HANDBOOK FOR PUBLIC PROSECUTORS

ISSUES UNDER THE POCSO ACT: A COMPILATION OF LEGAL CASES AND FACTS

Second Edition

HAQ: Centre for Child Rights, January 2023
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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 judgments of the Supreme Court of India and various High Courts have been compiled and presented for the benefit of Public Prosecutors and lawyers representing children, 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. The handbook was first brought out in 2019. The second edition of this handbook has been updated to include subsequent development in the law.

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. From 2013 up to February 2023, HAQ has reached out to 3,412 child victims/survivors of sexual abuse (531 children were provided both legal aid and psychosocial support and 2,881 children were provided psychosocial support only). Psychosocial support provided comprises “Restorative Care”, which to HAQ is an integral part of “Access to Justice”.

Data presented in this handbook is based on the evidence derived from the action research work undertaken by HAQ during the period January 2013 to February 2023.

I take this opportunity to thank all the Judges, Special Public Prosecutors, Child Welfare Committees, Police, State and District Legal Services Authorities various Government Departments and other stakeholders who have upheld the best interests of children in the justice system and travelled the extra mile to secure justice for children.

Finally, HAQ’s Legal and Restorative Care teams deserve appreciation for standing by children through thick and thin, helping them heal and fight for justice in the courts, including approaching the High Court for individual as well as collective relief, running around to banks, the UID office, schools, hospitals and other places to ensure children their entitlements with dignity. I also thank Dhanpal from HAQ’s Research team for meticulous data entry, collation and checks that have allowed us to add some data insights into this handbook and Ms. Preeti Singh for extending all the last minute help as always.

We are extremely grateful to the Azim Premji Foundation for supporting HAQ’s work on access to justice for children, including the publication of this handbook.

Bharti Ali
Co-Founder & Executive Director

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LIST OF ABBREVIATIONS & ACRONYMS

%	per cent
&	and
ACP	Assistant Commissioner of Police
Adv.	Advocate
AIR	All India Reporter
ALLMR	All Maharashtra Law Reporter
Anr.	Another
App/Appln.	Application
Bom	Bombay
BomCR(Cri)	Bombay Cases Reporter (Criminal)
CCR	Current Criminal Reports
Crl / Crl.	Criminal
CRA / Crl. A./ Crl A	Criminal Appeal
Cril. J.	Criminal Journal
Crl. L.P.	Criminal Leave Petition
Cri LJ / Cril LJ / CrLJ	Criminal Law Journal
Crl. M.A.	Criminal Miscellaneous Application
Crl. M.C. / Crl. MC / Crl MC	Criminal Miscellaneous Case
Crl. MP (M)	Criminal Miscellaneous Petition
Crl. O.P.	Criminal Original Petition
Crl. Pet. / CP	Criminal Petition
Crl. PIL	Criminal Public Interest Litigation
Crl. Ref.	Criminal Reference
Crl. Rev. / Crl. Rev. A.	Criminal Revision / Criminal Revision Application
Crl. Rev. P.	Criminal Revision Petition
CrPC	Criminal Procedure Code, 1973
CRR	Criminal Revision
CWC	Child Welfare Committee
DHC	Delhi High Court
DLSA	District Legal Services Authority
DLT	Delhi Law Times
DNA	Deoxyribonucleic Acid
DSP	Deputy Superintendent of Police
dt.	Dated
Ex.	Exhibit
FIR	First Information Report
FSL	Forensic Science Laboratory
GLT	Guwahati Law Times
HCLSC	High Court Legal Services Committee
i.e.	such as / that is
IEA	The Indian Evidence Act, 1872
ILR	Indian Law Reports
IO	Investigating Officer

IPC	Indian Penal Code, 1860
JCC	Journal of Criminal Cases
JCR	Jharkhand Cases Reporter
JJ Act	Juvenile Justice (Care and Protection of Children) Act
JJ Rules	Juvenile Justice (Care and Protection of Children) Rules
JT	Judgment Today
KHC	Karnataka High Court
Ld.	Learned
Misc	Miscellaneous
MLC	Medico-Legal Case
MLJ	Madras Law Journal
Ms.	Miss
NCT	National Capital Territory
No./Nos.	Number/Numbers
Ors.	Others
para	Paragraph
POCSO Act	The Protection of Children from Sexual Offences Act, 2012 (including its amendment in 2019)
POCSO Rules	The Protection of Children from Sexual Offences Rules, 2012 / 2020
PW	Prosecution Witness
Ref.	Reference
Rs./INR	Rupee
r/w	Read with
S.L.P./SLP	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
Sr.	Senior
Supp	Supplementary
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
W.P. (C)	Writ Petition (Civil)
W.P. (Crl)/ WP (Cr)	Writ Petition (Criminal)

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.

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**) as follows:

"**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."

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.***

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?*

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

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.

