Bureau of Investigation v. Birendra Kumar Singh @ Virendra Kumar Singh @ Pandit** (supra) it was also observed that the mere fact that the accused has undergone a certain period of incarceration by itself would not entitle the accused to be released on bail. Further, neither the fact that trial is not likely to be concluded in the near

future, either by itself, or coupled with a period incarceration, would constitute sufficient grounds for releasing the appellant on bail when the gravity of offence is severe.

Further, the Supreme Court in the case of **Ram Govind Upadhyay v. Sudarshan Singh & Ors**, AIR 2002 SC 1475 laid down that while a person's individual liberty is precious and courts must make every effort to protect such liberties, protection must be given only to deserving individuals and the question of bail must be determined based on the exigencies of the case. In light of this, in cases of heinous offences, it is the society that needs protection from the accused, as the alleged accused has the capability to disrupt the life and tranquillity of the people in the society.

In addition to this, the court also held that granting of bail is upon a discretion of the court, and any order of bail without any cogent reason cannot be sustained.

In cases of use of criminal force, gravity of offence etc., the courts are hesitant to grant bail to the accused. While hearing the application for anticipatory bail on behalf of the accused, the High Court of Himachal Pradesh in **Sachin v. State of H.P.**, CrI. MP (M) No. 1644 of 2015, observed that:

"8. ...At the time of granting bail following factors are considered, (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State.

... In the present case allegations against the petitioner are very heinous and grave in nature. Allegations against the petitioner are that petitioner assaulted upon the minor prosecutrix with intent to outrage her modesty. Courts are under legal obligation to protect the interest of minors. It is well settled law that every minor girl has legal right to live in society with dignity and honour. Assault upon minor girl with intent to outrage her modesty is most hated crime. It is the crime against basic human rights and it violates the right to life.

It is well settled law that bail in non-bailable criminal case is not a matter of right. In present case positive overt act has been attributed against the petitioner by minor prosecutrix relating to use of criminal force with intent to outrage the modesty of minor prosecutrix. Allegations against the petitioner are grave in nature qua commission of criminal offence relating to sexual assault under Protection of Children from Sexual Offence Act 2012.

Protection of Children from Sexual Offence Act 2012 is a Special Act enacted with object to protect the minor girls from sexual assault. Even as per Section 30 of POCSO

Act 2012 there is presumption of culpable mental state unless rebutted in accordance with law. *Presumption of culpable mental state by petitioner would be rebutted when the case will be decided by learned trial Court after giving due opportunities to both the parties to lead evidence in support of their case. Court is of the opinion that case is at the initial stage of investigation and if anticipatory bail is granted to petitioner at this stage then investigation of case would be adversely effected. Court is of the opinion that it is not expedient in the interest of State and general public to grant anticipatory bail to petitioner at initial stage of investigation.”*

Special care required while granting bail in cases of sexual crimes against child victims

Cases of sexual assault – whether a bailable offence?

In **Santosh Kumar Mandal v. State**, 2196 SCC Online Del 5378 the Petitioner sought regular bail for offences under sections 354(D)/342/363/506 IPC and Section 12 POCSO Act. The main argument of the petitioner was that the offences invoked against him are bailable offences as per law. The petitioner argued that an offence under Section 12 POCSO Act fell under category 3 of offences listed in the CrPC since it provides for punishment up to 3 years, and was as a result, a bailable offence.

While ascertaining the category of offence for the purpose of bail, the Delhi High Court rejected the contention of the petitioner that an offence under Section 12 of POCSO Act fell under Category 3 since it provides for punishment which “may extend to three years”. The Court held that to ascertain the category in which the offence falls, the maximum punishment that can be provided by the statute should be looked at, even though the discretion to impose a lesser sentences lies with the Court.

In the present case, the maximum sentence prescribed by Section 12 is three years, which implied that it is an offence which falls under Category 2 of the CrPC and not Category 3. The court thus rejected the contention that an offence under Section 12 was bailable by virtue of falling under Category 3 of CrPC

Thus, the Delhi High Court denied bail to the petitioner and held that Section 12 of POSCO Act is both a cognizable (in light of Section 19 of POCSO Act) and a non-bailable offence.

“10. It is thus evident that the main thrust of the decision to ascertain whether the offence was bailable or non-bailable was on the point that the offence being non-cognizable it had to be bailable. Section 19 POCSO Act notes that the offences punishable under POCSO Act are cognizable in nature and provides a special mechanism to deal with crimes effecting the children.”

*“11. Thus, the decisions of Supreme Court in case of Rajeew Chaudhary and Avinash Bhosale (supra) have no application to the facts of the case as discussed in detail by three Judge Bench in Om Prakash (supra) holding that the offences under Section 9 of Central Excise Act 1944 and Section 135(1) (ii) of the Customs Act 1962 were non-cognizable and thus bailable offences. **Considering the gravity of the offences and the special mechanism provided under POCSO Act to hold that the offences are bailable though cognizable and would fall in category 3 would be rendering an interpretation to the classification provided in second part of First Schedule of CrPC contrary to the object of the special enactment. Thus offences punishable under POCSO Act including Section 12 are cognizable and non-bailable offences.**”*

Can the victim approach a superior court for cancellation of the bail granted to the accused by a lower court?

Relying on the Declaration of **Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted by the General Assembly on 29 November 1985**, the High Court of Madhya Pradesh in **Mahesh Pahade v. State of Madhya Pradesh**, Criminal Appeal No. 933/2014 stated that the needs of the victims must be facilitated by informing them of their role and the progress of the proceedings including allowing their views and concerns to be presented and considered at the appropriate stages of the proceedings where their personal interests are involved. The victims of crime must be given the opportunity to address their grievances before the court of law.

In the present case, the trial court had convicted the accused (appellant) under Section 376(2)(n) of IPC and Section 6 of POCSO Act and sentenced him to suffer imprisonment for life. Based an additional document, with regard to the age, which was taken into consideration, the said court had granted bail to the appellant. The counsel for the prosecutrix challenged the said order and filed an application to cancel the bail granted on the basis that the bail was granted without granting the victim an opportunity to contest the said issue. The counsel for the appellant confronted the said application for cancellation of bail stating that Section 389 of the CrPC permits only the Public Prosecutor to an application for cancellation of bail. Further, he stated that even if a victim has been given right to file an appeal against an order of acquittal in terms of proviso to Section 372 of CrPC, she does not become entitled to seek cancellation of bail.

Section 372 of the CrPC provides the victim the right prefer an appeal, in the relevant court, against any order passed by the Court acquitting the accused or convicting for a lesser offence. Reading into the said section and relying on the judgment of the Supreme Court in **Puran etc. v. Rambilas and another etc.**, (2001) 6 SCC 338, this court held that **the right to appeal against an order of the lower court, as given to the victim, will include the right to seek cancellation of bail if the victim is aggrieved against such an order.**

Further, the High Court of Madhya Pradesh, referring the Supreme Court judgment in **Amanullah and Another v. State of Bihar and others**, (2016) 6 SCC 699, also stated that although it is the responsibility of the state to prosecute the accused, the victim cannot be left at the mercy of the State without any option to approach the appellate court for seeking justice.

Whether 'consent' of a minor prosecutrix should be a mitigating factor for the accused in bail applications?

This said question was discussed by the High Court of Bombay and High Court of Kerala and both had different viewpoints:

In **Sunil Mahadev Patil v. State of Maharashtra**, 2016 (3) BomCR(Cri) 435, the petitioner sought regular bail under Section 439 CrPC for offences punishable under Section 376, 363, 366A of IPC and under Section 3, 4, 5 and 6 of POCSO Act. The Court held that in cases similar to the present, where the minor prosecutrix is between the age group of 15 to 18 years, and the consent of the prosecutrix is obvious, then the fact that the prosecutrix consented to elope with the applicant/accused should be a mitigating factor while determining the bail of the applicant.

*“5.Undoubtedly, a minor girl is to be protected under the law, as there are number of incidents of sexual abuse of minor girls and therefore, there is a special legislation of POCSO in the year 2012 and amendment in sections 375 and 376 of the Indian Penal Code in 2014. The judiciary takes a very serious note of sexual offences against women and especially against the minor girls. In the present case, the facts are clear that prosecutrix and applicant/accused were in love with each other. The prosecutrix was a minor girl of 15 years. They both eloped to marry. The trial Court rejected the Bail Application by its order dated 31st March, 2015 mainly on the ground that the girl is 15 years old and her consent is immaterial and if at all the marriage was performed between the applicant/accused and prosecutrix, it was against the provisions of Child Marriage Restraint Act. Legally she is below the age of consent. **However, in many such cases, a boy who has eloped and established sexual relations with the girl, is 19 to 22 years of age and also in love with the prosecutrix. Under such circumstances, considering the law, facts and discretionary powers vested with the Court, it is difficult for the Court to decide the issue of regular bail under section 439 of Cr. P.C.”***

The Court further held that the following points are relevant and should be kept in mind while deciding bail for applicants in such cases:

- (i) What is the age of the prosecutrix, who is minor.

- (ii) Whether the act is violent or not.
- (iii) Whether there are antecedents or not.
- (iv) Whether the offender is capable of repeating the Act or not.
- (v) Whether there is likelihood of threats or intimidation, if at all the boy is released.
- (vi) Whether any chance of tampering with the material witnesses when their statements are recorded.
- (vii) It is also to be taken into account in such cases that a boy in his early 20's deserves to get employment and to plan, stabilize and secure his future.

On the contrary, the Kerala High Court in **Sujit v. State of Kerala**, 2018 (3) KHC 641 while considering the anticipatory bail application under Section 438 of the CrPC held that 'consent' of a minor girl is not a valid consent in law. The court also held that the consent of a minor victim is immaterial for the purposes of ascertaining the culpability of the accused.

*"12. There is difference between consent and submission. Every consent involves submission but the converse does not follow. A mere act of submission does not involve consent. If there was no voluntary participation in the sexual act, it would not amount to consent. Voluntary participation involves the exercise of intelligence based on the knowledge of its significance and moral quality of the act. Consent cannot be equated to inability to resist or helplessness. Consent is an act of reason accompanied by deliberation. A minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. A minor girl can be easily lured into giving consent for sexual intercourse since she does not have the capacity to understand the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 18 years of age. **Even when there is consent of a girl below 18 years, the other partner in the sexual act is treated as a criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual.**"*

The Court further held that it shall take into consideration the presumption under Section 29 of POCSO Act while dealing with an application for bail filed by a person who is accused of offences under Section 3, 5, 7 and 9 of the POCSO Act.

*"14. Section 29 of the Act states that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. **Therefore, the principle that an accused is presumed innocent till found guilty, will not apply to a case under Sections 3, 5, 7 and 9 of the Act with its full rigor. The***

Court shall take into consideration the presumption under Section 29 of the Act while dealing with an application for bail filed by a person who is accused of the offences under Sections 3, 5, 7 and 9 of the Act (See State of Bihar v. Rajballav Prasad : MANU/SC/1525/2016 : AIR 2017 SC 630). True, a presumption in a criminal case can arise only when the prosecution has adduced the facts forming the foundation of the case. In the instant case, prima facie, there are sufficient materials to find the complicity of the petitioner in the crime.”

Greater care required in cases where human trafficking is linked to sexual abuse

As cases of trafficking for sexual exploitation and sexual abuse are closely interlinked with each other, it becomes imperative to also understand guidelines to be considered while granting bail in cases of human trafficking. In this respect, the Bombay High Court, in the case of **Freedom Firm v. Commissioner of Police, Pune & Ors.**, Cr. Public Interest Litigation No. 4 of 2015 laid down the following guidelines:

- (i) *Bail should be denied to habitual offenders (traffickers) except upon exceptional, special and compelling reasons upon the most stringent conditions...*
- (ii) ***Bail should also be denied if the victim is a minor except in case of any extraordinary, compelling or special circumstances to be explained in the order itself and upon the most stringent conditions.*** Hence the bail may be granted only after the victim's age is verified by the birth certificate (and only if it satisfies the Magistrate/Judge that it is genuine, carries a presumption of its correctness, being a public document) and not a school leaving certificate (which would be required to be proved upon verification of the school records by the signatory and which never carries any legal presumption of its correctness, being a private document.) Such documentary evidence would, therefore, have to be necessarily verified by the competent authority issuing them before embarking upon the final decision of grant of bail if upon a simplicitor look at the victim her age (of adulthood) belies the contents of the documentary evidence produced. Even medical evidence is opportune, and in case of doubt, "re-age verification" for having a second opinion would be required to be directed before the order of grant of bail. When the victim is prima facie ("on the face of it") a minor, the aforesaid medical tests are mandatory before taking the risky option of deciding the application for grant of bail.
- (iii) *Bail should also be denied its case of violent offence which would be seen from the statements of the victims and witnesses. The Court would do well to take into account the expected intimidation and threat to the victims and/or witnesses.*
- (iv) *If bail is applied on the ground of death of a family member the Court should ensure that clear documentation is produced to prove the genuineness of the ground.*
- (v)
- (vi) *This would include a victim impact statement which may be considered with regard to the violence, if any, suffered by the victim or the other psychological and mental*

trauma having been faced by her whilst granting bail and fixing the conditions of such bail.

- (vii) The Court shall specify the condition of at least weekly attendance of the accused pending the trial with a further rider that failure of the accused to attend the Police Station shall be a ground for cancellation of bail. A condition be imposed on the Investigating Officer to submit a detailed report with regard to attendance of the accused.*
- (viii) The accused must never be allowed to gain access to the victim as the safety of the victim is of prime concern when the accused is released on bail. The Court shall give directions and make special conditions and provisions for supervision to ensure that there would be no contact between the accused and the victim.*
- (ix)*
- (x)*
- (xi)*
- (xii) The victim deserves to have legal representation and emotional support.... victims of ITPA offences are "victims of crime" and should not be treated as criminals or as a source of evidence. The stage of bail is the most important as also the most fragile when the victims' rights begin and should not be lost. Hence the Court shall permit any of the known NGOs and legal officers to work for assisting victims and prosecution and to represent the victims.*
- (xiii)*
- (xiv) **The police shall appoint specially trained and sensitized police officer as special police officer** for dealing with offence under the ITPA as mandated under Section 13 of the ITPA.*
- (xv)*
- (xvi) No victim shall be released to any person who claims her custody except upon verification of the identification of the claimant along with Post Card size photograph and details of name, age, local address, native address and contact details of such claimant and after consent of the victim is obtained.*
- (xvii)*
- (xviii) It is common knowledge that in a case involving more than 1 accused, if an accused is released on bail, another applies on the principle of parity. It is pertinent to appreciate what parity is. The dictionary meaning of parity in the New pocket Oxford English Dictionary, Indian Edition at page 652 is: "the state of being equal or equivalent". Hence the facts of each case must be appreciated to consider "parity"....*
- (xix) The Magistrates and Judges shall use the following bail checklist proforma while deciding the application for bail :*
 - (a) Whether antecedents of the bail applicant have been checked.*
 - (b) Whether antecedent report has been submitted before the Court.*
 - (c) Whether the address of the bail applicant and the local surety has been verified by the Police and whether a report has been submitted before the Court.*

- (d) *Whether bail applicant has had bail cancelled in the past.*
- (e) *If bail is applied for on medical grounds, whether treatment within the jail is possible.*
- (f) *Whether accused is likely to have contact with the victim and intimidate or threaten her.*
- (g) *Whether the accused is likely to repeat the offence; i.e. whether he/she would be able to return to and run the brothel.*
- (h) *Whether the brothel is already sealed (and if not to undergo the process of sealing before any order of bail is passed).*

Such proforma check list shall be duly completed and kept in the record & proceedings of the cases along with the order of bail....”

Need for cognizance of the danger to victim while granting bail!!

In a case of aggravated penetrative sexual assault of a 12-year-old by her neighbour, although bail was granted five months prior to the child’s testimony, the judge kept in mind the child’s safety while granting bail, and held that “The nature of allegations against the applicant/accused arise from the close proximity of residence between the accused and the child victim/prosecutrix. It is considered that the applicant/ accused has undertaken to shift his address. Investigation is complete. Charge sheet has been filed and the accused has also been charge sheeted. The accused cannot be incarcerated indefinitely as trial is likely to take some more time”.

The condition for bail also required the accused to “shift his residence immediately and make no effort to contact the child prosecutrix or her family members in any manner or hamper with the progress of the case”, in addition to “furnishing a bail bond of Rs. 10,000/- and a surety of like amount”.

On the other hand, in another case of aggravated penetrative sexual assault of a 15-year-old involving two accused, aged 23 and 25 years, who were also child’s neighbours, the bail hearing concluded on a note that suggests the accused are not guilty. While granting bail, the court relied on the submission made by the Defence Counsel about his clients being falsely implicated. The bail order states, “Considering the totality of the facts and circumstances of the case and the submissions that the accused/applicants have been falsely implicated by the mother of the prosecutrix cannot be ruled out and giving the benefit of doubt on the case of the complainant the applications are allowed”.

- Source: Factsheets based on study of 126 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2018. Available at: <http://haqrc.org/wp-content/uploads/2018/04/childrens-access-to-justice-and-restorative-care.pdf-1.pdf>

CHAPTER 4

INVESTIGATION, CHARGESHEET, FRAMING OF CHARGES AND TRIAL

Police Investigation

Things to know and understand

The first point of contact for the victim child and their family, or whoever else stands up for the victim is the police. Police investigation is one of the most important steps in a criminal case. Equally important is the issue of time taken to complete the investigation and file a charge sheet.

Under the Criminal Law Amendment of 2018, the police is mandated to complete the investigation within 2 months from the date on which the information was recorded by the officer in charge at the police station.

Endless wait

Investigation process has been delayed in large number of sexual offence cases in several States

| State | Total FIRs* | Final report not submitted in 180 days |
|----------------|-------------|--|
| Uttar Pradesh | 13,150 | 592 |
| Madhya Pradesh | 4,540 | 236 |
| Chhattisgarh | 1,552 | 155 |
| Haryana | 2,292 | 122 |

* FIRs filed between April 21, 2018 to February 13, 2019

Trial had been completed in only 4% of 24,000 cases sexual offences that were filed from January to June this year



• Criminal Law (Amendment) Act, 2018 came into effect on April 21, 2018. It mandates filing of final reports in sexual offence cases within 60 days

• According to Women and Child Development ministry, there are 664 dedicated existing special courts and 2021 public prosecutors for them. 1023 more courts are being planned

Source: Singh, Vijaita and Chandra, Jagriti. July 14, 2019. Sexual offence cases not being probed in stipulated time: Report. The Hindu.

Available at: <https://www.thehindu.com/news/national/sexual-offence-cases-not-being-probed-in->

Whether the irregularities in conducting investigation have an impact on the case?

In **Karnel Singh v. State of M.P.**, AIR 1995 SC 2472, the prosecutrix, a labourer in a factory, was working with another labourer, Charan, when the accused along with Pyaru walked in and asked Charan to get some tea. During that time, the accused took the prosecutrix inside a room and committed rape upon her while the other person, now acquitted, was keeping

an eye out. After the accused committed rape on the prosecutrix and just before the other person could also satisfy his lust, the prosecutrix ran away and went to her husband and narrated the incident to him. Thereafter an FIR was filed. The prosecutrix, while she was going to her husband, told one person, Raza, about the incident as well. The IO did not add the name of relevant witnesses i.e. Raza and Charan and therefore they were not examined. Further, the seizure of the 'chaddi', with semen stains, was not proved thus no evidence in this regard. However, despite the negligence and omissions on the investigation, the lower courts convicted the accused.

The Supreme Court observed the casual and defective investigation and stated that the courts must look into the evidence on record and establish the guilt. The Court held that acquitting the accused on the fact that there is defective investigation on the part of the IO would be adding insult to injury caused to the victim.

In **Paras Yadav and Ors. v. The State of Bihar**, Criminal Appeal No. 335 of 2006, the Supreme Court stated that it is true that there is negligence on the part of IO and negligence or omission may give rise to reasonable doubt which would obviously go in favour of the accused. However, based on the statements made by the witnesses corroborating the facts of the incident and that the deceased was in state of health to make the statements on the date of incident. The Court held that their evidence does not suffer any infirmity and that there was no justifiable reason pointed out to disbelieve the evidence of the said witnesses.

Quoting its judgment in the case of **Ram Bihari Yadav v. State of Bihar and Ors.**, 1998 CriLJ 2515, the Court further held that in a situation of lapses on the part of the Investigating Officer, the prosecution evidence must be looked at de hors such omissions to find out whether the said evidence is reliable or not.

"In such a situation, the lapse on the part of the Investigating Officer should not be taken in favour of the accused, may be that such lapse is committed designedly or because of negligence. Hence, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not.

For this purpose, it would be worthwhile to quote the following observations of this Court from the case of Ram Bihari Yadav v. State of Bihar and Ors. MANU/SC/0302/1998 : 1998CriLJ2515 –

'In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice'."

What are the implications of a defective investigation?

In **NCT of Delhi v. Laxmi Kant Tiwari**, CRL.L.P. 469/2014, the accused, charged under Section 8 and 12 of the POCSO Act, was acquitted by the trial court bench based on the contradictions in the versions of the prosecution witnesses. The trial court observed certain procedural lapses on the part of the investigation and held that based on the said lapses, the accused has been granted the benefit of doubt, and as a result been acquitted.

The Delhi High Court held that the statement of the child must be taken in accordance with Sections 24 and Section 25 of the POCSO Act, in order to protect children from sexual assault and sexual harassment and as far as may be to facilitate investigations of such offences so that the victim is more comfortable in getting her/his version recorded. However, it cannot always be inferred to be a ground for rejection of the otherwise coherent and reliable statements given by the prosecution witness.

“12. Whether the statements of PW-3 and PW-4 were recorded at the spot or whether they were recorded later on at the police station would not effect the gist of the statement which was as so stated in the aforementioned versions of the said witnesses. The trial Judge had noted that under the provisions of the POCSO Act, the statement of the child victim cannot be recorded in the police station and police officer should not be in police uniform which is a mandatory provision and violation of this would by itself meant that investigation is tainted. This is another argument of the respondent which has been noted by the Sessions Judge to grant an acquittal to the respondent.

13. The Protection of Children from Sexual Offences Act, 2012 has been legislated as an act to protect children from offences from sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. Chapter VI contains the procedure for recording the statement of the child. The language of section 24 and 25 itself suggests as far as practicable the statement of the child shall be recorded at his residence or at a place where he usually resides or at the place of his choice. This is to facilitate and to make the child comfortable and that is the whole purpose of the procedure contains in Sections 24 and 25 of the said Act. Special Courts have to be created under Section 28 which is contained in Chapter VII....

14. These versions clearly show that the statement of the victim was not recorded in the police station but on an isolated road at the place where the incident had occurred. At the cost of repetition the purpose of engrafting the POCSO was to protect

children from sexual assault and sexual harassment and as far as may be to facilitate investigations of such offences so that the victim is more comfortable in getting her/his version recorded. Sections 24 and 25 of the said Act provide that as far as practicable the police officer should not be in a police uniform at the time when he records the statement of the victim. However, it does not mean that if the statement of the victim is recorded by a police officer when he was in uniform that the statement would be a ground for rejection from the otherwise cogent and coherent testimony of the victim. The Sessions Judge holding this as a ground to grant an acquittal to the respondent has committed a grave illegality....

21. *The version of the prosecution all along was that PW-2 and PW-4 had been subjected to sexual harassment by the accused and whereas PW-3 has detailed three different times of the occurrence, the version of PW-2 is also on the sexual harassment suffered by him at the hands of the respondent. They are fully corroborative of one another."*

GUIDELINES: *In Virender v. The State of NCT of Delhi, Crl. A. No. 121/2008, Delhi High Court issued guidelines for the police to follow during investigation of cases:*

(i) On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately. (Ref: Court On Its Own Motion v. State and Anr.)

(ii) Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice. (Ref : Mahender Singh Chhabra v. State of N.C.T. of Delhi and Ors.)

(iii) The investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime. (Ref: Court On Its Own Motion v. State and Anr.)

(iv) The statement of the victim shall be recorded verbatim. (Ref: Court On Its Own Motion v. State and Anr.)

(v) The officer recording the statement of the child victim should not be in police uniform. (Ref: Court On Its Own Motion v. State and Anr.)

(vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear. (Ref: Court On Its Own Motion v. State and Anr.)

(vii) The statement should be recorded promptly without any loss of time.

(viii) *The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.(Ref: Court On Its Own Motion v. State and Anr.)*

(ix) *The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.(Ref: Court On Its Own Motion v. State and Anr.)*

(x) *The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.(Ref: Court On Its Own Motion v. State and Anr.)*

(xi) *The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.(Ref: Court On Its Own Motion v. State and Anr.)*

(xii) *In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.(Ref: Court On Its Own Motion v. State and Anr.)*

(xiii) *The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A CrPC) at the nearest government hospital or hospital recognized by the government.(Ref: Court On Its Own Motion v. State and Anr.)*

(xiv) *The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.(Ref: Court On Its Own Motion v. State and Anr.)*

(xv) *The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.(Ref: Court On Its Own Motion v. State and Anr.)*

(xvi) *The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.(Ref: Court On Its Own Motion v. State and Anr.)*

(xvii) *The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.(Ref: Court On Its Own Motion v. State and Anr.)*

(xviii) *To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O., for investigations on any particular aspect of the matter, the same shall be*

adverted to by the I.O. Proper entries shall be made by I.O. in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.(Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)

(xix) Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration.(Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)

(xx) The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)

(xxi) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)

(xxii). Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion v. State and Anr.)

Filing of Charge sheet

Under Section 173 of the CrPC 'charge sheet' is the final report of the police officer on completion of investigation of a particular case. This report is then forwarded to the magistrate who takes cognizance of the case based on the charge sheet. All relevant documents pertaining to the offence and the accused are filed as a part of the charge sheet.

In **State of Karnataka v. Shivanna**, (2014) 8 SCC 913, the Supreme Court exercised its powers under Article 142 of the Constitution and issued interim directions in the form of mandamus to all police stations in the country to expedite the procedure under Section 164 CrPC in rape cases. The directions issued in the case were as follows:

- (1) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under Section 164 CrPC A copy of the statement under Section 164 CrPC should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 CrPC should not be disclosed to any person till charge sheet/report under Section 173 CrPC is filed.
- (2) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

- (3) *The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.*
- (4) *If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.*
- (5) *Medical Examination of the victim: Section 164 A CrPC, inserted by Act 25 of 2005 in CrPC, imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 CrPC.*

Obligation of Magistrate to record statement under Section 164 of CrPC

In **State of Karnataka v. Shivanna** (supra) the Supreme Court exercised its powers under Article 142 of the Constitution and issued interim directions in the form of mandamus to all police stations in the country to expedite the procedure under Section 164 CrPC in rape cases.

GUIDELINES: *In Virender v. The State of NCT of Delhi, Crl. A. No. 121/2008, Delhi High Court issued guidelines for the recording of statement before the magistrate:*

(i) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.(Ref: Court On Its Own Motion v. State and Anr.)

(ii) In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.(Ref: Court On Its Own Motion v. State and Anr.)

(iii) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref: Court On Its Own Motion v. State and Anr.)

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref: Court On Its Own Motion v. State and Anr.)

(v) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion v. State and Anr.)

(vi) No Court shall detain a child in an institution meant for adults.(Ref: Court On Its Own Motion v. State and Anr.)

Can the documents that are not a part of the charge sheet be received as a part of evidence for the prosecution after the commencement of trial?

The High Court of Karnataka addressed this question in the case of **B L Udaykumar and Ors v. State of Karnataka**, C.P no. 4398 of 2018 and held that the criminal court during the trial is bound to receive the evidence by the prosecution despite the fact that such evidence was not a part of the charge sheet.

In the present case, a charge-sheet was filed against the petitioners alleging offences punishable under Sections 408 and 201 of the IPC During the course of the trial, the prosecution filed an application under Section 242(2) of CrPC seeking to produce 17 documents. The Petitioners of the present appeal, raised serious objections to the receipt of the 17 documents contending that the Investigation Agency should have seized the original documents through a proper mahazar and filed a supplementary report to its primary report under Section 173(8) of CrPC The Petitioners further argued that Section 242(2) of CrPC does not permit the prosecution to file documents at a later stage, after the submission of the charge-sheet, since Section 173(5) of CrPC mandates that all relevant documents have to be produced along with the charge-sheet.

The Court held that Section 242(3) casts a mandatory duty on the Magistrate to take all the evidence produced in support of the prosecution. The Court further held that while the word “produced” under Sections 242(3) could be given a restrictive meaning to hold that only materials collected during the investigation could be permitted, such a construction would defeat the very purpose of the trial. The Court noted that the main purpose of a criminal trial is to discover the truth, and in light of such purpose, it is necessary all evidence, which could help the Court in arriving at a just decision, should be allowed to come on record. Thus, the Court held that it was immaterial whether the “evidence” produced during the trial was collected during investigation or later.

Can a statement or counselling report given by an NGO or private counsellor be filed with the charge sheet?

This issue was addressed by the Delhi High Court in **Court on Its Own Motion v. the State**, CRL. REF. No.2/2016. In the present case, the court held that a statement under POCSO Act can only be made to a police officer or a magistrate, and the provisions of POCSO Act or the

JJ Act, do not contemplate any report to be made by a counsellor. The Court further held that it is explicitly clear under the POCSO Act and POCSO Rules and the JJ Act, that counselling reports/notes were confidential in nature, and as a result, the same cannot be made part of the charge-sheet by the Investigation Officer.

“5. Having regard to the scope of the reference, it is critical to analyze the statutory scheme in order to determine the following:

- (i) Whether a “Counsellor’ is envisaged in law and what is the role of the counsellor?*
- (ii) Whether or not the statements mandate counselling report?*
- (iii) What is the legal significance of such counselling reports/notes prepared by the counsellor?*
- (iv) What is the manner in which the statement of a child victim of sexual offences needs to be recorded under the Acts?*

6. The above extracted provisions of POCSO Act amply establish that the law contemplates recording of the statement of a child victim only by a police officer under Section 24 of the Act, and/or the Magistrate under Section 25 of the Act and not that by any third party such as a counsellor. The law has also clearly delineated specifically even the gender, attire, manner and the place at which such statement would be recorded.

7. A close scrutiny of the legislation would show that the law does not anywhere envisage recording of a statement of child.

6. The above extracted provisions of POCSO Act amply establish that the law contemplates recording of the statement of a child victim only by a police officer under Section 24 of the Act, and/or the Magistrate under Section 25 of the Act and not that by any third party such as a counsellor. The law has also clearly delineated specifically even the gender, attire, manner and the place at which such statement would be recorded.

7. A close scrutiny of the legislation would show that the law does not anywhere envisage recording of a statement of child victim by a counsellor or a report of any kind from a counsellor about his/her interactions with the child.” ...

70. The POCSO Act and the Rules 2012 do not contemplate any report to be made by a counsellor or any observations of the counsellor which were made part of the police file or could be placed on record of the trial court.

75. The aforesaid provisions of Acts make it explicitly clear that counselling report/notes of the counsellor (as well as any person or expert recognized under the POCSO Act and Rules of 2012 and the JJ Act) are confidential in nature and the same cannot be made a part of the chargesheet.

76. The counsellor at best has the duty of facilitating the victim and disclosure of any kind made by the victim to the counsellor is confidential in nature. The notes prepared during the counselling by the counsellor as well as his report are completely confidential and cannot be made part of the chargesheet or the record of the trial court in a case under POCSO Act, 2012.

77. The second part of the reference is concerned with the issue of multiple statements of a victim being recorded by the police during investigation and the problems caused thereby.”

Framing of charges

The nature of justice is determined by the manner in which charges are framed, the sections of the law that are recorded and the time taken to do so.⁸

In the 237 cases under study from 1 January 2013 to 30 September 2019, charge sheet is filed in 233 (98%) cases and charges have been framed in 211 (89%) cases.

Out of 233 cases where charge sheet is filed, the nature of offence changed after police investigation in 28 cases on account of child’s age and in another 22 cases registered for penetrative sexual assault the nature of offence did not change even after completion of police investigation though the children were below the age of 12 years. In another 2 cases registered as those of penetrative sexual assault the offence changed to aggravated penetrative sexual assault on grounds of proximity between child and the accused and age of the child respectively. The police failed to register a case of sexual assault by the child’s drawing teacher as aggravated sexual assault and subsequently corrected it in the charge sheet. Similarly, a case of penetrative sexual assault was wrongly registered as that of sexual assault and corrected subsequently on completion of police investigation.

- Source: Factsheets based on ongoing study of 237 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2019.

Whether the accused could be convicted for offences not mentioned in the charge sheet?

In **Moti Lal v. State (NCT of Delhi)**, Crl. A. 992/2015, the High Court of Delhi addressed the said question. The accused was charged for commission of offence under Section 8 POCSO Act and convicted under Section 10 of POCSO Act. On the issue that there was a difference in sections under which conviction was given and the sections under which

⁸ Factsheets based on ongoing study of 237 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2019.

charges were framed, the High Court held that the ingredients under Section 9 of POCSO Act were being fulfilled i.e. sexual assault and victim being under the age of 12 years. The accused's defence that he cannot be convicted under a section which was not mentioned in the charge sheet is unsustainable. Therefore, the charges were duly amended and accused was convicted under Section 10 of POCSO Act.

Changes in recording of nature of offence between the FIR and Framing of Charges

- In 33 cases of children below the age of 12 years, the nature of offence was changed at the time of framing of charges on account of child's age...
 - 20 cases of penetrative sexual assault became cases of aggravated penetrative sexual assault
 - 1 case of penetrative sexual assault became a case of aggravated sexual assault
 - 5 cases of sexual assault became cases of aggravated penetrative sexual assault
 - 7 cases of sexual assault became cases of aggravated sexual assault
- 5 cases of aggravated sexual assault became cases of aggravated penetrative sexual assault and 1 case registered under section 377 of IPC became a case of aggravated penetrative sexual assault considering the nature of offence made out besides the child's age.
- 4 cases of penetrative sexual assault remained the same despite the children being below the age of 12 years.
- In 8 cases of children above the age of twelve years registered as penetrative sexual assault, charges were framed for aggravated penetrative sexual assault. two of these involved step father and another two involved a relative. Even the police did not pay attention to this as cases involving step father and paternal uncle continued to be treated as those of penetrative sexual assault on completion of police investigation.

- Source: Factsheets based on ongoing study of 237 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2019.

Trial

Statement of accused under Section 313 of CrPC

In the case **Nar Singh v. State of Haryana**, AIR 2015 SC 310 the Supreme Court held that the statement of an accused under Section 313 of CrPC is important and is based upon

the rules of natural justice for an accused. Under the section the accused is made aware of the circumstances and evidence put against him, and he is afforded an opportunity to give a proper explanation to the accusations. The Court further held, that any impediments or infirmities in the statement under Section 313, due to the failure the court, will not ipso facto vitiate the trial, unless it can be shown that some material prejudice has been caused to the accused.

Further, the court held that the question of whether a trial of the accused stands vitiated depended upon the degree of error and proof of material prejudice caused to accused due to the non-compliance of Section 313 of CrPC. The court held that in such cases on non-compliance there are four options available to courts, which include:

- (1) Whenever a plea of non-compliance of Section 313 CrPC is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer;
- (2) In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.
- (3) If the appellate court is of the opinion that non-compliance with the provisions of Section 313 CrPC has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused. Under Section 313 CrPC and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;
- (4) The appellate court may decline to remit the matter to the trial court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused.

Re-examination by the Public Prosecutor under Section 138 of IEA

In **Rammi and Ors v. State of Madhya Pradesh**, AIR 1999 SC 3544, the Supreme Court held that the very purpose of re-examination under Section 138 of the IEA, was to explain matters which have been brought down in the cross-examination. The Court further held that the purpose of re-examination is not confined to clarification of ambiguities, which

have come forth during the cross-examination, and is extended to the party who had called the witness seeking an explanation for any matter referred to in the cross-examination. An explanation may be required in cases of ambiguity or otherwise. The Court held that the public prosecutor should formulate questions for such purpose and the court cannot direct the public prosecutor to confine his questions to ambiguities alone. The Court further held that there is no upper limit on the number of questions that the public prosecutor can ask during the re-examination- depending on the facts and circumstances of each case, any number of questions can be asked in the re-examination of a witness.

Guidelines to followed while holding trial of child sexual abuse of rape

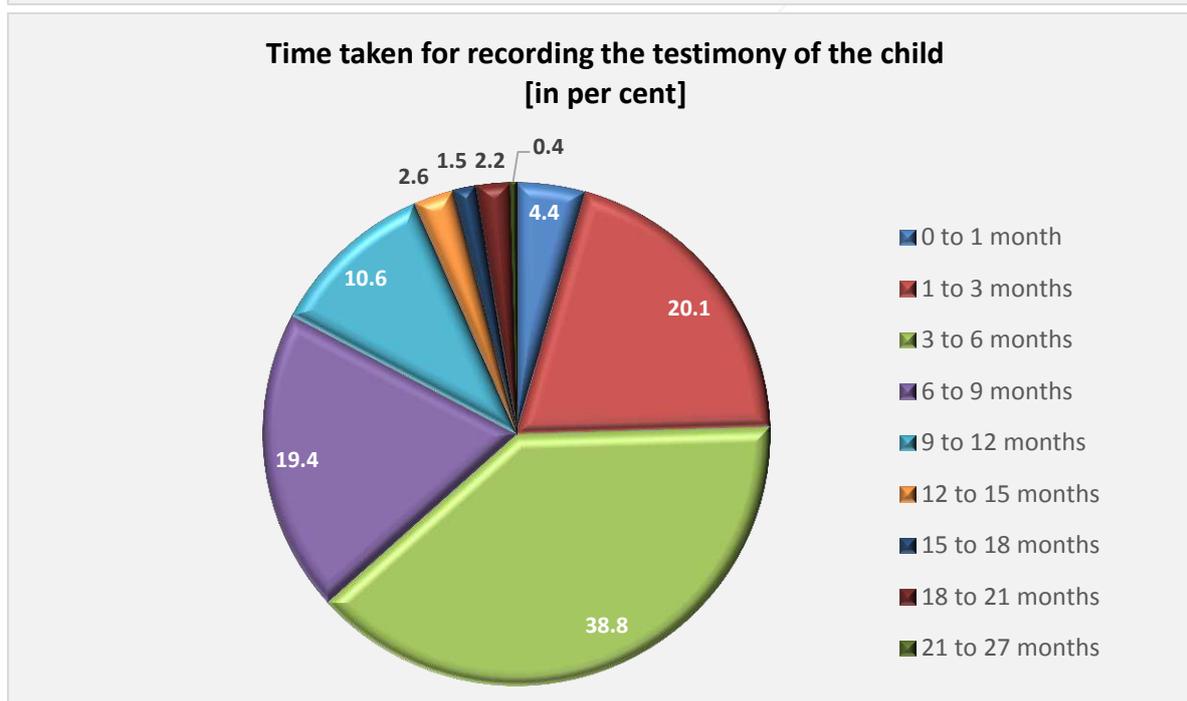
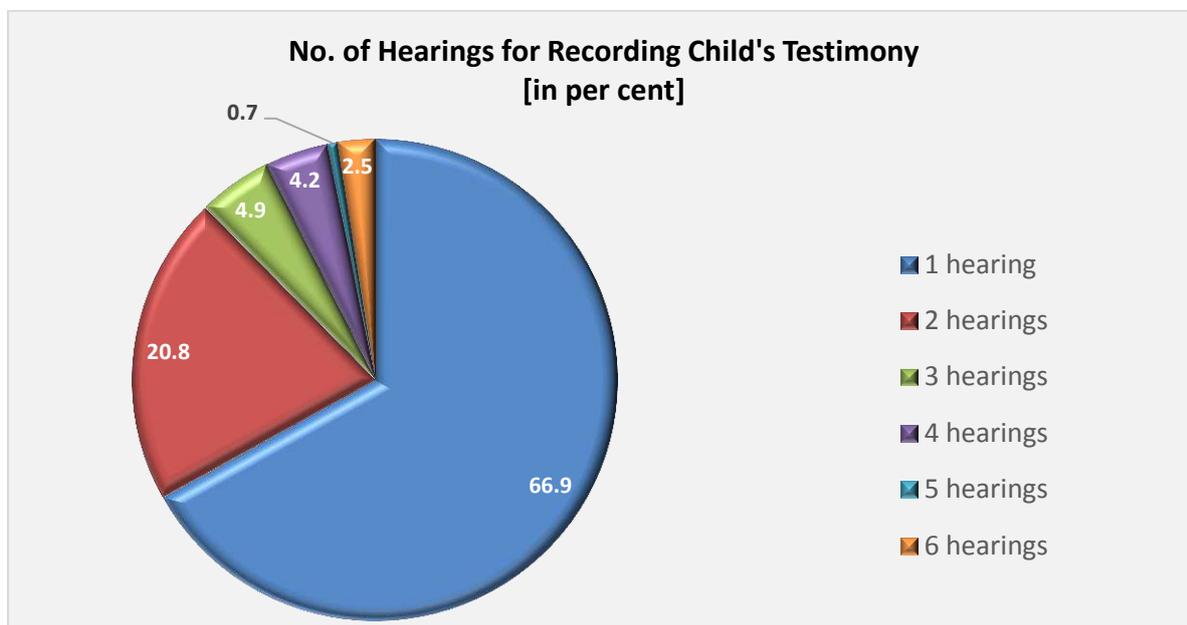
The Supreme Court in **Sakshi and Ors. v. Union of India (UOI) and Ors.**, (2004) 5 SCC 518 held that in holding trial of child sex abuse or rape, the courts must comply with the following guidelines:

- (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
- (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
- (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

This was also held by the Supreme Court in *State of Punjab v. Gurmit Singh*. In this case, the court held that trial courts should take recourse to the provisions of Section 327 (2) and (3) of CrPC liberally, and in camera trial of rape cases should be the rule and open trial should be conducted only in exceptional cases.

CHAPTER 5

RECORDING OF CHILD'S TESTIMONY



- Source: Study by HAQ: Centre for Child Rights & FACSE. Available at: <http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>

The above charts are for cases analysed from Delhi. In 66.9% of the cases, children came to court only once, and in 12.3% of the cases, the child had to come to the court 3 to 6 times. 89.4% of children's testimony was recorded beyond the period of 30 days, extending as far as 27 months.

Things to know and understand

Children who are victims of sexual crimes carry a huge burden of guilt, shame and humiliation, which gets aggravated when required to recount the violation to strangers in formal surroundings. The trauma of a child victim is only multiplied as he or she is required to repeatedly recapitulate her ordeal to the investigating agencies, prosecutors and then in court.

A child witness is to be treated with special care not only on point of reliability but also on the need for a special procedure when a child witness is testifying. Provisions under the POCSO Act, which lay down the procedure of conducting a child's testimony take into consideration the special needs of a child. To smoothen the child's experience and journey through the criminal justice system, **Sections 24, 25, 26, 33, 36 and 37 POCSO Act gain significance while dealing with child witnesses.**

The Supreme Court and High Courts have consistently laid down guidelines to ensure that during criminal trial the child's rights and interests are safeguarded and protected. Lack of proper implementation of such guidelines, and absence of adequate safeguards during proceedings, have continued to create impediments for children and their families during their testimony in court.

The present chapter makes an attempt to delineate all important aspects pertaining to examination of child witnesses in court. In doing this, the chapter focusses on both statutory law (special laws pertaining to children) and judicial precedents, in the form of guidelines and directions given by courts to examine child witnesses.

Questions for consideration:

- *How important is it for the child to give his/her statement?*
- *How would the court determine the competency of the child witness?*
- *When can the courts place reliance on the testimony of the child?*
- *Whether the testimony of the child requires corroboration?*

Competency of a child witness to testify

Determining competency of a witness becomes more important when the witness is a child of tender years.

As a general rule **Section 118 of The Indian Evidence Act, 1872 (IEA)** states that *"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."* It also explains that a lunatic

is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

The POCSO Act does not stipulate any minimum age for the purpose of deposition – the court is required to ascertain whether a particular child is competent to depose, and such competence may differ from child to child.

On the question of competency of a child to testify as a witness, the Delhi High Court in **Virender v. The State of NCT of Delhi**, CrI. A. No. 121/2008 stated that the courts in India have relied on the proposition formulated by Justice Brewer in **Wheeler v. United States**, 159 US 523 (1895). In the said case, it was opined that the evidence of a child witness cannot be rejected per se, but the courts, as a rule of prudence, should consider such evidence with close scrutiny and only on being convinced about the reliability and quality thereof can record the said child's statement.

Further, referring to the Supreme Court case of **Panchhi v. State of U.P.**, AIR 1998 SC 2726, the court in **Virender v. The State of NCT of Delhi** (supra) stated that *'the reservation expressed with regard to evaluating the testimony of a witness is based on apprehensions that children may be vulnerable and susceptible to be swayed by what others say and the child witness is an easy prey to tutoring, and therefore, their evidence must be evaluated carefully and with greater circumspection'*.

Competency of a child witness who is not a victim of the crime

In **Golla Yelugu Govindu v. State of Andhra Pradesh**, AIR 2008 SC 1842 the Supreme Court held that age was not a determinative factor to adjudge competency of a witness and thus a young child could testify if he/she had the intellectual capacity to answer the questions posed to him/her.

"9. The 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 of intelligence, 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 of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous..."

The Delhi High Court in **State v. Sujeet Kumar**, 213 (2014) DLT 635, has discussed competency of the child witness and the relevant assessment to be done.

The court has and reiterated that:

"...as regards competency of a person to appear as a witness, the legislature has underlined the basic requirement of a person's understanding of the obligation to speak the truth and to give an accurate impression and possession of the mental capacity at the time of the occurrence concerning which he has to testify and to receive an accurate impression of it.

This would be more so in

case the witness is a child of tender years. An assessment by the court of the competency of a child who is to appear as the witness on these issues is essential. It is also necessary to ascertain as to whether the witness had a memory sufficient to retain an independent recollection of the occurrence; capacity to understanding simple questions about it and the capacity to express his/her memory of the occurrence. ...If after careful scrutiny of the testimony of child witness the court comes to the conclusion that there is impress of truth in it then there is no reason as to why the court should not accept the evidence of child witness."

So as far as the competency to appear as a witness is concerned, the courts have emphasised upon the following:

- a person's understanding of the obligation to speak the truth;
- possession of the mental capacity at the time of the occurrence, concerning which he has to testify, and to receive an accurate impression of it;
- a memory sufficient to retain an independent recollection of the occurrence;
- capacity to understand simple questions about the occurrence and express his/her memory of the occurrence.

Relying on a paper by Ms. Sherrie Bourg Carter, a renowned psychologist in U.S.A., titled, "*Child Witness Competency: When Should the Issue be Raised*", the High Court of Delhi, in Para 51 of **State v. Sujeet Kumar**, acknowledged the following parameters given for the courts to follow while assessing the competence of a child witness to testify:

- *Adequate intelligence and memory to store information;*
- *The ability to observe, recall, and communicate information;*
- *An awareness of the difference between truth and a lie;*
- *An appreciation of the meaning of an oath to tell the truth;*
- *An understanding of the potential consequences of not telling the truth.*

The High Court further drew guidance from the paper on the nature of questions that could facilitate a fair evaluation of the child's competency, as follows:

"I. For determining Intelligence and Memory - For a young child, questions about family, school, counting, and knowledge of the alphabet and colours can provide sense of the child's intelligence and memory. With older children, more difficult

intellectual skills determining their literacy level would provide information about their intelligence and memory.

II. Ability to Observe, Recall and Communicate - Examples of recent experiences about which child can be questioned should include what the child ate or who the child saw that day. An example of the distant past events should include what happened say on the child's birthday or memorable holiday or a field trip or a vacation. Further questioning could be about attended, and what gifts were received. (Of course, these questions are required to be put keeping in view the socio-economic background and literacy of the child, especially in our country).

III. Understanding of Truth and Lie-To assess a child's understanding of these concepts, questions about right and wrong, real and make-believe, truth and lie typically are asked."

Whether the statement of a child witness is worthy of credence?

From the Supreme Court of India...

In **Panchhi v. State of U.P.** (supra), the Supreme Court observed that, ***if satisfied that the testimony of the child witness is a voluntary expression of what transpired and is an accurate impression of the same, no corroboration of the testimony is required.***

In **Moti Lal v. State of U.P.**, JT 2008 8 SCC 271, the Supreme Court reiterated the well settled principle that ***even if the doctor who examined the victim does not find any sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix if it inspires confidence.***

In **State of Punjab v. Gurmit Singh**, 1996 Cri.LJ 1728 SC, it was held that a ***conviction can be founded on the testimony of the victim alone unless there are compelling reasons for seeking corroboration.***

From the Delhi High Court ...

In **Virender v. The State of NCT of Delhi** (supra), the court held that ***if satisfied that the testimony of the child witness is a voluntary expression of what transpired and is an accurate impression of the same, no corroboration of the testimony is required.***

In **State v. Sujeet Kumar** (supra), the Delhi High Court was of the view that ***after careful scrutiny the court should accept the evidence if it is convinced that the witness is reliable, does not seem tutored and there is "impress of truth" in the testimony.***

Multiple statements given by child witness

In **Court on Its Own Motion v. the State**, CRL. REF. No.2/2016 the Delhi High Court discussed the permissibility and legality of recording multiple statements/versions of a victim of sexual assault (women and children), by an investigating officer or a judicial officer.

It held that the law allows investigating agencies to record multiple statements of the victims and thus, there is no prohibition on recording multiple statements of the victim by the police. The Court further held that a seemingly contradictory initial account is not reason enough to disbelieve the subsequent testimony of the victim. The court further held that **children and young persons may disclose abuse in different ways and the child's type of disclosure may be influenced by their age at the time of the abuse as well as the age at the time of their disclosure.**

"79. It needs no elaboration that the children would be reluctant and unlikely to disclose an entire adverse experience in proper detail in their first statement to the police, let alone the necessary details. The fear for themselves or their family; an apprehension that they would be disbelieved; inability to identify themselves as victims; pressure or threats from the perpetrator; relationship to the perpetrator; fear of embarrassment, shame or self-blame; fear of stigmatization; lack of trust with the investigating agency amongst other would be some of the reasons which would act as barriers to a child making a disclosure of a complete incident in a single meeting."

80. There is great variation in how disclosure is defined and studied. Disclosure is rarely a spontaneous event and it is more likely to occur slowly over time as part of a process. For some it is a process that reoccurs and is never finished. Children and young people disclose abuse in many different ways ranging from direct verbal statements to more subtle indirect methods. Some children will tell purposefully yet others will do so indirectly or only after being encouraged by others to talk Non- verbal disclosures are more common among young children and can come about through letter writing, role playing or drawing Bodily or physical signs of abuse can include stomach aches, encopresis, enuresis, adverse reactions to yoghurt or milk, or soreness in the genitals Emotional signs of abuse include fear, anxiety, sadness, acting out without immediate cause, mood swings and reluctance to visit the perpetrator Behavioural signs can include sexualised playing with dolls, sexual experimentation, excessive masturbation, or drawing sexual acts. However, such behaviours need to be considered in the context of individual, family and wider societal dynamics in which they occur Various models or stages of disclosure have been proposed including staged, social exchange and social cognitive models. The models agree that disclosure is an interactive and dynamic process that is influenced by the way children conceptualise and make decisions about whom to tell and the reactions they might receive.

81. Children may disclose spontaneously (disclosure as an event) or indirectly and slowly (disclosure as a process). The child's type of disclosure may be influenced by their developmental features, such as their age at the onset of abuse and/or their age at time of disclosure. For instance, younger children are more likely to spontaneously disclose than older children (Lippert, Cross, & Jones, 2009; London et al., 2005; Shackel, 2009).”

Things to remember...

A child against whom a sexual offence has been committed is a crucial prosecution witness and the success or failure of the prosecution's case depends on his/her evidence.

Over the years both the Supreme Court of India and various High Courts have established the importance of victim's testimony and clearly stated that conviction can be based on a consistent and reliable testimony of a competent witness.

Whether the sole evidence of a child can be the basis for conviction?

The Supreme Court has repeatedly held that the testimony of a child can be the sole basis for conviction in a case. The Court has consistently held that the rule of corroboration is only a rule of caution and prudence, and does not need to be followed in every case.

The Supreme Court in the case of **Dattu Ramrao Sakhare v. State of Maharashtra**, 1997 5 SCC 341 held that:

“6. ...A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while 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 being tutored”.

Even while acquitting the appellant on the grounds that the evidence of the prosecutrix was full of discrepancies and did not inspire confidence, the Supreme Court in **Radhu v. State of Madhya Pradesh**, Appeal (Crl.) 624 of 2005, held that:

“5. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult

to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. ...Whether there was rape or not would depend ultimately on the facts and circumstances of each case”.

In **Virender v. The State of NCT of Delhi** (supra), High Court of Delhi stated:

“12. It needs no elaboration that a conviction can be based on the uncorroborated evidence of a prosecutrix if the same inspires complete confidence”.

While dealing with the question of competency of a child witness in **State v. Sujeet Kumar** (supra), the High Court of Delhi stated that:

“46. The evidence of a child witness cannot be rejected per se, but the court as a rule of prudence is required to consider such evidence with close scrutiny and if it is convinced about the quality thereto and the reliability of the child witness it can record conviction based on his testimony”.

In **State of Himachal Pradesh v. Sanjay Kumar**, (2017) 2 SCC 51, the Supreme Court that the deposition of the prosecutrix should be taken as a whole since the victim of rape is not an accomplice to the offence. As a result, her evidence can be acted upon without corroboration as she stands at a higher pedestal than an injured witness does. In light of this, minor contradictions between the testimonies of the prosecutrix and other material witnesses, when other material facts of the incident are in sync, are not relevant and courts should not focus on the same.

The Court also held that this by no means should imply that the testimony of the victim child should be treated as the gospel truth in all cases- as stated above, the Court held that once the testimony of the child is examined and analysed, and there are no compelling reasons to disbelieve the child, the case should be dealt with sensitivity.

*“30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which **testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases.***

*31.**No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice***

and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime.”

In **Suryanarayana v. State of Karnataka**, (2001) 9 SCC 129 the Supreme Court held that if upon examination and scrutiny, if the court is satisfied that the evidence is reliable and not tutored, the court can secure the conviction of the accused based solely upon the child’s testimony. Further, it stated that corroboration is not a rule but a matter of prudence, and minor discrepancies and inconsistencies are not a basis for disregarding the testimony of the child.

Is the inability of the child prosecutrix to disclose specific particulars of the incident i.e. date and place prove fatal to the case?

In **Balaji Sarjerao Kamble v. State of Maharashtra**, 2017 ALLMR (Cri) 4232 the Bombay High Court held that this inability could not be a ground to doubt the testimony of the child prosecutrix.

“12. True it is that the victim of the crime has not mentioned the date of the incident but that is inconsequential. Such a discrepancy cannot touch the core of the prosecution case which is in respect of the commission of penetrative sexual assault. Ultimately, the court will have to keep in mind age of the PW1 at the relevant time, and therefore, merely because date of the incident is not stated by the victim, her evidence cannot be doubted. The PW1 is not expected to have such chronometric sense at the tender age.”

Is the inability of the child to record statement under Section 161 and 164 of CrPC fatal to the case?

In **Chaitu Singh Gond v. State of Madhya Pradesh**, CrI. A. No. 344 of 2014, the Madhya Pradesh High Court observed that child prosecutrix was merely 5 or 6 years old, she would have undergone immense trauma, as a result of which she was not able to speak or communicate during the investigation. Thus, the court held that it is understandable why the child prosecutrix was not able to record her statement during investigation. Additionally, the court held that in the present case, the conviction of the appellant is not based on the sole testimony of the child prosecutrix, and it is also based upon the testimony of the prosecutrix’s grandmother and mother, which were duly recorded

during the investigation. Thus, the appellant could not claim that he was not aware of the case against him during the investigation.

“10. In the instant case, the Court can take notice of the fact that at the time of incident the witness was merely 5 or 6 year old girl and was studying in Class III. She came from a rustic background and must have been under a great deal of mental trauma during the course of investigation. That apart, it has come on record that immediately after the incident, she was scolded and slapped by her mother for accompanying the appellant inside his house. She was subjected to sexual assault and was seen by her mother in that condition. In such circumstances, even an outspoken woman would be tongue tight due to embarrassment.”

What is the credibility of a deaf witness?

In the case of **Chander Singh v. State**, CrI. A. 751/2014, the appellant challenged his conviction on the ground that a deaf and dumb child witness could not be cross-examined and that her testimony could not be read in evidence. The Delhi High Court dismissed his appeal and held that the testimony of the deaf and dumb child prosecutrix, through her sign language, inspired confidence and was sufficient to prove the offence committed by the appellant. Additionally, the court held that the response of the child-prosecutrix in cross-examination, wherein she drew and explained the distance where incident took place, reflected that there was sufficient compliance with the right to cross-examination of the appellant in the present case.

Further, the Delhi High Court held that it is important for courts to acknowledge the disability of a deaf and dumb witness, and take into account that such witness would not be able to explain each answer in detail by sign language during the proceedings. Thus, the courts should direct, monitor and control the cross-examination keeping in mind the ability of the witness to answer questions posed to her, and prevent any abuse of such witness during the cross-examination.

“9. As noted above the prosecutrix is a deaf and dumb girl and obviously would not be able to face grilling cross-examination which learned counsel for the appellant attempted to do. However even in cross-examination on the relevant point as to where the incident took place she was able to explain by drawing. The purpose of cross-examination is to test the veracity of the version of the complainant which in this case was explained by gestures by the prosecutrix to her mother on whose statement the FIR was registered and who also deposed as PW-4 in the witness box. Nothing could be elicited from the mother of the prosecutrix in cross-examination.

The prosecutrix had stood by her complaint even in her deposition before the Court and her testimony cannot be brushed aside merely because she has not been able to answer irrelevant and unnecessary questions put to her in the cross-examination....

*13. When a deaf and dumb witness is under cross-examination, the Court is required to take due care of the fact that vocabulary of such a person is limited as he or she speaks through sign language and it may not be possible for that witness to answer, or in detail explain every answer by sign language. **This disability of a limited vocabulary of sign language does not affect either the competence or the credibility of such witness. The Court is required to exercise control over the cross-examination keeping in view the ability of the witness to answer the questions.***

14. From the examination of the witness which was in question-answer form and the response to the cross-examination wherein the witness drew and explained the distance where the incident took place, it can safely be held that there was sufficient compliance of the right to cross-examination provided to an accused and the testimony of this witness is not required to be effaced.”

Can the statement of a deaf and dumb child prosecutrix can be discarded if it has not been recorded under Section 164 CrPC?

The Delhi High Court in **Shahid Ali v. State**, CrI.A. 850/2015 stated that the child prosecutrix was a deaf and dumb girl who had not learnt the sign language as taught in school and was more used to the sign language taught by her mother. It added that as a result, statement of the mother instead of the child during the investigation should not be a ground to discard the child’s evidence or doubt the credibility of child’s evidence. The Court was thus of the view that since other witnesses have duly corroborated the child’s evidence, even though her statement could not be recorded under Section 164 of the CrPC the same was not a ground to discard her testimony before the court.

*“12. Though learned counsel or the appellant had contended that there are material improvements in the testimony of PW-2 and PW-3 however, these witnesses have not been confronted with the improvements made. There was no need for the prosecution to examine the interpreter for the reason while examining the prosecutrix in Court she was explained by her mother as well with sign language. **Moreover the prosecutrix was a deaf and dumb girl who had not learnt sign language as taught in the school but was more attuned to the sign language taught to her by her mother. Even if the statement of the prosecutrix could not be recorded under Section 164 CrPC the same is not a ground to discard her deposition before the Court which is duly corroborated by the witnesses. Moreover the appellant was apprehended at the spot.”***

Whether refreshing memory of child witness during trial is ground to doubt the credibility of a child's testimony?

In the case of **Akshay Sarma v. State of Assam & Ors.**, 2016 (5) GLT 579 the child victim, aged 7 years, was sexually assaulted by her classmate's father. The child testified in court more than a year after the incident. In light of the said fact, the mother of the child victim had read out to her the statements made by her under Section 161 and 164 of the CrPC. The defence argued that in her cross examination the child victim deposed that she was tutored by her mother, so her evidence be discarded.

The Guwahati High Court observed that all the child victim's statements (under Section 161, 164 of the CrPC and her testimony in court) have been consistent. It noted the fact that as the child was deposing in court after a year of the occurrence of the incident it was natural for her mother to refresh her memory before coming to court. Though the trial court used the English word 'tutor', the High Court held that the term may not have had the same meaning in the vernacular language of the victim. Thus, it cannot be inferred to have the meaning that the mother had persuaded her to give the statement.

The High Court also laid down certain guidelines, with specific reference to the use of vocabulary, which needs to be followed while recording the testimony of a child witness.

*"22. However, this Court is not agreeable to such a contention raised by the appellant, being alive to the facts situation that we are dealing with a case of a minor that too aged about 7 years, who neither have any prosecution about the sexual conduct of a person nor could gauge the animosity if any. The testimony of the victim girl remained consistent while giving statement u/s. 161 CrPC before I.O. and u/s. 164 CrPC before Magistrate and even before the Court of trial. She made her first statement after the incident on 20.1.2013 and before the Magistrate on 21.1.2013 and she gave deposition before the Court as on 17.12.2013 and **by this time around 12 months have elapsed and it is quite natural that her memory is to be refreshed by her mother while coming to the Court after a long lapse as to what to say in the Court. Though the Court while recording evidence in English has used the word 'tutored' but the same was perhaps not the exact word stated by the victim in vernacular. Thus the word tutor has no necessary implication that the victim girl was persuaded to give false evidence.....***

30. Another important aspect while recording the testimony of a child witness is about the vocabulary used by the child. This assumes much importance inasmuch as the same word have different connotation and meanings in different language and the different regions. It is to be noted that at some time the concerned Magistrate recorded statement u/s. 164 CrPC and the learned trial Court in course of trial while recording the evidence used the word stated by the witness as stated by them without

implicating the meaning of the word say so by the victim and at some time it resulted in acquittal because of such words which reflect no actual as well as legal meaning which will obviously result in miscarriage of justice, because of unmindness of the Court concerned while recording such evidence.

31. As per the mandate of law that has been pronounced by the aforesaid decisions it can be summed up that the learned trial Court as well as the Magistrate concerned should follow the **few guidelines while recording the statement of child witness-**

- (i) A child friendly environment should be created prior to recording of statement of such witnesses and the witness should be at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly;*
- (ii) The Court should be satisfied that a victim is not scared and he/she is able to reveal what has happened to her when she is subjected an examination during recording her evidence. The Court must ensure that the child is not concealing any portion of evidence for the reason that she was ashamed of what happened to her;*
- (iii) Question should be put to the victim or the child witness which are not connected with the case to make the witness comfortable and to depose without fear and pressure;*
- (iv) The Trial judge may allow, if desirable, to have a social worker for other friendly independent or neutral adult to whom the child has confidence at the time of such giving testimony;*
- (v) The court should ensure that the victim should not be allowed to put any question in cross examination only to embarrass or confuse such victim of sexual abuse;*
- (vi) The examination and cross-examination of the child witness should be carefully monitored by the presiding judge to avoid any such harassment or intimidation to the child witness.;*
- (vii) It is the duty of the court to arrive at the truth and court have to take participatory role in the trial but not as a mere spectator in a manner so that something which is not relevant is unnecessarily brought on record. Even if the prosecutor is remiss the court can control the proceeding effectively to elicit the truth;*
- (viii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposing. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance "bad works " or "any colloquial language" have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that those words mean to her and what is intended to be conveyed are sensitively brought out.*

- (ix) *The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustrations by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.*
- (x) *In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.*
- (xi) *The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.*
- (xii) *The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice."*

The Delhi High Court in **Attar Singh v. State**, CrI. A. No. 335 of 2006 observed that the *Investigating Officer was well within his right to refresh the memory of the child witness.* Citing *Dattu Rama Rao Shakare v. State of Maharashtra (supra)* and *State of Karnataka v. Shantappa Madivalappa Galapuji and Ors., JT 2009(5) SC 660*, the said court observed that the child witness had denied the suggestion that she was being tutored by the IO and held that *'merely because she was refreshing her memory does not tarnish her credibility on this count.'*

"3.PW-1 has reiterated her statement (Ex. PW-1/DA) which she had been made to the police; she has categorically denied the suggestion that she was tutored. Merely because she was refreshing her memory does not tarnish her credibility on this count.

4. The Supreme Court in Dattu Rama Rao Shakare vs. State of Maharashtra reported in MANU/SC/1185/1997 : 1997(5) SCC 341, it was held as under:

The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness.

5. In *State of Karnataka vs. Shantappa Madivalappa Galapuji and ors.*, reported in MANU/SC/0644/2009 : JT 2009(5) SC 660, it was held as under:

This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, 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.

6. *In no manner can it be said that the testimony of PW-1 is tarnished."*

Similarly in **Kusehrideen and Another v. State Of U.P.**, Criminal Appeal No. 335 of 2006, the Public Prosecutor was alleged to have tutored the child victim as in her statement she had stated that the Public Prosecutor had refreshed her memory by reading out the statement to her. The Allahabad High Court held that no part of the child's statement diminishes the evidentiary value of her statement. Further, the Public Prosecutor had the right to ensure that the child witness had seen the occurrence or not and also had to make her comfortable with the technicalities of law. Basis her statement the court found her to a truthful witness and that she had seen the occurrence.

*"5. Km. Neelam P.W.2 is a child witness who was administered oath after the trial Judge satisfied himself about her understanding. **She has fully supported the prosecution version. She is an injured witness. Her testimony appears to be natural. Though on behalf of the appellants last para of her statement has been referred to show that she was tutored by public prosecutor. In this para the witness has stated that public prosecutor had refreshed her memory by reading her statement but she further said that whatever statement was read over that statement was truth. We do not think that the part of her statement referred by learned counsel for the appellants diminishes the evidential value of her statement.***

....Had she not been a child witness it might have mattered but due to her tender age the public prosecutor had a right to ensure that the witness he was going to examine had sufficient understanding or not, whether she had seen the occurrence or not. A child may not understand the technicalities of law. Whatever she was asked she replied that before the Court. Her statement reveals that she had actually seen the occurrence. We found her to be a truthful witness."

Guidelines on how to examine a child witness

In both the international and domestic legal framework, it has been recognized that the child's testimony must be recorded and interpreted in a special manner.

International Legal Framework

Universal Declaration of Human Rights, 1948, Article 25, provides that children as a category need special care and assistance. Alongside this there is '*UN Guidelines on Justice in matters involving Child Victims and Witnesses of Crime, 2005*', which prescribes for special protection, assistance and age-appropriate support to prevent further hardship and trauma for child witnesses. Elaborating on the UN Guidelines, the Delhi High Court in **State v. Sujeet Kumar** (supra), states the follows:

"48. ...The UN guidelines prescribe that the children are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. The UN guidelines further prescribe that female child witness is more vulnerable than the male child witness and may face discrimination at all stages of the justice system. The UN guidelines stresses the importance of ensuring dignity and physical, mental and moral integrity of the child witness; the justice process should be sensitive to child's age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socioeconomic condition as well as special needs of the child including health, ability and capacities".

Domestic Legal Framework

The '**Guidelines for recording of evidence of vulnerable witnesses in criminal matters**' were issued by Delhi High Court for providing assistance at the pre-trial and trial stage, to ensure the '**best interests of the child**' and that their '**right to be protected from hardship during the justice process**' are not violated.

The High Court of Delhi in the case of **Virender v. The State of NCT of Delhi (supra)** lays down the guidelines on how to examine a child witness/victim of an offence. The judgment observed that trial courts have unrestricted powers to ascertain and discover relevant facts, which neither party can object to.

It is pertinent to mention that in **State v. Sujeet Kumar (supra)**, overturning the trial court's judgment, the Delhi High Court recognized that assessing the competency of a child witness is not easy and passed detailed guidelines on how to question a child witness.

While acknowledging the specific needs of a child providing testimony and developing the guidelines for it, the Court also referred to the fact that this issue has been the focus of the United Nations and legislatures of other countries.

In Paras 49 of **State v. Sujeet Kumar (supra)**, the Delhi High Court listed the difficulties faced while assessing the competence of a child witness. Recognising that it is not an easy task, the court has listed several factors to be taken into consideration:

- *the environment of court which is intended to be imposing,*
- *presence of accused,*
- *child's worry about being not believed while testifying,*
- *general public getting to know about the incident,*
- *child worrying about mixing up facts or forgetting things while testifying,*
- *embarrassment in sharing details of the incident,*
- *child worrying about the repercussions and retaliation by or against her/his family,*
- *children may have different understanding from adults as to meaning of a word, lesser accuracy in terms of time, distance etc.*

Further Para 50 of the aforesaid judgment states that exhaustive research has been conducted with respect to children's linguistic abilities and understanding and a number of significant points may be distilled from research, some of which are being enumerated herein under:

- *Young children are very literal in use of language, so it is essential to find out what they mean when they use words and not to assume that they have the same meaning as an adult would give them.*
- *It takes children longer to process words, so it is essential to give them time to think and respond to the question; pausing during questioning can be very productive.*
- *Children will not say they do not understand, whether because they do not realize that they do not understand or because they do not want to show ignorance; they may not be aware that this is an option.*
- *Use one question for each idea and start the question with the main idea. For example, ask children 'did the bell ring when you were eating?' rather than asking 'when you were eating, did the bell ring?'*
- *Avoid jumping from one topic to another while questioning the children.*
- *Do not use word 'any' (anything, anyone, anywhere) as these are not specific and will tend to generate the answer 'no'; a very young child will not know what 'anyone' means and if asked 'did you see anyone' will answer 'no'. Instead ask 'who did you see?' or 'did you see X?'*
- *Avoid using 'different' or 'the same' while questioning children: asking a child 'was it same as this?' is confusing for the child; by age five or six, children may be able to distinguish between 'the same' toy - meaning the actual one they played with - and a similar one, but it may take several more years to appreciate that things generally similar are regarded by adults as different.*
- *The word 'inside' is problematic for children: in sex abuse cases involving suspected penetration, a child may need to be asked if an object was inserted 'inside' an orifice and could also be asked how far; this is fraught with difficulties; it is essential to find*

out what the child understands by 'inside'. (For example, anything between the legs could be perceived as inside by the child) and the question needs to be asked in an age-appropriate way.

- Avoid using either/or questions: adults recognize that neither choice may be accurate; this is difficult for children to do;
- How/why questions: in relation to 'why', this is seen by a child as requiring the child to defend herself to justify why something happened; 'why' also requires a child to be able to look at motivations, reasoning from effect back to cause, which children cannot do until about ages 7 to 10. 'How?' may require memory of concepts; 'how many times did that happen?' may require ability to recognize intention and flow of events; instead of asking 'how did he do that?' ask 'what did he do?' 'Show me what he did?'
- Leading questions are confusing for children and result in children giving incorrect responses.
- Pronouns (he, she, they) confuse children. It is better to name the person being talked about or to ask the child to do so."

The Delhi High Court in the case of **State v. Rahul**, CR.L.P. 250/2012 examined the general principles which govern a competency examination of the child witness before the court and also referred to the judgment from other countries to highlight the importance and precautions to be taken at the time of recording child's testimony.

*"...It is essential to note that all these concerns apply to all stages of a child witness court appearance including the competency examination of the child and evaluation of her/his response thereto. **We cannot emphasize enough that the legislation, the statutory requirements as well as the jurisprudence on the subject have kept the best interest of the child as the complete focus of every action, especially Court proceedings and the decision. This aspect cannot be compromised in any manner.** The matter assumes even greater importance in cases involving the sexual offences and abuse of the child as in the present case."*

In the case of **Sudesh Jhaku v. K.C.J. & Ors.**, 62 (1996) 39 DLT 563, the Delhi High Court observed that the prosecutors need to be cautious about undervaluing a child's feelings. In Para 38 it clearly expressed that:

*"38. I hope that while the child is in the witness box every effort will be made by the learned trial Judge to lessen her ordeal and that he will take care that nothing is said or done which causes unnecessary distress to her. **The Prosecutor in his zeal might undervalue the child's feelings. There is need to keep a check on it.** The defense counsel undoubtedly have a primary duty to their clients but they owe a duty towards the court and the judicial system also. They are expected to avoid needless abuse and*

harassment of the witness. If the court notices any departure from this course of conduct, it should rise to the occasion promptly and effectively. **Child sexual abuse being one of the most serious and damaging criminal offences, the trial Judge shall handle the proceedings with considerable sensitivity and ensure that the trial is fairly conducted. He should take care that questions asked are not complex or confusing. Questions containing a negative or double negative should be better avoided. The feasibility of giving breaks during questioning may also be kept in mind though such breaks need not be long. If the prosecution establishes to the satisfaction of the court that to obtain a full and candid account from the child witness the use of a screen would be necessary, the court may be inclined favourably to provide such a screen. I may notice that the reason for such a step may not necessarily be a fear of the accused. It may be of the court room itself. However, here is a word of caution. Since demeanour of a witness is always of some importance, the screen, if provided, should not come in the way of trial Judge to notice it. One thing more before I draw the curtain. It relates to child support persons in the court room. On that Mr. Jaitely had drawn my attention to the Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada Reaching for Solutions, 1991. In fact that the guidelines delineated above have drawn inspiration from the said Report and as regards the child support this is what it states : "**There are situations in which it is desirable to have a social worker or other friendly but "neutral" adult visible to the child, or even sitting beside a young child who is testifying. While some judges have permitted this, others have not.** There have been cases where the Judge has ordered supportive persons to leave the court room, along with other members of "the public." I am leaving the matter to the good sense of the learned trial Judge. However, one thing is certain. **The proceedings have to be in camera.**"**

Directions to be followed with while conducting rape trials:

In State of Punjab v. Gurmit Singh (supra), the Supreme Court issued the following directions to lower courts to be followed while conduction rape trials:

- *The Supreme Court disapproved of any approach that casted a stigma on the character of the prosecutrix and held that no stigma should be cast against the prosecutrix for it is the accused and not the victim of the rape who is on trial in court.*
- *In rape cases, the court shoulders a great responsibility and thus such cases must be dealt with utmost sensitivity. In light of this, the court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the testimony of the prosecutrix. Thus, in the event the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars.*

- The court must ensure that the cross examination of the prosecutrix is not a means of harassing or humiliating her. The court further held that the victim of rape has already gone through a traumatic experience and if she is made to repeat the incident incessantly, in unfamiliar surroundings, she may be too ashamed/nervous/confused to speak and her silence or a confused stray sentence/remark may be wrongly seen as 'discrepancies or contradictions' in her evidence.

Use of doll to record testimony of child victim

In the case of **Hunny v. State**, CrI. A. 841/2016, the child prosecutrix responded to all the questions posed to her except the one where she was asked about how the appellant had sexually assaulted her. She responded to the said question by referring to the doll. The issue which arose in the High Court was with respect to whether the testimony of a child prosecutrix could be relied upon if she had not expressly communicated what happened to her but instead used the doll in her hand to show what the appellant had done. The Delhi High Court held that given her young age, it was understandable why she could communicate the same in words, and held that her testimony cannot be discarded merely because the child prosecutrix did not use specific words to expressly communicate what the appellant had done.

"10. True, the child was hesitant to respond to some questions put at the time of recording her statement. Obviously, the child was reluctant to answer embarrassing questions which were derogatory in nature. The court can understand shyness of tender aged girl to answer dirty or vulgar questions. She has given answers to other questions. Nevertheless, she had categorically pointed out as to what the appellant had done with her by referring it to the doll in her hand. She had conveyed as to what was done by the appellant with her. Nothing more can be expected from a child aged around five years considering her limited understanding. Her testimony cannot be discarded merely because 'X'; in specific/express words did not tell that nails were scratched on her vagina by the appellant after putting off her underwear."

Test Identification Parade by Child Witness

In **Rakesh Kumar v State**, CRL.A. 513/1998, the Delhi High Court held that a failure to hold a Test Identification Parade (**TIP**) was not a ground to discredit the testimony the child eye witness. The Court further gave directions to the Director General (Prisons) in cases where the child witness is below the age of 12 years and had to participate in a TIP proceeding.

The Court thus issued the following directions:

- (a) In every case where witness is a child below the age of 12 years TIP proceedings shall be held in one of the court rooms attached with the main Tihar Jail so that the child does not enter the main Jail Complex to reach the Test Identification Parade room.
- (b) Installation of semi reflective screen or any other screen or mechanism in a room where TIP proceedings will be conducted so that the child witness is not confronted face to face with the criminals participating in the TIP proceedings.
- (c) A person accused of the offence and the others who may be participating in the TIP will be explained the procedure and the manner of TIP proceedings to be held in a case of child witness.
- (d) No officer below the rank of Deputy Superintendent of Jail shall accompany the child witness at the time of TIP proceedings and endeavour shall also be made by the Jail Superintendent that, so far as possible only female officer is deployed wherever witness happens to be a girl child for the purposes of identifying the accused person.
- (e) No police official shall be seen in a uniform right from the stage when the child enters the TIP Room and till he/she leaves the premises after the completion of TIP proceedings. The child witness shall be entitled to accompany his parents/guardians or any of his close relatives so as to make the child comfortable before participating for identifying the accused in the Test Identification Parade.
- (f) Endeavour shall be made by Director General (Prisons)/Jail Superintendent that a lady officer who is more humane,
- (g) The child friendly atmosphere will be created in a room where the child is brought first and the stay of the child will be made most comfortable so that the child finds the place to be attractive and conducive to his/her requirements.
- (h) Necessary arrangements for light refreshment to the general liking of children below the age of 12 years shall also remain in place to keep the mood of the child upbeat.

“40. Before parting with this case, we deem it necessary to give certain directions to the Director General (Prisons), Delhi for making some congenial and conducive environment to conduct the TIP proceedings in a case where the witness happens to be a child below the age of 12 years. There may be many child witnesses like the one in the facts of the present case, who may get frightened and traumatised to the unfriendly and unfamiliar environment of Jail where at every step there is a deployment of police and para-military forces firstly to reach the room meant for conducting TIP proceedings, after passing through several entry points. No normal child can be expected to remain undeterred or un-influenced with such kind of frightening atmosphere surrounded by gun toting police officials and then ultimately coming across the criminals engaged for participation in the Test Identification Parade. It is very normal for a child to get apprehensive and frightened as has happened in the present case where the child was of below 12 years of age and she got frightened on seeing the atmosphere of the jail and when she was asked to take three rounds so as to

identify the accused person, she started weeping bitterly and then tried to run out of the room.”

Making courts victim friendly!

Vulnerable Witness Deposition Complexes: *Delhi has been the first state to have initiated the setting up of Vulnerable Witness Deposition Complexes (VWDC) under the able guidance of a Committee of the Delhi High Court chaired by Hon’ble Justice Gita Mittal. Gradually other states also initiated such steps to make the court infrastructure victim-friendly. While the end result of a case depends on several factors ranging from police investigation to evidence on record, it goes without saying that facilities like the VWDCs have helped the victims immensely, particularly children, whose testimonies reflect a marked difference in substance and quality.*

Whether the testimony of close relatives can be relied upon to convict the accused?

The Supreme Court in **Darya Singh and Ors. v. State of Punjab**, AIR 1965 SC 328 observed that case of the prosecution rests on the evidence of three eye-witnesses who seem reliable and gave a consistent account of the attack on deceased which they witnessed in front of their house and gave a description about how each one took part in the assault. The court held that the testimony of a close relative must be looked into carefully and in the event a case of hostility is seen, then the courts must scrutinize all the infirmities in that evidence before deciding to act upon it. A person may be interested in the victim being in the capacity of his/her relative; however, it cannot be held as a principle that they shared the same hostility towards the accused.

In the present case, the place of offence was right outside the house of the witnesses and they were not chance witnesses i.e. it was not improbable for them to be there at the time of the scene. The court held that – *‘The story deposed to by these witnesses appears to be very probable and has been treated by the Courts below as consistent and cogent.’*

“6. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal Courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence.

But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal Court to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.

In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence.

If the offence has taken place as in the present case, in front of the house of the victim, the fact that on hearing his shouts, his relations rushed out of the house cannot be ruled out as being improbable, and so, the presence of the three eye-witnesses cannot be properly characterised as unlikely. If the criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised.....

On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars.....

12. It is well-known that in villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers are generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks."

Evidence cannot be discarded on that count that eye-witnesses are related to the deceased. The evidence of the interested witnesses can be relied upon if it inspires confidence.

The Supreme Court in **Subal Ghorai and Ors. v. State of West Bengal**, (2013) 4 SCC 607 analyzed the testimonies of the related witnesses and held that if the evidence of the interested witnesses is found truthful and in accord with the relevant circumstances on record, the court should not hesitate to accept it and record conviction on the basis thereof. It further held that all interested witness are not necessarily bad witness and in cases wherein the witnesses are related to the deceased, there is a less chance of leaving letting go the real assailants. Thus, the Supreme Court held that they are not inclined to reject the evidence of the witness on the ground that they are related to the deceased.

Not finding any infirmity in the evidence of the deceased's close relatives, the Supreme Court in **Harbans Kaur And Anr v. State Of Haryana**, (2013) 4 SCC 607 held that the trial Court and the High Court were right in relying on the evidence of the prosecution witnesses. Further, it held that that *'There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused. No evidence has been led in this regard.'*

CHAPTER 6

CORROBORATIVE VALUE OF MEDICAL AND SCIENTIFIC EVIDENCES

Generally, in any criminal trial, independent corroboration may be necessary before establishing guilt... BUT, in case of rape if the statement of victim is found to be worthy of credence and reliable, it requires no corroboration. The court may convict the accused on the sole testimony of the victim.

However, a lot of weightage is given to forensic evidence and therefore such evidence can help to convict/acquit the guilty. Thus, the testimony of a doctor can help in providing the necessary medical corroboration in rape cases.

Questions for consideration:

- *Who is an expert witness and how much weightage does their evidence command?*
- *What is the weightage of medical evidence in cases of rape?*
- *Whether the doctors are mandated to conduct examination in cases not referred to by the police?*
- *Whether the accused can be convicted in the absence of medical corroboration?*

Who is an 'expert witness'

In today's age the development of science has changed many spheres of human life. It has also brought a great change in the way crimes are being investigated and the way in which evidence is being collected. The investigation, collection and analysis of the evidence in a scientific way requires special knowledge, skill and expertise in the relevant field.

The person having that required special knowledge, skill and expertise is called an 'expert witness'. Section 45 of the IEA defines an expert witness as under:

"Section 45 - Opinion of experts

When the court has to form an opinion upon a point of foreign law or of science or art, or as to identify of handwriting or finger impressions, the opinions, upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identify of handwriting or finger impression are relevant facts. Such persons are called experts."

Whether the evidence given by an expert witness can be considered direct evidence?

Justice M Monir, in his book titled, 'Principles and Digest of the Law of Evidence', states that **'when a medical person is called as an expert, he is not to witness the facts, because his**

evidence is not direct evidence of how an injury in question was done. He gives his opinion only on how that, in all probability was caused. The value of such evidence lies only to the extent it supports and lends weight to direct evidence of eye-witnesses or contradicts evidence and removes the possibility of the injury in question and could take the manner alleged by the witness.'

What is the difference between an 'expert witness' and an 'ordinary witness'?

The Supreme Court in **Malay Kumar Ganguly v. Sukumar Mukherjee**, AIR 2010 SC 1162 stated that:

"for the purpose of arriving at a decision on the basis of the opinion of experts the court must take into consideration the difference between an 'expert witness' and an 'ordinary witness'. The opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such evidence could be admitted or how much weight should be given thereto, lies within the domain of the court. The evidence of an expert should, however, be interpreted like any other evidence."

Further, the court in **Dayal Singh v. State of Uttaranchal**, AIR 2012 SC 3046 observed that:

"the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. If eye-witnesses' evidence and other prosecution evidence are trustworthy, have credence and are consistent with the version given by the eye-witnesses, the court will be well within its jurisdiction to discard the expert opinion."

The expert evidence has only corroborative value i.e. it is only corroborative evidence. It means, the court has to first look at the direct evidence or the evidence of eyewitnesses, then court may take corroboration from the expert evidence.

Direct evidence is essential to prove an offence beyond reasonable doubt while an opinion (expert) evidence gets secondary importance.

Whether non-examination of the 'expert witness' is always fatal to the prosecution case?

In the case of **Asgar Ali v. State (NCT of Delhi)**, 2013 CriLJ: 1838 DHC, the High Court of Delhi relying on Supreme Court's judgment of **State v. Dayal Sahu**, AIR 2005 SCC 2471 held that:

"the non-examination of doctor and non-production of medical report would not be fatal to the prosecution case if the evidence of prosecutrix and other witnesses is worthy of credence and inspire confidence".

In **Sri Kishan Poddar v. The State (Govt. of NCT of Delhi)**, CrI. A. No. 452/2006 the security guard raped a female (married) employee of a factory inside the factory premises. The FIR

was registered after a delay of one week and hence there was no incriminating material found in the Medico-Legal Case (“MLC”). The accused in his defence pointed out many contradictions in the statement of prosecutrix, delay in reporting the matter to the police and hence claimed false implication by the prosecutrix. The High Court of Delhi ignored the contradictions and relied on the statement of the prosecutrix. It was observed that the delay in registration of FIR had been reasonably explained. The court further took note from the MLC of the prosecutrix and observed that:

“...the MLC of the prosecutrix corroborates with the version of the prosecutrix as the alleged history contained therein reveals that the prosecutrix had disclosed to the doctor that she was raped by the accused, whose name has been specifically given and is noted in the alleged history in MLC.”

In the case of **Gurvinder Singh v. State of NCT of Delhi**, CRL.A. 659/2011 , a 10 year old child was kidnapped from her house and raped by the accused. Traces of semen were found on the clothes and the child’s hymen was stated to be torn and not fresh. On examination of the forensic evidence and the testimony of the child and other witness, it was held that the testimony of the witness as well as the corroborative evidence of the medical examination was consistent and the High Court of Delhi found merit in the contention of the prosecution.

Direct evidence can be discarded by the court if the opinion of the expert witness (expert opinion) directly contradicts it. However, in some cases of such contradiction between the opinion of the expert witness (expert opinion) another direct evidence, the court may reject both the expert evidence and direct evidence.

In cases where the eyewitness and the medical evidence is consistent with each other, conviction of the accused is more likely.

In **Rajkumar v. State of MP**, Crl. A. Nos. 1419-1420 of 2013, a 14 year old girl child was raped and murdered by the accused. Her 10 year old younger brother was the eye witness to the incident. MLC and the Forensic Science Laboratory (FSL) report were also against the accused- (i) The hymen of the deceased victim was found torn; (ii) Semen of the accused was found on the slide prepared from the vaginal swab of the victim as proved by the DNA report; (iii) The shawl of the deceased was also found having semen stains which were of the accused; (iv) The hair found near the body of the victim were found to be of the accused as per the DNA report.

The counsel for the accused in their defense stated that the 10 year old younger brother of the victim cannot be a reliable witness. Supreme Court rejected the contention of the accused and held that:

“we have been taken through the impugned judgments rendered by the High Court as well as the trial court and the evidence on record. In view of the concurrent findings of fact recorded by the courts below, particularly in respect of the DNA report to the extent that the semen of the Appellant was found in the vagina swab of the prosecutrix and that she died of asphyxia caused by strangulation, we affirm the findings of fact recorded by the courts below.”

In **Raju v. State of Haryana**, Appeal (Crl.) 581 of 2000 an 11 year old prosecutrix was murdered by the accused after raping her. There were two last seen witnesses. There was another witness to whom the accused had made extra judicial confession about the commission of the offence. ***Relying on the evidence given by the said witnesses as well as other incriminating evidence the Supreme Court convicted the accused for the offence of rape and murder*** and observed that:

“Further, FSL report establishes that the pant put on by the accused was stained with numerous small dark brown stains/streaks especially on the front. Similarly, the multi coloured printed terry cot shirt of the accused was also stained with numerous darkish stains specially on his sleeves and contained human blood as per the FSL report. On the underwear worn by the accused, blood and semen was found. There is no explanation given by the accused how the blood was there on the shirt put on by him and that how there were blood stains on the pant and underwear.”

What is the weightage of medical evidence in cases of rape?

It is important to remember that the definition of rape in the Indian Penal Code and penetrative sexual assault in the POCSO Act is quite wide to include penetration by any object and to any extent. This has further reduced the scope for reliance on medical examination.

Moreover, there is recognition in law of non-penetrative sexual offences, which cannot always be corroborated with medical evidence.

Dr. Jagadeesh N⁹, while examining the implications of recent changes in medical examination in sexual violence cases refers to the World Health Organization (WHO) evidence to suggest that in 2 out of 3 cases of sexual violence you do not find injuries. According to him, the absence of injuries could be due to various reasons:

- the victim being unconscious either due to trauma or being drugged / intoxicated, overpowered, silenced with fear;
- use of lubricant in sexual violence.

⁹ Jagadeesh N, Recent Changes in Medical Examination of Sexual Violence Cases, Journal of Karnataka Medico-Legal Society, JKAMLS Vol 23(1), Jan - Jun 2014.

He further explains that even the rape law as contained in Explanation 2 to Section 375 of IPC does not state that a women needs to physically resist the rape or have physical injuries during such resistance to prove that rape has taken place.

He further argues that in light of Section 146 of the IEA, past sexual history or conduct of the prosecutrix is inadmissible as evidence in a court of law. As a result of this any discussion of deliberation upon the sexual history of the rape victim is immaterial in rape cases.

On the same line, he argues that any evidence to suggest past sexual practices is rendered meaningless in the wake of Section 146 IEA, which prohibits the debate on previous sexual experience/ past sexual practices.

In **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat**, 1983 CriLJ 1096 SC, the Supreme Court observed that the refusal to act on the testimony of a victim of sexual assault in the absence of corroboration, as a rule, is adding insult to injury. The court criticized viewing evidence of such victims with the aid of spectacles fitted with lenses tinted with doubts, disbelief or suspicion.

Further, the insistence on potency test of the accused has also been questioned by Dr. Jagadeesh as Section 53 A CrPC, which specifically deals with medical examination of accused of rape, does not mention anything about potency examination. According to him, Section 375 IPC *“does not insist on erected penis nor complete penetration. Medically you cannot give a definitive opinion on whether a person is potent or not because of the limitation of not ruling out psychological impotence by physical examination. Thus doing a potency examination of the accused is not acceptable/ relevant”*.

In **State of Karnataka v. Revannaiah**, 2005 CrLJ 2676 KHC, a case of rape on a child, the Karnataka High Court observed that the failure of the investigating officer to get the accused medically examined to ascertain his potency is not of significance when the accused is found to be a married man and having two children.

Whether the testimony of a child prosecutrix can be accepted when it is not corroborated with medical evidence?

In **Ranjit Hazarika v. State of Assam**, (1998) 8 SCC 635 the Supreme Court discussed whether the testimony of a child prosecutrix be accepted when it is not corroborated with medical evidence. The court held that the ***opinion of the doctor that no rape has been committed, which is based only on the absence of injuries and non-rupture of hymen, cannot be the reason for rejecting an otherwise cogent and trustworthy testimony of a child prosecutrix.***

*“5. The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. **Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake.** The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".”*

In **Sheikh Zakir v. State of Bihar**, 1983 CriLJ 1285 SC, the Supreme Court held that the non-production of the medical report would not be of much consequence if the other evidence on record is believable.

In certain cases the medical evidence might be present, however, the direct evidence is unreliable/infirm.

In the case of **Hemraj v. State of Haryana**, (2014) 2 SCC 395, the appellant had allegedly raped the prosecutrix. The testimony of the prosecutrix and her brother, who was the eyewitness, did not support the case. Further, as per the FSL report human semen was detected on the salwar of the prosecutrix and on the underwear of the accused appellant. The Supreme Court, upon going through the testimony of the prosecutrix and her brother, found the same unreliable. Despite the MLC and FSL report supporting the case of prosecution, the court set aside the order of conviction and sentence. The court observed:

“The MLC does suggest that the hymen of the prosecutrix was torn. It is also true that the prosecution has brought on record FSL Report which shows that human semen was detected on the salwar of the prosecutrix and on the underwear of the accused. However, it is difficult to infer from this that the prosecutrix was raped by the Appellant. The prosecutrix herself has vacillated on this aspect. It was pointed out that no injuries were found on the prosecutrix. We do not attach much importance to this aspect because presence of injuries is not a must to prove commission of rape. But the prosecutrix's evidence is so infirm that it deserves to be rejected.”

Additionally, in the case of **Manoj Kumar and Ors v. State (GNCT of Delhi) and Ors.**, CrI. A. 1393 and 1348/2013 the prosecutrix was raped by the accused and later became pregnant. The alleged incident of rape was reported to the mother after a lapse of 55 clear days. It is to be noted that the MLC report did not match the DNA of the fetus with the accused. The High Court did not find the testimony of the prosecutrix reliable and set aside the order of conviction and sentence. The High Court further observed that:

“X's (prosecutrix name changed) emphatic version that she was made pregnant by A-1 because of commission of rape upon her on 05.03.2009 stood belied by DNA report (Ex.PW-21/A). As per DNA report (Ex.PW-21/A), the source of Ex.2 (A-1's blood sample) could be excluded for being responsible as biological father of source of Ex.1 (X's fetus). It further concluded that the source of Ex.3 (X's blood sample) could not be excluded for being responsible as biological mother of source of Ex.1 (X's fetus). Apparently, A-1 was not the source of pregnancy. During investigation or trial, the prosecutrix did not reveal if at the relevant time, she was having any physical relations with someone else also.”

Whether the two-finger test is constitutional and valid in law?

In **Lillu and Ors. v. State of Haryana**, AIR 2013 SC 1784, the accused were charged under Section 376 and 506 of the IPC. Basis the medical examination (two-finger test) report and the statement of the concerned doctor in court, it was stated that the victim was habitual in sexual activities. The defence counsel alleged consent as the victim was habitual to sex.

The Supreme Court held that the comment with respect to the victim's sexual history is immaterial and/or her consent is inconsequential as the victim in the said case is a minor. Further, the court deliberated upon the constitutionality of the controversial 'two finger test' used to conduct and interpret forensic examination of rape survivors. Citing various other Supreme Court judgments, the court observed that:

- (i) **Narayanamma (Kum) v. State of Karnataka and Ors.**, (1994) 5 SCC 728 – The Hon'ble Supreme Court held that *'admission of two fingers and the hymen rupture does not give a clear indication that the victim is habitual to sexual intercourse.'*
- (ii) **State of Uttar Pradesh v. Munshi**, AIR 2009 SC 370 – even if the victim is accustomed to sex, it does not give the right to the accused to commit rape upon her. Even a woman of easy virtue has the right to refuse to submit herself to sexual intercourse. The question should be whether the accused committed rape upon the victim on that particular occasion.
- (iii) **Narender Kumar v. State (NCT of Delhi)**, AIR 2012 SC 2281 – The statement of the prosecutrix is enough to record conviction, if it is found, in totality, to be reliable. Further, the court held that *'merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated'*.

- (iv) **State of Punjab v. Ramdev Singh**, AIR 2004 SC 1290 – The act of rape is violative of a women’s right to life, a fundamental right under Article 21 of the Indian Constitution. *‘It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society.’*

The Supreme Court in the said case also made reference to international conventions i.e. International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, to state that the medical procedures used to examine the rape victim must not violate their right to provide consent or go against their right to dignity. Further, that the medical procedures carried out should be humane and health should be an important consideration.

In this regard, it was held that the two-finger test is violates the right to dignity and privacy and even if the result is affirmative, the reading of the test must not ipso-facto be used as a way of valid consent.

Whether the court can re-examine the samples collected by FSL?

In **The State Govt of NCT of Delhi v. Khursheed**, CRL.A. 510/2018, the trial court acquitted the accused of the charges under Sections 376 IPC and Section 4 of the POCSO Act on the basis that the statement given by the prosecutrix and other witnesses was untrustworthy and that the FSL report did not point towards incriminating the accused. In the said case, DNA profile generated from the semen found on the underwear of the prosecutrix did not match the DNA profile generated from the blood sample of the accused.

In appeal, the High Court of Delhi noticed that there was something amiss in the FSL report as contrary to the said report the statements of the prosecutrix, other witnesses and medical evidence pointed towards the guilt of the accused. Based on the fresh examination of the samples, the Court concluded that the DNA found on the underwear of the prosecutrix matched that of the accused. This lead to the possibility that the earlier DNA report had been compromised (as the seal of the samples collected was broken).

Relying on certain Supreme Court judgments, the said court has decided to take the latter of the contradicting forensic evidences into consideration as the said report seemed most probable and was in conjunction with the direct evidences produced before the court.

- (i) **State of Haryana v. Bhagirath**, (1999) 5 SCC 96 - Opinion of the medical need not be the last one; when there are two different opinions by medical experts, the one which is most probable should be accepted.
- (ii) **Piara Singh and Ors. v. State**, AIR 1977 SCC 2274 – When there are two contradicting evidences, from competent medical experts, the court should accept the opinion of that expert which supports the direct evidence in the case.
- (iii) **Anil Rai v. State of Bihar**, (2001) SCC (Cri) 1009 – When the medical evidence points out to two possible outcomes, the one consistent with the reliable and satisfactory statements of the witness has to be accepted.

On the aforesaid grounds, the Delhi High Court set aside the impugned judgment of the trial court and convicted the accused of the offence under Section 6 of the POCSO Act.

Further, the Court while passing the said order, stated that the report prepared by the FSL has grave consequences for both the victim and accused - *“A false report in favour of the accused would lead to grave miscarriage of justice for the victim and for the society at large, as the rule of law would stand subverted with the acquittal of an offender, who deserves to be brought to justice. On the other hand, a false report against the accused can lead to an even more grave miscarriage of justice, as an innocent person may get falsely implicated.”*

Whether doctors are mandated to conduct medical examination in cases that are not referred to them by the police?

In the case of **State of Karnataka v. Manjanna**, AIR 2000 SC 2231, the Supreme Court observed that the testimony of the prosecution witness was consistent with the medical evidence in the present case. An important point, which was discussed in the said case, was of voluntary medical examination and not by way of reference of the police. ***It held that the refusal of certain government hospital doctors to conduct any medical examination of a victim of rape, unless referred to by the police, would be detrimental to her case as there would be delay in the final examination of the victim and any evidence proving her case may be lost or washed away. Every State has been given the responsibility to ensure such a case does not recur in the future.***

Section 27 of the POCSO Act and Rule 5 of the POCSO Rules also makes it clear that the registration of an FIR or a legal or magisterial requisition is not necessary for a hospital or medical practitioner to provide emergency medical care to a minor victim of sexual crime.

Section 357 C of the CrPC that was added as a result of the Criminal Law Amendment of 2013, also requires the hospital to conduct the medical examination and provide necessary care and treatment without waiting for documentation or requisition. Failure to do so is a punishable offence under Section 166B of the IPC

It is pertinent to note that medical practitioners are mandated to conduct medical evaluation of victim who go to them out of their own will, and are not referred to them by the police.

Guidelines for conducting medical examination of a child:

In Virender v. The State of NCT of Delhi, CrI. A. No. 121/2008, Delhi High Court issued guidelines to be followed while conducting the medical examination of the child:

(i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts. (Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)

(ii) While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

(iii) In case of a girl child victim the medical examination shall be conducted preferably by a female doctor. (Ref: Court On Its Own Motion v. State and Anr.)

(iv) In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself. (Ref: Court On Its Own Motion v. State and Anr.)

(v) The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim. (Ref: Court On Its Own Motion v. State and Anr.)

(vi) In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report. (Ref: Court On Its Own Motion v. State and Anr.)

(vii) The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination. (Ref: Court On Its Own Motion v. State and Anr.)

(viii) Emergency medical treatment wherever necessary should be provided to the child victim. (Ref: Court On Its Own Motion v. State and Anr.)

(ix) The child victim shall be afforded prophylactic medical treatment against STDs. (Ref: Court On Its Own Motion v. State and Anr.)

(x) In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station. (Ref: Court On Its Own Motion v. State and Anr.)

CHAPTER 7

RIGHT OF CHILD TO TAKE ASSISTANCE OF LEGAL PRACTITIONER

Questions for consideration:

- *Who is a guardian and what is their role?*
- *How will children who do not have parents or whose parents are unfit access their right to appoint a lawyer?*

Things to know and understand:

POCSO Act, under Section 40 provides for right of child to take assistance of legal practitioner -

“.....the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act. Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.”

The Supreme Court in **Delhi Domestic Working Women Forum v. Union of India**, (1995) 1 SCC 14 and also Delhi High Court in **Khem Chand v. State of Delhi**, 2008 (4) JCC 2497 had directed that:

“...the victim be provided with a Counsel. The existing practice of the victims being represented by a Counsel from the Rape Crisis Cell may continue. In cases where the victim has a private lawyer, she may be allowed to retain the private lawyer.”

The question arises as to how will children who do not have parents or whose parents are unfit to sign the vakalatnama on their behalf, access this right?

A child's right to legal representation cannot be dependent upon his/her condition; rights of children living in such vulnerable situations should necessarily be secured.

Cases where children are orphans, or have been abandoned by their families, or cases of incestuous abuse, are very complex. In such cases, the shelter homes that provide refuge to orphaned/abandoned children become the guardians of such children.

All such children, despite their circumstances, are entitled to legal representation and assistance under the POCSO Act.

In the absence of parents, guardians are allowed to act on behalf of minors. But who are these guardians?

As per Section 2(31) of the JJ Act, 2015, the definition of the term ‘**guardian**’ in relation to a child, means his natural guardian or any other person having, in the opinion of the Committee or, as the case may be, the Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceeding.

The Delhi High Court in **Delhi Commission for Women v. Delhi Police**, (2010) 172 DLT 65 laid down certain guidelines to enable the authorities to tackle sexual offences effectively including the sexual abuse offences against children which defined a ‘guardian’ and imposed a duty on the court to provide legal aid to a victim of sexual offence.

The guidelines state that - (c) *“Guardian” includes besides the natural guardian, support person or any person appointed by the Child Welfare Committee for a specified period to take case of the victim during the pendency of the trial.*

Article 10 of the **UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime** published by UN Office on Drugs and Crime, Vienna, UN, New York 2009, which also provides for legal assistance to the child victim or witness, reads as under:

“A child victim or witness shall be assigned a lawyer by the State free of charge throughout the justice process in the following instances:

- (a) At his or her request;*
- (b) At the request of his or her parents or guardian;*
- (c) At the request of the support person, if one has been designated;*
- (d) Pursuant to an order of the court on its own motion, if the court considers the assignment of a lawyer to be in the best interests of the child.”*

What does the term ‘Guardian ad litem’ mean? What are their duties prescribed under law?

The term ‘**guardian ad litem**’ which has also been defined in the aforesaid **UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime** as a person appointed by the court to protect a child’s interests in proceedings affecting his or her interests. Para 15 and 16 provide for ‘Appointment of Guardian ad litem’ and ‘Duties of Guardian ad litem’, respectively, and read as under:

“15. Appointment of Guardian ad litem:

The Court may appoint any person as guardian ad litem as per law to a witness who is a victim of, or a witness to a crime having regard to his best interests after considering

the background of the guardian ad litem and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian ad litem may be a member of bar / practicing advocate, except a person who is a witness in any proceeding involving the child.

16. Duties of guardian ad litem:

It shall be the duty of the guardian ad litem so appointed by court to:

(i) attend all depositions, hearings, and trial proceedings in which a vulnerable witness participates.

(ii) make recommendations to the court concerning the welfare of the vulnerable witness keeping in view the needs of the child and observing the impact of the proceedings on the child.

(iii) explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which the child is involved;

(iv) assist the vulnerable witness and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;

(v) remain with the vulnerable witness while the vulnerable witness waits to testify.”

The above mentioned international guidelines and judgements clearly and repeatedly reiterate the rights of children. The High Court of Delhi reiterated the aforesaid guidelines with respect to appointment and duties of guardian ad litem in its case **Arsheeran Bahmech v. State**, (2015) 224 DLT (CN13).

As far as the issue of appointment of guardian ad litem is concerned, it has been settled by the High Court of Delhi in **Smt Lavanya Anirudh v. State of NCT of Delhi**, CRL.M.C. 301/2017 wherein it stated that “Section 39 of POCSO Act provides that the State government shall prepare guidelines for use of non- governmental organisations, professionals and experts or other persons having special knowledge to be associated at the pre-trial and trial stage to assist the child.”

The case also goes on to mention that:

“Article 39A of the Constitution of India casts an obligation upon the State to provide free legal aid. Section 40 of POCSO, which is in harmony with Article 39A of the Constitution of India recognizes the right of the child to take legal assistance of legal practitioner. Thus, it casts an obligation on Courts to ensure that the child is provided legal aid. POCSO Rules, 2012 also provides that the concerned authority shall inform the child and his parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with Section 40 of the POCSO Act”.

The High Court of Delhi in the aforesaid case (Smt. Lavanya Anirudh v. State of NCT Delhi) also observed that -

“...20. In the present case, since the father of Minor 'X' was the accused and the mother had abandoned the family and remarried, the Child Welfare Committee (CWC) had rightly appointed the petitioner as the guardian of Minor 'X' as there was no natural guardian.....

Despite the fact that the learned Additional Sessions Judge was under a constitutional obligation and bound by the decisions of the Supreme Court and this Court laying down guidelines to be followed and mandated the Court to ensure that the victim had a guardian ad litem and was given legal representation, the learned Additional Sessions Judge failed to comply with the same by not only not recognizing the guardian so appointed by the Child Welfare Committee but also by not appointing a guardian ad litem.

21. The repeated advertence of the learned Additional Sessions Judge in the impugned orders that the guardian was not a family member fails to notice that the mother of the victim had abandoned her and the father was the accused. Learned Additional Sessions Judge also not only failed in its constitutional and statutory obligation but also failed to exercise its parens patriae jurisdiction for watching the best interest of the child victim.

22. Consequently, the impugned orders passed by the learned Additional Sessions Judge are set aside. Ms. Lavanya Anirudh Verma who is Director of Samarpan Homes for Girls which fact has been verified by the State will act as guardian ad litem for the child victim and would thus be permitted to exercise all rights in the interest of the child victim. ...”

CHAPTER 8

VICTIM COMPENSATION

Questions for consideration:

- *Are the Special Courts neglecting their duty to award compensation under the POCSO Act? Whether payment of interim compensation is a norm in cases of child sexual abuse?*
- *Should the payment of interim compensation only be granted after the child testifies? Is there a confusion regarding victim compensation under POCSO Act?*

Things to know and understand

Compensation in general terminology means awarding of something to someone in recognition of their loss, suffering or injury.

Which provisions in law deal with compensation payable to a victim?

Section 33 of the POCSO Act read with Rule 7 of the POCSO Rules provides that the Special Courts may on their own or on receiving an application, “recommend the award of compensation”, determine the quantum of compensation and “make a direction for the award of compensation”.

The Constitution of India also provides for certain safeguards to the victims of crime under Article 14 and 21. Further, a provision for payment of compensation to the victim is also contained under the Sub-section (3) of Section 357 of the CrPC, which is laid down hereunder:

“When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.”

The Supreme Court in **Ankush Shivaji Gaikwad v State of Maharashtra**, AIR 2013 SC 2454 held that Section 357 conferred a power coupled with a duty on the Courts to apply its mind to the question of exercise of its power to award compensation to victims in every criminal case.

“50. Applying the tests which emerge from the above cases to Section 357, it appears to us that the provision confers a power coupled with a duty on the Courts to apply its mind to the question of awarding compensation in every criminal case. We say so because in the background and context in which it was introduced, the power to award compensation was intended to reassure the victim that he or she is not

forgotten in the criminal justice system. The victim would remain forgotten in the criminal justice system if despite Legislature having gone so far as to enact specific provisions relating to victim compensation, Courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that unless Section 357 is read to confer an obligation on Courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision.”

Further, the Court further held that the **compensation is not ancillary to other sentences but is in addition to other sentences.**

The Sikkim High Court in **Deo Kumar Rai v State of Sikkim**, Crl. A. No. 13 of 2016 held that there is a mandatory duty on the special courts under Section 33(8) of POCSO Act, to apply its mind to the question of awarding compensation.

The court further held that Section 7(1) of POCSO Rules, the special court can, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation.

Can compensation payable to the victim be linked to the financial capability of the accused?

Compensation, under Section 357 of the CrPC is payable by the accused, and the criminal court while calculating it, considers the financial capacity of the accused. Hence, the compensation awarded may not always be commensurate with the loss or injury suffered. Further, compensation under Section 357 CrPC is awarded only after the accused is convicted, and therefore it does not cater to the victim’s immediate necessary relief.

Acknowledging the importance of restitution, reparation and rehabilitation, the Supreme Court in **Delhi Domestic Working Women Forum v. Union of India**, (1995) 1 SCC 14, *inter alia* laid down “broad parameters in assisting the victims of rape”.

“It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up a Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatized to continue employment.”

Further, it held that- *“Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not conviction has taken place.”*

The judgement delinked the question/quantum of compensation from the financial capability of the accused. This is correct, as the victim's rehabilitation should not be dependent or contingent on the accused's financial ability or inclination.

Can the Special Courts decide and determine the amount of compensation? Who is responsible to disburse the compensation as per the provisions of the POCSO Act read with the rules?

Keeping in view the rehabilitation needs of a victim and the limitations of Section 357 of CrPC, Section 357A, **Victim Compensation Scheme**, has been inserted in the CrPC. It is for the State Governments to make funds available for payment of compensation upon recommendation of the court to a victim of crime. Under Section 357A of CrPC, every State Government shall *“prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.”*

Compensation may be awarded when, in the trial court's opinion, “compensation under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated”, or “where the offender is not traced or identified”. The quantum of compensation is to be determined by the State (SLSA) or District Legal Services Authority (DLSA), who in certain circumstances may also grant interim relief.

The aforesaid has been reiterated by the Supreme Court in **In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014**, (2014) 4 SCC 786, wherein it held that there is a statutory duty upon the State, under Section 357A of CrPC, to award compensation to victims of crime. The Court also held that a new Section, 357A was introduced to the Criminal Procedure Code, in order to cast a responsibility on the State Governments to formulate Schemes for compensation to the victims of crime in coordination with the Central Government. Unlike Section 357, the onus was not simply on the offender to pay the compensation, but had been put on the District Legal Service Authority or State Legal Service Authority to determine the quantum of punishment in each case.

Dealing with amount or adequacy of compensation Supreme Court in **Suresh & Anr. v. State of Haryana**, (Crl) No. 420 of 2012 held that:

“The object and purpose of the provision of Section 357A CrPC is to enable the Court to direct the State to pay compensation to the victim where the compensation under Section 357 was not adequate or where the case ended in acquittal or discharge and the victim was required to be rehabilitated.”

The provisions regarding compensation under the POCSO Act and Rules are based on Section 357A of CrPC, with suitable changes, to ensure immediate and speedy relief to the child. ***Under the POCSO Act and Rules, the special courts can decide the question of victim compensation and also determine the quantum of compensation and accordingly make a direction for award of compensation. The said compensation shall be payable by the State Government through schemes or funds established for such purpose.***

More recently, in October 2017, the Supreme Court took cognizance of discrepancies in the victim compensation schemes of different states and UTs in Writ Petition (Civil) No. 565/2012, titled, **Nipun Saxena v. Union of India**. In its Order dated 12 October 2017, the apex court directed NALSA to “prepare Model Rules for Victim Compensation for sexual offences and acid attacks”. What emerged is insertion of a chapter titled, “Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes”, into the Home Ministry’s Central Victim Compensation Fund Scheme. This chapter excludes victim compensation under the POCSO Act since the POCSO Act lays down its own procedure and process for compensating minor victims of sexual abuse. However, recognising absence of guidelines for victim compensation under the POCSO Act and Rules, the Supreme Court held vide its Order dated 5 September 2018 that until the POCSO Act and Rules are amended, ***“the NALSA’s Compensation Scheme should function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 until the Rules are finalized by the Central Government”***, and ***“the legislation is gender neutral and, therefore, the Guidelines will be applicable to all children.”*** The scheme and guidelines have become operational since October 2, 2018.

What are the kinds of compensation available under the POCSO Act?

India being a welfare state is bound to protect its citizens and in case an offence committed against its citizens, the state compensates for the injury or loss to victims by providing monetary compensation. The loss may be direct (medical expenses as a result of incident) or indirect like loss of employment or relocation due to the incident. In cases of sexual abuse the purpose of compensation is to serve the immediate as well as long term need of survivor (and sometime of the family as well) to help recover from the loss suffered.

As per Rule 7(1) and 7(2) of the POCSO Rules, a victim is entitled to both interim compensation for meeting the immediate relief and rehabilitation needs of the child and final compensation, irrespective of the outcome of the case in terms of conviction, acquittal or discharge, and also if the accused remains untraced or unidentified. ***“The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purpose of compensating and rehabilitating victims”***.

The Calcutta High Court in **Bijoy v. State of West Bengal**, 2017 Cril.J. 3893 held that the compensation envisaged under the POCSO Act, includes compensation at the interim stage for immediate relief and rehabilitation of a child victim. This interim compensation may be awarded by the Special Court, independent of, and in addition to the compensation payable by the convict or accused under section 357(2) and (3) of the Code.

*“34. Compensation envisaged under the aforesaid provision of law may be awarded by the Special Court at the interim stage also for immediate relief and rehabilitation of a child victim in light of the parameters laid down under Sub-Rule (3) of Rule 7 of the aforesaid Rules. Such compensation payable by the State is independent of the compensation which may be directed to be paid by the convict upon conviction in terms of Section 357(2) and (3) of the Code. **The philosophy of awarding compensation by the State is in the nature of a reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime. I am informed that a Victim Compensation Fund has been notified by the State under Section 357A CrPC, which, inter alia, prescribes the minimum amount of compensation that may be awarded for various offences/injuries in the following manner as set in the schedule of the notifications.**”*

The Victim Compensation Fund is the vehicle through which the compensation may be paid by the State Government, and in no way limits the powers of the Special Court in determining the amount of compensation. The obligation of the State Government to make such payment is absolute; if no Victim Compensation Fund or other scheme exists, such compensation is payable by the State Government. Payment of compensation under the POCSO Act should not deny the child victim from claiming entitlement under any other scheme.

- *In a survey done by HAQ, data for 1803 cases was collected in Delhi.*
 - *Out of these, 365 cases were disposed of by way of acquittal or conviction.*
 - *For information on victim compensation, judgments in 79 cases that ended in conviction were studied. While no compensation was awarded in cases that ended in acquittal, information on compensation was only available in seven disposed of cases (9%).*
- Source: Study by HAQ: Centre for Child Rights & FACSE. Available at: <http://haqcrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>*

Victim Compensation (Delhi Example)

Source: Study by HAQ: Centre for Child Rights & FACSE. Available at:

<http://haqcrc.org/wpcontent/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>

| Nature of Offence | Section 33 (8) of POCSO Act | Section 357(1)(b) of CrPC | Section 357 (3) of CrPC | Section 357A of CrPC | POCSO Act & Section 357(1)(b) of CrPC | Total |
|---------------------------------------|-----------------------------|---------------------------|-------------------------|----------------------|---------------------------------------|-------|
| Aggravated penetrative sexual assault | 0 | 0 | 0 | 1 | 1 | 2 |
| Aggravated sexual assault | 0 | 2 | 0 | 1 | 0 | 3 |
| Sexual harassment | 0 | 0 | 2 | 0 | 0 | 2 |
| Total | 0 | 2 | 2 | 2 | 1 | 7 |

In **State v. Rameshwar Dayal**, SC No.07/02/2013, the Dwarka District Court, Delhi the accused was convicted for aggravated penetrative sexual assault, was the only case where the Special Court granted compensation of Rs. 1,50,000 under Section 33 (8) of the POCSO Act and directed the DLSA to pay the same. The court further directed that since the child had crossed the age of 18 years, he was at liberty to utilize the compensation amount in the manner he liked. Further, the Special Court also directed payment of compensation of INR 25,000, INR 15,000 out of the fine under Section 357 (1) (b) of CrPC to the child as compensation.

What is the basis on which the compensation amount is decided?

The amount of compensation is to be determined by the Special Court - *“it shall take into account all relevant factors relating to the loss or injury caused to the victim”* and include the following:

- Type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;
- The expenditure incurred or likely to be incurred on child’s medical treatment for physical and/ or mental health;
- Lack of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason; etc.

In **Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty**, 1996 AIR SC 922, the Supreme Court held that:

*“Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. **The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of the child but if this occurred as a result of the rape.**”*

The court further held that:

“If the Court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the Court the right to award interim compensation which should also be provided in the Scheme”.

Are there any limits to the quantum of compensation that can be granted by Special Courts?

Delhi is the first state to have settled the confusion regarding victim compensation in cases under the POCSO Act. Since the law refers to Section 357A of the CrPC, for a long time the Special Courts and Juvenile Justice Boards hearing matters under the POCSO Act were forwarding all applications for interim compensation to the SLSA/DLSA instead of using their powers under Section 33 (8) of the POCSO Act and deciding the compensation as per provisions of Rule 7 of the POCSO Rules. Even when the special courts started exercising their powers to grant compensation under the POCSO Act and Rules, they were confining their decision on the amount to the scheme prescribed under the Delhi Victim Compensation Scheme.

The matter was settled through **The Minor Through Guardian Zareen v. State (Government of NCT Delhi)**, W.P. (Crl) 798/2015, the matter came to rest once and for all as the judgment clarified that:

“the reading of Section 33 of the POCSO Act would show that the power has been given to the Special Court to grant compensation and there is no outer limit which has been fixed while granting the compensation”.

While the concerned JJB compensated the child for physical abuse, that was provided for in the state scheme, the Delhi High Court taking into account the provisions laid down under Section 33 of POCSO Act read with Rule 7 of the POCSO Rules awarded the child a sum of Rs. 3,00,000/- for his physical and mental suffering.

Compensation to male child victims

This aspect of victim compensation has been overlooked by most legislative schemes, but was addressed by the Delhi High Court in **The Minor Through Guardian Zareen v State (supra)** (a case supported by HAQ). In the above case, the Delhi High Court addressed the

issue of discrimination of the male child victim as well as their right to compensation, and awarded compensation to the male child victim.

Issues and observations based on HAQ's experience

- There is lack of clarity on procedures for disbursing the compensation, especially in cases where the child has no family support, or resides in a childcare institution without parental support, or there is apprehension that the compensation so awarded may be misused.
- In Delhi, it is easier to get interim compensation under the Delhi Victim Compensation Scheme as the procedure has been streamlined through directions of the Delhi High Court. In Court on its Own Motion vs. Union of India through Secretary, Ministry of Home Affairs and Another [WP (C) 7927 of 2012], the Delhi High Court by order dated August 13, 2014 directed that: *“with effect from 21-08-2014 the victims in whose favour the award has been made by the District Legal Services Authorities shall receive the payments in their accounts within one day of the communication of the award to the Delhi State Legal Services Authority.”*
- Payment of interim compensation is usually kept on hold till the victim has testified in court and the court is assured that it is not a ‘false case’ or that the case can proceed with trial without the apprehension of the victim turning hostile or non-cooperative. While judicial application of mind is necessary, this could also delay the benefit of immediate relief to the victim. As majority of victims of sexual abuse belong to the low-income group, hence, the compensation is essential to meet the immediate needs for relief and rehabilitation of the child.
- The compensation amount is to be deposited in the child’s bank account and in case the bank account is not opened, the Investigating Officer shall assist the child in opening a bank account in any nationalised bank.

Reasons for delay of receiving interim/final compensation have been:

1. *The child does not have a bank account due to lack of valid or necessary documents*
2. *Delay in disbursement by DLSA despite grant of compensation*
3. *Child’s bank account opened recently and DLSA is yet to receive details of the same*
4. *DLSA did not receive copy of the interim compensation order*
5. *Delay on part of DLSA to decide on amount of compensation*
6. *Delay on part of IO for verification of child’s address and other details*

- Source: Factsheets based on study of 237 cases from Delhi under the POCSO Act supported by HAQ: Centre for Child Rights, 2019.

CHAPTER 9

PROTECTION OF VULNERABLE WITNESSES

It is imperative that all states enact strong witness protection schemes in order to encourage victims of rape to record FIRs and depose without fear.

Witness protection programs will ensure the arrest of sexual offenders, increase the conviction rates and help in rehabilitating survivors and their families.

Who is considered to be a witness? Why are they important to a case?

A 'witness' in court is any person who has knowledge of some relevant information about the case. Any person directly or indirectly involved in the case is a witness. Victim of the offence is the main witness in a criminal case. Thus, a victim, victim's family member, police officer who steered investigation, doctor who conducted medical examination or any witness who was present at the time when an offence was committed can be a witness of a case.

In Himanshu Singh Sabharwal v. State of Madhya Pradesh and Ors., AIR 2008 SC 194, the court observed that "witnesses are the eyes and ears of the justice system" and when a witness is threatened or killed or harassed, it is not only the witness who is threatened but it is also violation of fundamental right of a citizen to have a free and fair trial.

Testimonies of witnesses play an important role and every witness has a distinct role to play. These testimonies ultimately effects the judgement of a case strongly, therefore there is always a need to ensure that the witnesses are able to testify before the court freely and fearlessly. In order to strengthen the capacity of witnesses and to prosecute the perpetrators effectively, many countries have established witness protection measures as a part of criminal proceedings. Just as it is the duty of witness to give a fair testimony under oath, the state is also bound to protect the witness.

Protection of identity of child witness

Section 33 (7) of the POCSO Act mandates special courts to ensure the identity of the child is not disclosed at any time during the course of the trial.

In the case of **Gaya Prasad Pal v State**, CRL.A. 538/2016 the Delhi High Court held that there was a statutory responsibility on the Special Court to ensure that identity of the child was not disclosed during the investigation or the trial. The court further held that given the nature of offences committed against her by the appellant, the victim was entitled to

protection of her identity under Section 33(7) of POCSO Act. As a result, the special court was under a duty to ensure that her identity was “not disclosed at any time”.

“124. In view of the above, it is the statutory responsibility of the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. The proviso carves out an exception for the court to permit such disclosure but the consideration therefor being again “the interest of the child”. As clarified in the explanation, the identity of the child does not mean only the name but includes the identity of family, school, relatives, neighbourhood or any other information by which his/her identity may stand exposed.

125. All concerned, not merely the statutory authorities (which include the courts), would have to bear in mind that the legislative command against disclosure of identity of victims of sexual offences requires strict and scrupulous compliance. It has to be borne in mind that the relevant provisions including those referred to above are to be read, after coming into force of Criminal Law (Amendment) Act, 2013 with effect from 03.02.2013, with the provision contained in Section 228 A IPC, whereunder improper disclosure of the identity of the victim of such offences entails sanction in penal law. Since the responsibility to enforce the criminal law rests with the criminal courts, breach of such propriety by the courts themselves cannot be brooked. Though directions on the subject have been given in the past, we reiterate and direct that all the trial courts shall ensure that the identity of the victim in cases involving sexual offences shall not be disclosed anywhere on judicial record and that names shall be referred by pseudonyms in accordance with law and they be so identified during the course of trial and in the judgment.”

What are the reasons for witnesses turning hostile?

The threat to the lives of witnesses is one of the primary reasons for them to retract their earlier statements during the trial. Apart from these sections, the law does not provide protection of witnesses from external threats, inducement or intimidation. Political pressure, self-generated fear of police and the legal system, absence of fear of the law of perjury, an unsympathetic law enforcement machinery and corruption are some of the other reasons for witnesses turning hostile in the course of trial.¹⁰

¹⁰ Naveena Varghese, *Witness Protection: Problems Faced and Need for a Protection Programme in India*, National University of Advanced Legal Studies, Kochi. Available at: <https://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india/>

Why is there a need to protect the witnesses?

A witness is an indispensable part of the criminal justice system since his/her testimony can make or break a case. Therefore, the truthfulness of the witness's testimony becomes the cornerstone of justice and hence the witness is made to offer statement under oath. A witness must depose without force, fear and pressure and out of his or her own free will and consent.¹¹

In India the discussion regarding the need to protect witnesses started as early as 1958 whereby the financial burden on the witness was taken to account and thereby the said witnesses were provided reimbursement for their travel etc. Later in 1980 it was realized that the number of witnesses turning hostile was increasing- due to the witnesses being pressured from the accused's side. Thus, proper monitoring and protection to the witnesses gained further importance. Finally, the Malimath Committee in the year 2003 expanded the witness protection umbrella to cover physical, financial and legal protection and it stressed on anonymity of the witness.

In light of the alarming situation of lower rate of conviction in criminal cases to 39.6%, wherein the accused having access to witnesses was considered as one of the reasons for witness hostility, the Supreme Court in its judgement in **National Human Rights Commission v. State of Gujarat & Ors.**, (2009) SCC 342 SC gave direction to all states and union territories to provide suggestions in drafting and formulating guidelines for witness protection.

The Legislature has made certain efforts with respect to ensuring safety of individuals exposing corruption such as the Whistleblowers Protection Act, 2014. Certain courts have, in cases of rape and murder also, granted the witnesses police protection though the effort is not enough. The Bengal Suppression of Terrorist Outrage Act, 1932 was one of the first statutes in India to have a provision regarding '**protecting identity of witness**' apart from that **Universal Declaration of Human Rights** and Article 14 of the **International Covenant on Civil and Political Rights (ICCPR)** to which India is a signatory, considers right to fair trial as a privilege which ultimately is connected to the protection of witness.

In India there are only few provisions like Section 327 (2) of CrPC, which consider witness protection in different forms like "***in camera proceedings***" etc.

¹¹ ibid

Amendment to the Whistleblowers Protection Act, 2014 is proposed to be made vide the Whistleblowers Protection (Amendment) Bill, 2015 with the objective to bring in a stronger law for witness protection.

The said bill aims to ensure protection of witness in following ways:

- *Protection to witness at different stages of a criminal case starting from the investigation of case till post judgement;*
- *Introduction of “Witness Protection Cell” for the holistic work on Witness protection Programme;*
- *Witness Protection Councils at National and State level for the proper implementation of witness protection programme;*
- *Providing safeguards to ensure protection of identity of witness;*
- *Providing transfer of cases out of original jurisdiction to ensure that the witness can depose freely;*
- *Providing stringent punishment to the persons contravening the provisions;*
- *Prescribing stringent actions against false testimonies and misleading statements*

The abovementioned bill has not been passed as yet.¹²

What is the nature of protection that witnesses require?

Protection of witnesses should be against any person or entity who has some interest in the case and who tries to interfere, pressurise, harm, threaten the witness so as to change their statement or withdraw the legal action.

Earlier protection was looked at only in context of financial burden but presently it has been realised that it has much more dimensions to it and therefore the scope of witness protection needs to be expanded accordingly. This may cover things as simple as providing a police escort to the courtroom, offering temporary residence in a safe house, using modern communication technology (such as video-conferencing) for recording of testimony etc. In complex cases, where testimony of witness is crucial for successful prosecution against a powerful criminal, extraordinary measures are required to ensure safety of witness viz. anonymity, resettlement of the witness under a new identity in a new and undisclosed place of residence. Witness protection, especially in its practical operation, must therefore be viewed on a case-by-case basis.

Considering the responsibility of state to provide witness protection the Delhi High Court in **Ms. Neelam Katara v. Union of India**, (2003) ILR 2 Delhi 377 held that:

¹² “Witness protection Law in India: A brief”, November 15, 2017. Available at: <https://www.2thepoint.in/witness-protection-law-india-brief/>

“Police protection to witness in case of threat to life and property before or after testimony, however in determining whether or not a witness should be provided police protection competent authority shall take into account the nature of the risk to the security of the witness which may emanate from the accused or his associates, the nature of the investigation or the criminal case, the importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness and the cost of providing police protection to the witness.”

The court also held that the ‘Competent Authority’ to pass the relevant order would be ‘Member Secretary, Delhi Legal Services Authority’.

Delhi formulated the **Delhi Witness Protection Scheme, 2015** (“**Delhi Witness Protection Scheme**”) which *inter-alia* provides for the following measures:

- In camera proceedings where the press and general public are not allowed;
- Live link which include technology in case the witness is absent for the court room then testimony through television link;
- Protection to identity of witness;
- Ensuring that accused and witness do not come face to face during investigation or trial;
- Emergency contact persons for the witness;
- Close protection, regular patrolling around the witness’s house;
- Temporary change of residence to a relative’s house or a nearby town;
- Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;
- Allowing a support person to remain present during recording of statement and deposition;
- Usage of specially designed vulnerable witness court rooms which have special arrangements like live links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness’ voice, so that he/she is not identifiable;
- Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;
- Awarding periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/profession, if desired;
- Any other form of protection measures considered necessary, and specifically, those requested by the witness.

Though there is no scale to measure the threat to witness, the Delhi Witness Protection Scheme provides a provision for ‘Threat Analysis Report’ which is a detailed report prepared

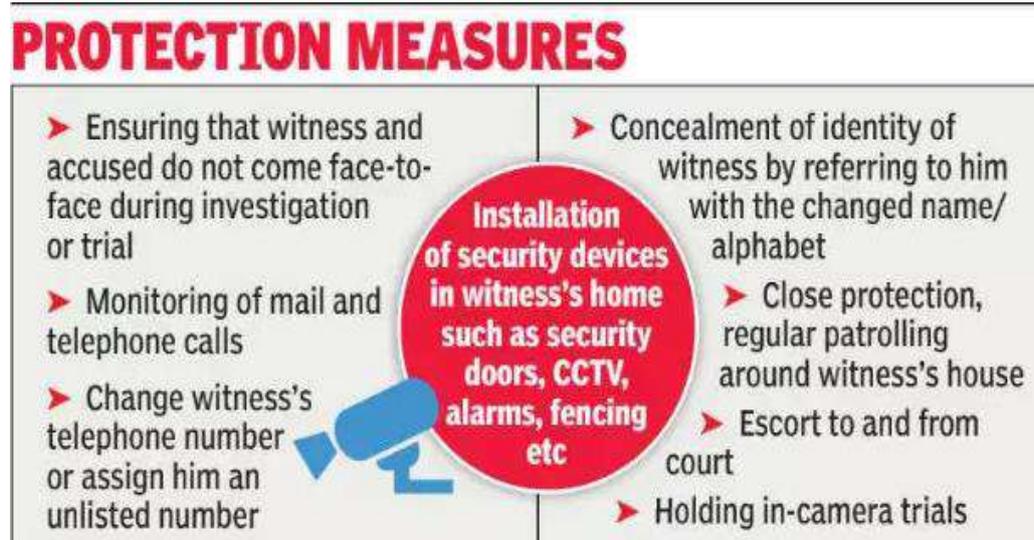
and submitted by the Addl. CP/DCP/Addl. DCP of the District/Unit investigating the case qua the seriousness and credibility of the threat perception to the witness or his family members.

The threat analysis report shall contain specific details about the nature of threats faced by the witness or his family members. It may be related to their life, reputation or property. Apart from analysing the extent, the intent motive and resources to implement the threats is also considered in the report. It shall also provide specific measures which deserves to be taken in the matter.

On the same lines, the Supreme Court of India in **Mahender Chawla & Ors. Vs. Union of India & Ors.** [Writ Petition (Crl.) No. 156 of 2016] approved a National Witness Protection Scheme that was prepared by the Bureau of Police Research Development (BPR&D) in consultation with the National Legal Services Authority (NALSA) , and through its judgement dated 5 December, 2018, directed all states and UTs to implement the scheme with immediate effect and set up Vulnerable Witness Deposition Complexes (VWDCs) by the end of 2019.

Besides setting up specially designed court rooms/complexes and expediting the depositions of vulnerable witnesses, the scheme provides for police escort to the witnesses and their family members facing threats, relocation to a safe house based on a Threat Analysis Report (TAR) from ACP/DSP and financial aid for sustenance, installation of CCTV cameras and such other security devices at the residence of witnesses, monitoring of the social media accounts, emails and phone calls of the witnesses, and other protection measures such as change of phone number or even identity, if required.

Provisions under the Witness Protection Scheme, 2018



Source: Choudhary, Amit Anand 06 December 2018, Supreme Court OKs 24x7 witness protection scheme, TNN, Available at: <https://timesofindia.indiatimes.com/india/supreme-court-oks-witness-protection-plan/articleshow/66961866.cms>

Why is there a need for categorisation of threats?

The reason behind the categorization of the threats is to give the priority and protection as per the need of a witness. The threats are categorised on the basis of the level of danger:

- (i) **Category A**- where the threat is graver and extends to life of a witness or his/her family members;
- (ii) **Category B**- if there is threat to the safety, reputation or property of the witness or family member; and
- (iii) **Category C**- where the threat is moderate and extends to harassment or intimidation of the witness or there is threat to the reputation or property of a family member of the witness.

What is the procedure to file an application for receiving witness protection under the Delhi Witness Protection Scheme, 2015? Who can file such an application?

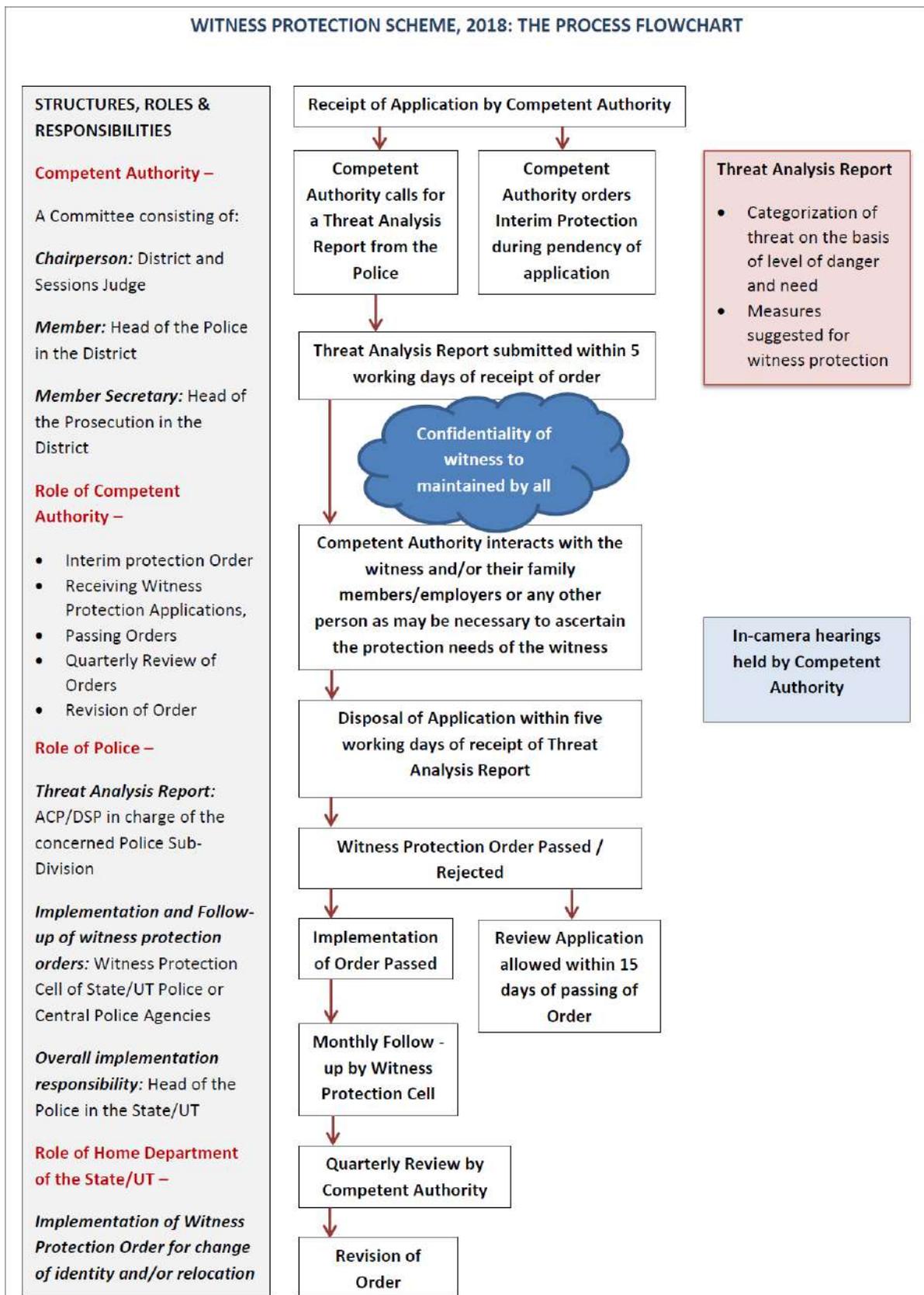
Under the Witness Protection Scheme of 2018, as approved by the Supreme Court, an application can be moved in the prescribed form before the **Competent Authority** of the concerned District where the offence is committed, addressed to the Member Secretary of the Competent Authority. The Head of Prosecution in the District is the Member Secretary of the Competent Authority.

Competent Authority means a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary.

An application can be moved during investigation/trial or thereafter by the witness, a family member of the witness, a duly engaged counsel of the witness or the IO/SHO/SDPO/Jail Superintendent concerned. Supporting documents, if any, can be attached or enclosed with the application.

Recognising that the police are overburdened and that it may not be practically possible for the concerned ACP/DSP to carry out a threat analysis personally, it may be worthwhile to bring in the role of social welfare agencies/child rights organisations or support persons assigned to children as per Rule 4(9) of the POCSO Rules in the preparation of threat analysis reports and victim impact assessments.

The procedure for processing the said application under the Scheme is laid down in brief as under:



- (i) As and when the Competent Authority receives an application, it shall forthwith pass an order for calling the Threat Analysis Report from the ACP/DSP in charge of the concerned Police Sub-Division.
- (ii) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or family members of the witness, during the pendency of application.
- (iii) The Threat Analysis Report shall be prepared expeditiously while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.
- (iv) Threat Analysis Report shall categorize the threat perception and shall suggest measures for providing adequate protection to the witness or family of the witness.
- (v) The Competent Authority shall, preferably personally or otherwise through electronic means, interact with the witness and/or their family members/employers or any other person deemed fit so as to ascertain the protection needs of the witness.
- (vi) All the hearings on witness protection application shall be held in-camera in the chamber of the Competent Authority while maintaining full confidentiality.
- (vii) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.
- (viii) The Witness Protection Order passed by the Competent Authority shall be implemented by the Witness Protection Cell of the State/UT or the Trial Court, as the case may be. Overall responsibility of implementation of all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT. However, the Witness Protection Order passed by the Competent Authority for change of identity and/or relocation shall be implemented by the by the Department of Home of the concerned State/UT.
- (ix) Upon passing of a Witness Protection Order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.
- (x) Witness Protection Order can be revised by the Competent Authority if it so deems necessary either on its own or on receipt of an application in this regard. The order can be revised during pendency of trial or thereafter, on the basis of a Threat Analysis Report called from the ACP/DSP in charge of the concerned Police Sub-Division.

CHAPTER 10

PERMISSIBILITY OF COMPROMISE IN RAPE CASES

The analysis by the Centre for Child and the Law in relation to the cases tried by the Special Courts in Delhi is similar; “The prosecutrix/ victim turned hostile in a staggering 67.5% of the cases”. Further, “The highest percentage of cases in which the victim turned hostile were those in which she was married to the accused (99%), followed by cases in which she was in a romantic relationship with the accused (96.07%), his step-daughter (76.47%), and daughter (76.34%).

In 73.58% cases in which the victim was related to the accused, the child turned hostile.” Examination of cases in Maharashtra by the Centre shows that in 47% of cases “the victims turned hostile,” resulting in acquittal in about 98% of such cases. “Out of the 629 cases in which the victim was declared hostile, acquittals were recorded in 618 cases (97.93%) and convictions in 11 (1.74 %). Of these, 159 cases (25.27%) were romantic in nature, and 31 (5.06%) were cases in which the accused was a father, brother or step-father.

According to a Public Prosecutor, the pressure from the community to compromise is very high in these types of cases and that explains why victims turn hostile. It is important to note that, these categories aside, victims turned hostile in most cases in which the accused was known to them in some way.

Source: Study by HAQ: Centre for Child Rights & FACSE

Available at: <http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>

In incest cases where fathers are involved, the mothers find it difficult to sustain the family and tend to compromise. In Delhi, 10% of the cases that ended in acquittal due to the child and witnesses turning hostile, were those where the accused was the father of the child. In such situations, the child may continue to remain in an abusive setting and could undergo repeated sexual abuse.

Source: Study by HAQ: Centre for Child Rights & FACSE

Available at: <http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>

The courts have held that compromise is impermissible at any stage of the investigation and trial.

In the case of **Shimbhu v. State of Haryana**, (2013)10 SCALE 595 the Supreme Court held that a compromise between the accused and victim in rape cases to reduce the sentence of the accused convicted is impermissible.

The court held that rape is a non-compoundable offence against the society and thus, there cannot be a compromise between parties when the offence has been committed. The Court further held that it is difficult to ascertain whether the victim gave her free consent for such settlement, as it is possible that she was coerced or forced by the convicts. By accepting such a settlement, the Court might set a dangerous precedent and will put an additional burden on the victim in future rape cases by making her susceptible to the coercion or threats of convicts to make her reach a compromise.

In **Ankush Kumar v. State**, CRL.M.C. 4046/2015, the Delhi High Court held that a compromise between the accused and the victim's family to quash the FIR against the accused is impermissible. In the present case, the Petitioner filed the petition under Sections 482 and 483 of CrPC for quashing the FIR filed under Sections 377 of IPC by the respondent against him. He filed the petition on the basis of a compromise between him and the respondent's (victim's) father.

The court held that such compromise/settlement is not permitted by the statute or the law laid down by the Supreme Court.

| Crime Head | Cases Compounded or Compromised | Cases Disposed off by Plea Bargaining |
|---|---------------------------------|---------------------------------------|
| Rape | 18 | 2 |
| POCSO | 102 | 30 |
| Section 4 & 6 of POCSO Act or POCSO Act (Section 4 & 6) r/w Section 376 IPC | 39 | 2 |
| Section 8 & 10 of POCSO Act or POCSO Act (Section 8 & 10) r/w Section 354 IPC | 58 | 2 |

- Excerpts from "Table 4A.5: Court Disposal of Crime against Children (Crime head-wise)-2017"-

Crime in India, 2017, NCRB- Available at:

<http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>

CHAPTER 11

PRESUMPTION OF GUILT

Things to know and understand

There is a statutory presumption of guilt under Section 29 of the POCSO Act when '*a person is prosecuted for committing or abetting or attempting to commit offence under Sections 3, 5, 7 and section 9 of this Act*'. Under this statutory presumption of guilt, the Special Court shall presume, that '*such person has committed or abetted or attempted to commit the offence, as case may be unless the contrary is proved*'.

Constitutionality of a statutory presumption of guilt

The Supreme Court has upheld the constitutionally validity of different statutory provisions that create a rebuttable presumption of guilt in several landmark judgments.

- **M/S Sodhi Transport Co. v. State of UP**, AIR 1986 SC 1099: The constitutional validity of the presumption of guilt contained in Section 28-B of the Uttar Pradesh Sales Tax Act, 1848 was challenged. The Court upheld the constitutional validity of the Section, and held that a rule of presumption which has the effect of shifting the burden of proof cannot be termed unconstitutional if the person concerned has the opportunity to displace or rebut such presumption by leading evidence. The Court further held that a presumption should not be seen as an evidence of guilt against a party, as it only makes a prima facie case for the party in whose favour it exists. It should thus be seen as a rule concerning evidence, which indicates the person on whom the burden of proof lies.
- **Noor Aga v. State of Punjab**, (2008) 16 SCC 417: The constitutional validity of the presumption of guilt contained in Section 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which places a burden of proof on the accused i.e places the burden of proof to prove his/her innocence was challenged. The court upheld the constitutional validity of the sections and held that only because in certain circumstances the burden of proof is placed on the accused, by the Act, would not render the Act unconstitutional.

Whether a presumption of guilt is an inviolable presumption?

In **C.M Girish Babu v. CBI Cochin**, AIR 2009 SC 2022, the Supreme Court held that the presumption of guilt held under Section 20 of the Prevention of Corruption Act, 1988 was not an inviolable presumption. The Court further held that the accused against whom such presumption has been drawn can rebut it either through cross-examination of the witnesses cited against him or by adducing relevant reliable evidence. Only if the accused fails to rebut the presumption, the presumption of his guilt would stick and only then can it be held by the Court that the prosecution has proved its case against accused. The Court further held

that the burden of proof placed upon the accused as per such presumption Section 20 of the Act, is not akin to the burden placed on the prosecution to prove the case beyond reasonable doubt.

Strict adherence to procedural requirements when there is a statutory presumption of guilt

In **Mohal Lal v. State of Punjab**, 2018 (9) SCALE 663, the Supreme Court held that a fair investigation is the very foundation of a fair trial specially under laws such as Narcotic Drugs and Psychotropic Substances Act, 1985 which carry a reverse burden of proof. The Court held that the right to fair trial is a constitutional guarantee under Article 21 of the Constitution. In light of this, the investigation to establish a prima facie case against the accused needs to be fair and judicious, and there should be no spectre of doubt about its veracity. The Court further held that the obligation on prosecution to establish a prima facie case against the accused rests on a fair investigation, in the absence of which, the accused cannot get a fair trial. In order for the investigation to be just, it must be free from infirmities which may lead to the accused doubting the fairness or veracity of the investigation.

CHAPTER 12

MANDATORY REPORTING UNDER POCSO ACT

Things to know and understand

The POCSO Act is the first child-rights legislation that places a mandatory duty on all bystanders and other witnesses of child abuse or rape, to report the same to the police. Under the Act, any person who has the knowledge of commission of an offence against a child, and fails to report such offence to the police is penalised with incarceration or a fine, or with both.

Under Section 21 sub-section (1) of POCSO Act, *“Any person who fails to report the commission of an offence...shall be punished with imprisonment of either description which may extend to six months or with fine or with both.”*

Further, under Section 21 sub-section (2), the punishment is more stringent if such non-reporting is by *“Any person, being in-charge of any company or an institution...in respect of a subordinate under his control”*. This provision applies to schools and child-care institutions.

The POCSO Act under Section 20 obligates *“personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities”* to inform the police of *“coming across any material or object which is sexually exploitative of the child (including photographic, sexually-related or making obscene representation of a child or children) through the use of any medium”*, and the failure to do so is an offence under Section 21.¹³

Duty of by-standers/witness to report crimes

In the case of **Shankar Kisanrao Khade v. State of Maharashtra**, (2013) 5 SCC 546, the Supreme Court took up the issue of non-reporting of sexual offences by by-standers and other witnesses. The Court held that it must be the duty of every citizen in the country to report a crime that has taken place in front of them. The Court further noted that non-reporting is most prevalent within the family, whereby adult members of the family, including the parents of the victim, don't report such crimes in order to protect children from social stigma, which causes even more psychological and emotional harm to the

¹³ HAQ: Centre for Child Rights & FACSE, *Implementation of the POCSO Act, Goals, Gaps and Challenges: Study of Cases of Special Courts in Delhi & Mumbai (2012 – 2015)*. Available at: <http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>

child. In order to address this issue, the court issued directions to various stake-holders of such offences.

“55. In my opinion, the case in hand calls for issuing the following directions to various stake-holders for due compliance:

- 1) The persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping utmost secrecy to the nearest S.J.P.U. or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family members.*
- 2) Media personals, persons in charge of Hotel, lodge, hospital, clubs, studios, photograph facilities have to duly comply with the provision of Section 20 of the Act 32 of 2012 and provide information to the S.J.P.U., or local police. Media has to strictly comply with Section 23 of the Act as well.*
- 3) Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate action.*
- 4) Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.*
- 5) Hospitals, whether Government or privately owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child. (6) The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.*

- 6) *Complaints, if any, received by NCPCR, S.C.P.C.R. Child Welfare Committee (CWC) and Child Helpline, NGOs or Women's Organizations etc., they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law. (8) The Central Government and the State Governments are directed to constitute SJPU's in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J. J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime. (9) The Central Government and every State Government should take all measures as provided under Section 43 of the Act 32/2012 to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act."*

Scope of duty under Section 19(1) of POCSO Act

In **Dr. Sr. Tessy Joe v. State of Kerala**, CRL.No. 3712 of 2018, the Supreme Court held that the Section 19(1) of POCSO Act puts a legal obligation on a person to inform the relevant authorities if he/she has knowledge that an offence under POCSO has been committed. The Court noted that the expression used under the section is "knowledge" which meant that information was received by such person of the offence being committed, but does not extend to an obligation to conduct an investigation in order to "gather" such knowledge.

In the present case, the appellants (Hospital Staff- Gynaecologist, Paediatrician and a Hospital Administrative), had appealed against the initiation of proceedings against them in the Sessions Court, based on charges Section 19(1) read with Section 21(1) of POCSO Act and Section 75 of the Juvenile Justice Act. The appellants had been had been accused of not fulfilling their duty under Section 19(1) of the POCSO Act as they did not enquire about the cause of the pregnancy of the minor child who had come to them. The court held that since the duty under Section 19(1) of the POCSO Act is not to investigate and gather knowledge, the appellants did not violate their legal obligation under Section 19(1).

Prosecution under Section 21

Whether simultaneous prosecution for non-reporting under Section 21(2) of POCSO Act is permissible when the principal offences against the main accused have not been proved?

The Chhattisgarh High Court in **Kamal Prasad Patade v. State of Chhattisgarh**, WP(Cr) No. 8 of 2016 held that the simultaneous prosecution of a person who has failed to report a case under Section 21 of the POCSO Act cannot take place when the guilt of the main accused has not been established beyond reasonable doubt.

In the present case, the petitioner, a principal of a school, invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution to quash the charge-sheet filed against him by the police under Section 21(2) of POCSO Act. In the writ petition,

the petitioner questioned the initiation of prosecution against him, citing that the prosecution against him for non-reporting of the offence, is a clear abuse of the process of law, since the co-accused, the peon of the school, was still facing trial and his guilt had not been established beyond reasonable doubt. The Petitioner thus argued that unless the co-accused was convicted for the offences under the POCSO Act, the Petitioner could not be implicated under Section 21(2) of POCSO for non-reporting of offence.

Analysing Section 19(1) of POCSO Act, the Court in the present case, held that Section 19(1) can only be invoked when the person concerned had the exclusive knowledge of the commission of an offence under POCSO Act, by a subordinate under his control, and had failed to report it. The Court further held that in the prosecution under Section 21(2) of POCSO Act, the prosecution first had to establish beyond reasonable doubt that the co-accused had committed the offences under POCSO Act. After establishing this, the prosecution then had to establish that the petitioner had exclusive knowledge of such offence under Section 19(1). Since in the present case, it was evident that the prosecution had not yet established the guilt of the co-accused without reasonable doubt, the first burden was not met, and as a result, the prosecution of petitioner under Section 21(2) was in clear violation of the due process of law.

In a similar factual scenario, a different view was taken by the Bombay High Court in the case of **Balasaheb v. State of Maharashtra**, C.R.A 69 of 2017.

In the present case, the Court held that the decision of the Chhattisgarh High Court in Kamal Prasad Patade was incorrect and if implemented or enforced, would defeat the very objective of enacting POCSO and would also violate Section 33(5) of POCSO Act. The Court further held that the Chhattisgarh High Court in Kamal Prasad Patade had erred in not considering the possibility of both the accused being charged jointly under Section 223 of the CrPC.

The court judged the present case keeping the objective of the POCSO Act along with the duty enshrined under Section 19 in mind and held that the prosecution had established a prima facie case against the Petitioner which resulted in framing of charges against him.

"12. Perusal of the judgment in the matter of Kamal Prasad Patade (supra) shows that the aspect as to what persons may be charged jointly was never considered in that matter. At this juncture, it is apposite to quote provisions of Section 31 of the POCSO Act which reads thus :

"31 Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court: Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 including the provisions as to bail and bonds shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a court of Sessions and the

person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."

It is, thus clear that unless otherwise provided, offence under the POCSO Act are required to be tried by following the provisions of the Code of Criminal Procedure, 1973. Section 223 of the Code of Criminal Procedure, 1973, deals with what persons may be charged jointly and it reads thus.

*13. Similarly, in the wake of the fact that the revision petitioner /original accused no.2 was certainly having the knowledge of commission of the alleged offence, I am unable to persuade myself to endorse the view taken by the learned Single Judge of Chhattisgarh High Court to the effect that it is initially for the prosecution to establish first commission of the main offence under the POCSO Act for making a person liable for the offence punishable under Section 21(2) of the POCSO Act. **If such view is accepted, then, it will not only defeat the very object of enactment of the POCSO Act i.e. to protect the child from sexual offences, but it will also violate the provision of Section 33(5) of the POCSO Act, which provides that the child should not be called repeatedly to testify in the court."***

CASES REFERRED

Delay in lodging FIR

1. Ramdas & Ors. v. State of Maharashtra, (2007) 2 SCC 170
2. State of Himachal Pradesh v. Gian Chand, (2001) 6 SCC 71
3. State of Himachal Pradesh v. Shree Kant Shekari, AIR 2004 SC 4404
4. State of Karnataka v. Manjanna, AIR 2000 SC 2231
5. State of Punjab v. Gurmit Singh and Ors., 1996 Cri LJ 1728
6. Deepak v. State of Haryana, (2015) 4 SCC 762
7. Sancha Hang Limboo v. State of Sikkim, II(2018)CCR295
8. Jnanedar Nath Das v. State, 2016 (1) JCC 414
9. Tulshidas Kanolkar v. The State of Goa, (2003) 8 SCC 590
10. Gaya Prasad Pal v. State, 235 (2016) DLT 264

Age determination of the prosecutrix/victims of crime

1. State of Punjab v. Okara Grain Buyers Syndicate Ltd., Okara, AIR 1964 SC 669
2. Jarnail Singh v. State of Haryana, (2013) 7 SCC 263
3. Ashwini Kumar Saxena v. State of Madhya Pradesh, AIR 2013 SC 553
4. Mahadeo S/o Kerba Maske v. State of Maharashtra and Anr., (2013) 14 SCC 637
5. State of Madhya Pradesh v. Anoop Singh, (2015) 7 SCC 773
6. K. Muthu Mariappan v. The State Represented by the Inspector of Police, 2015 (3) MLJ (Crl) 429
7. Manoj Vishwakarma v State of Chhattisgarh, Cr. Rev. No. 138/2017
8. Jaya Mala v. Home Secretary, Government of Jammu Kashmir and Ors., AIR 1982 SC 1297
9. Rakesh v. State of M. P., MANU/MP/1289/2019
10. Ram Deo Chauhan v. State of Assam, (2001) 5 SCC 714
11. Babloo Pasi v. State of Jharkhand and Anr., (2009) (1) JCR 73 (SC)
12. Arnit Das v. State of Bihar, (2000) 5 SCC 488
13. Shweta Gulati v State Govt of NCT of Delhi, Crl.Rev.P. 195/2018
14. Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr., Criminal Appeal Nos.12171219 of 2017 [Arising out of S.L.P. (Crl.) Nos. 2640-2642 of 2016]

Bail

1. Anwari Begum v. Sher Mohammad, 2005 AIR SC 3530
2. Prahlad Singh Bhatti v. NCT Delhi, AIR 2001 SC 1444
3. Central Bureau of Investigation v. Birendra Kumar Singh @ Virendra Kumar Singh @ Pandit, 207 (2014) DLT 680
4. Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7SCC 528)
5. Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr., (2004) 7 SCC 528
6. Ram Govind Upadhyay v. Sudarshan Singh & Ors, AIR 2002 SC 1475
7. Sachin v. State of H.P., Crl. MP (M) No. 1644 of 2015 (HP HC)

8. Santosh Kumar Mandal v. State, 2196 SCC Online Del 5378
9. Mahesh Pahade v. State of Madhya Pradesh, Criminal Appeal No. 933/2014
10. Puran etc. v. Rambilas and another etc., (2001) 6 SCC 338
11. Amanullah and Another v. State of Bihar and others, (2016) 6 SCC 699
12. Sunil Mahadev Patil v. State of Maharashtra, 2016 (3) BomCR(Cri) 435
13. Freedom Firm v. Commissioner of Police, Pune & Ors., Cr. Public Interest Litigation No. 4 of 2015

Investigation, Charge sheet, Framing of Charges and Trial

1. Karnel Singh v. State of M.P., AIR 1995 SC 2472
2. Paras Yadav and Ors. v. The State of Bihar, Criminal Appeal No. 335 of 2006 (SC)
3. Ram Bihari Yadav v. State of Bihar and Ors., 1998 CriLJ 2515
4. NCT of Delhi v. Laxmi Kant Tiwari, CRL.L.P. 469/2014 (Del HC)
5. Virender v. The State of NCT of Delhi, Crl. A. No. 121/2008 (Del HC)
6. State of Karnataka v. Shivanna, (2014) 8 SCC 913
7. B L Udaykumar and Ors v. State of Karnataka, C.P no. 4398 of 2018 (Karnataka HC)
8. Court on Its Own Motion v. the State, CRL. REF. No.2/2016 (Del HC)
9. Moti Lal v. State (NCT of Delhi), Crl. A. 992/2015 (Del HC)
10. Nar Singh v State of Haryana, AIR 2015 SC 310
11. Rammi and Ors v. State of Madhya Pradesh, AIR 1999 SC 3544
12. Sakshi and Ors. v. Union of India (UOI) and Ors., (2004) 5 SCC 518

Recording of child's testimony

1. Virender v. The State of NCT of Delhi, Crl. A. No. 121/2008 (Del HC)
2. Wheeler v. United States, 159 US 523 (1895)
3. Panchhi v. State of U.P., AIR 1998 SC 2726
4. Golla Yelugu Govindu v. State of Andhra Pradesh, AIR 2008 SC 1842
5. State v. Sujeet Kumar, 213 (2014) DLT 635
6. Moti Lal vs. State of U.P., JT 2008 8 SCC 271
7. State of Punjab v. Gurmit Singh, 1996 Cri.LJ 1728 SC
8. Court on Its Own Motion v. the State, CRL. REF. No.2/2016
9. Dattu Ramrao Sakhare v. State of Maharashtra, 1997 5 SCC 341
10. Radhu v. State of Madhya Pradesh, Appeal (Crl.) 624 of 2005
11. State of Himachal Pradesh v. Sanjay Kumar, (2017) 2 SCC 51
12. Suryanarayana v. State of Karnataka, (2001) 9 SCC 129
13. Balaji Sarjerao Kamble v. State of Maharashtra, 2017 ALLMR (Cri) 4232
14. Chaitu Singh Gond v. State of Madhya Pradesh, CRL. A. 344 of 2014 (MP HC)
15. Chander Singh v. State, CRL. A. 751/2014 (Del HC)
16. Shahid Ali v. State, CRL. A. 850/2015 (Del HC)
17. Akshay Sarma v. State of Assam & Ors., 2016 (5) GLT 579
18. Attar Singh v. State, CRL. A. No. 335 of 2006 (Del HC)
19. State of Karnataka v. Shantappa Madivalappa Galapuji and Ors., JT 2009(5) SC 660

20. Kusehrideen and Another v. State Of U.P., Criminal Appeal No. 335 of 2006 (All HC)
21. State v. Rahul, CR.L.P. 250/2012 (Del HC)
22. Sudesh Jhaku v. K.C.J. & Ors., 62 (1996) 39 DLT 563
23. Hunny v. State, CRL.A. 841/2016 (Del HC)
24. Rakesh Kumar v State, CRL.A. 513/1998 (Del HC)
25. Darya Singh and Ors. v. State of Punjab, AIR 1965 SC 328
26. Subal Ghorai and Ors. v. State of West Bengal, (2013) 4 SCC 607
27. Harbans Kaur And Anr v. State Of Haryana, (2013) 4 SCC 607

Corroborative value of medical and scientific evidences

1. Malay Kumar Ganguly v. Sukumar Mukherjee, AIR 2010 SC 1162
2. Dayal Singh v. State of Uttaranchal, AIR 2012 SC 3046
3. Asgar Ali v. State (NCT of Delhi), 2013 CriLJ: 1838 DHC
4. State v. Dayal Sahu, AIR 2005 SCC 2471
5. Sri Kishan Poddar v. The State (Govt. of NCT of Delhi), CrI. A. No. 452/2006 (Del HC)
6. Gurvinder Singh v. State of NCT of Delhi, CRL.A. 659/2011 (Del HC)
7. Rajkumar v. State of MP, CrI. A. Nos. 1419-1420 of 2013 (MP HC)
8. Raju v. State of Haryana, Appeal (CrI.) 581 of 2000 (SC)
9. Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 CriLJ 1096 SC
10. State of Karnataka v. Revannaiah, 2005 CrLJ 2676 KHC
11. Ranjit Hazarika v. State of Assam, (1998) 8 SCC 635
12. Sheikh Zakir v. State of Bihar, 1983 CriLJ 1285 SC
13. Hemraj v. State of Haryana, (2014) 2 SCC 395
14. Manoj Kumar and Ors v. State (GNCT of Delhi) and Ors., CrI. A. 1393 and 1348/2013 (Del HC)
15. Lillu and Ors. v. State of Haryana, AIR 2013 SC 1784
16. Narayanamma (Kum) v. State of Karnataka and Ors., (1994) 5 SCC 728
17. State of Uttar Pradesh v. Munshi, AIR 2009 SC 370
18. Narender Kumar v. State (NCT of Delhi), AIR 2012 SC 2281
19. State of Punjab v. Ramdev Singh, AIR 2004 SC 1290
20. The State Govt of NCT of Delhi v. Khursheed, CRL.A. 510/2018
21. State of Haryana v. Bhagirath, (1999) 5 SCC 96
22. Piara Singh and Ors. v. State, AIR 1977 SCC 2274
23. State of Karnataka v. Manjanna, AIR 2000 SC 2231
24. Virender v. The State of NCT of Delhi, CrI. A. No. 121/2008 (Del HC)

Right of Child to Take Assistance of Legal Practitioner

1. Delhi Domestic Working Women Forum v. Union of India, (1995) 1 SCC 14
2. Khem Chand v. State of Delhi, 2008 (4) JCC 2497
3. Delhi Commission for Women v. Delhi Police, (2010) 172 DLT 65
4. Arsheeran Bahmeech v. State, (2015) 224 DLT (CN13)

5. Smt Lavanya Anirudh v. State of NCT of Delhi, CRL.M.C. 301/2017 (Del HC)

Victim Compensation

1. Ankush Shivaji Gaikwad v State of Maharashtra, AIR 2013 SC 2454
2. Deo Kumar Rai v State of Sikkim, Crl. A. No. 13 of 2016 (Sikkim HC)
3. Delhi Domestic Working Women Forum v. Union of India, (1995) 1 SCC 14
4. In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014, (2014) 4 SCC 786
5. Suresh & Anr. v. State of Haryana, (Crl) No. 420 of 2012 (SC)
6. Bijoy v. State of West Bengal, 2017 Cril.J. 3893 (Cal HC)
7. State v. Rameshwar Dayal, SC No.07/02/2013 (Dwarka District Court)
8. Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, 1996 AIR SC 922
9. The Minor Through Guardian Zareen v. State (Government of NCT Delhi), W.P. (Crl) 798/2015 (Del HC)
10. Nipun Saxena v. Union of India, Writ Petition (Civil) No. 565/2012

Protection of Vulnerable Witnesses

1. Himanshu Singh Sabharwal v. State of Madhya Pradesh and Ors., AIR 2008 SC 194
2. Gaya Prasad Pal v. State, CRL.A. 538/2016 (Del HC)
3. National Human Rights Commission v. State of Gujarat & Ors., (2009) SCC 342 SC
4. Ms. Neelam Katara v. Union of India, (2003) ILR 2 Delhi 377
5. Mahender Chawla & Ors. v. Union of India & Ors., Writ Petition (Crl.) No. 156 of 2016

Compromise impermissible in rape cases

1. Shimbhu v. State of Haryana, (2013)10 SCALE 595
2. Ankush Kumar v. State, CRL.M.C. 4046/2015

Presumption of Guilt

1. M/S Sodhi Transport Co. v. State of UP, AIR 1986 SC 1099
2. C.M Girish Babu v. CBI Cochin, AIR 2009 SC 2022
3. Mohal Lal v. State of Punjab, 2018 (9) SCALE 663

Mandatory Reporting under POCSO Act

1. Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546
2. Dr. Sr. Tessy Joe v. State of Kerala, CRL.No. 3712 of 2018 (SC)
3. Kamal Prasad Patade v. State of Chhattisgarh, WP(Cr) No. 8 of 2016 (Chhattisgarh HC)
4. Balasaheb v. State of Maharashtra, C.R.A 69 of 2017 (Bom HC)