Delay in registration of FIR

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 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."*

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

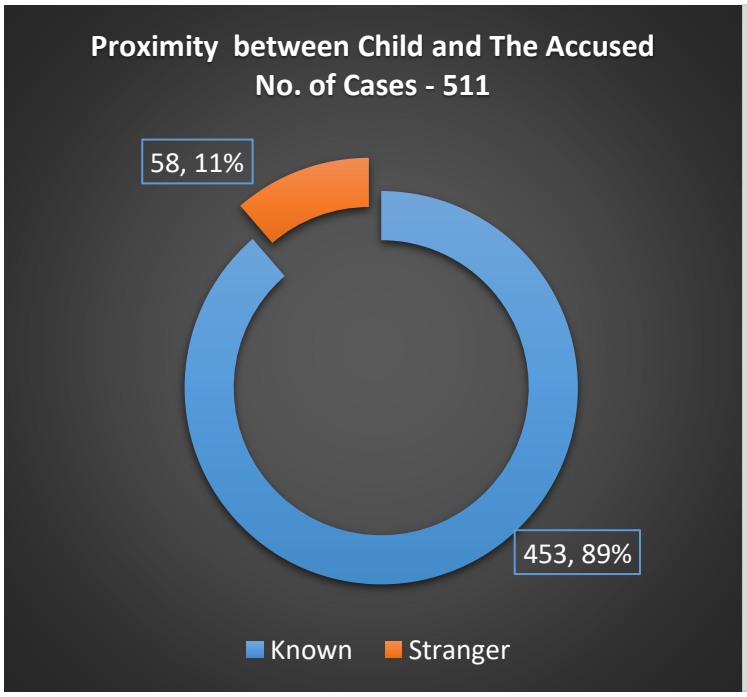
In the case of **State of Himachal Pradesh v. Gian Chand**, (2001) 6 SCC 71, the Supreme Court has rightly held that delay in filing of *FIR* cannot be used as a ritualistic formula to doubt the authenticity of the prosecution evidence. When an explanation for delay is offered it is the duty of the courts 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 delay in lodging an FIR include social context of the child, community pressure imposed, child's dependence on the accused (mostly in insect cases).



According to the NCRB's Crime in India Report, 2021…

In 97.1% cases (32,365 out of 33,348), the accused were known to the child

Of these…

- 9% cases involved family members
- 45% involved family friends, neighbours, employers and other known persons
- 46% involved friends/online friends or live in partners

Offence-wise Number of Accused and Proximity with the Child

Nature of Offence	Total No. of Cases	Total No. of Accused	Accused is known to the victim		Stranger	
			No. of Cases	No. of Accused	No. of Cases	No. of Accused
PSA	85	109	78	100	7	9
APSA	304	412	264	347	40	65
SA	51	63	43	52	8	11
ASA	46	55	43	52	3	3
SH	21	26	21	26	0	0
Unnatural Offence u/s 377	2	2	2	2	0	0
Kidnapping u/s 363 IPC	2	4	2	4	0	0
Total	**511**	**671**	**453**	**583**	**58**	**88**

Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 2. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf

Child-Accused Proximity			
Type of Proximity	**No. of Cases**	**No. of Known Accused**	**Proximity (among known accused) (%)**
Incest (related by blood, adoption or marriage)	61	70	13%
Close Relatives	29	38	6%
Relatives/Friends	22	30	5%
Neighbours	260	319	57%
Friends	40	74	9%
School Staff / Tutor	16	17	4%
Staff of Children's Home	1	1	0%
Employer / Employment Agent	10	15	2%
Co-worker	2	5	0%
Others (Landlord's Driver, Tantrik, Friend's Father-in-	12	14	3%
Total	**453**	**583**	
Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 2. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf			

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 filing the 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**."*

Number of Accused and Relationship with the Child in cases of Incest Abuse		
Relationship with the Child	**No. of Cases**	**No. of Accused**
Biological Father	36	40
Step Father	18	20
Adoptive Father	1	1
Brother	6	9
Total	**61**	**70**

Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 2. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf

Based on HAQ's experience…

Incest abuse cuts across all class. HAQ has addressed cases from slums as well as high end gated apartment blocks and bungalows. The tragedy of incest cases is that cases fail to go forward in the justice system due to inaction and lack of support from the child's family, including their own mother. The legal provision of mandatory reporting does not necessarily help in such cases. Even children do not want their father or brother or grandfather to go to jail though they do want an assurance that it will not happen again, or they simply want the abuser to leave the house and go away.

What can be said with certainty is that if a child takes the plunge and the mother is supportive of the child, she receive economic assistance and psychological support to not only sustain the legal battle, but most importantly, sustain the 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 for the rest of their life.

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THE TIMES OF INDIA, NEW DELHI
MONDAY, DECEMBER 26, 2022

How mothers have led battle to secure justice for abused child

10 YRS OF POCSO: At Times, Have Had To Fight Own Families

Ambika.Pandit@timesgroup.com

New Delhi: With the Protection of Children From Sexual Offences Act 2012 completing a decade in November this year a qualitative analysis of 498 cases from Delhi shows many mothers at the forefront of the battle for justice for their child, at the cost sometimes of even having to fight their own families. In cases of sexual abuse by the father, several mothers have taken the lead in reporting the crime and some have mustered the courage to file the complaint and pursue the case in court.

The analysis by voluntary organisation HAQ:Centre for Child Rights dwells on the trajectory of trial in cases handled by their team over 10 years in Delhi. While in 43% (214) cases pertaining to various sections of Pocso Act the children filed the complaint with police, mothers were complainants in 170 cases. It turns out that the child chose to make the disclosure about the abuse to the mother in as many as 279 cases and mother was the one to inform the police in 235 cases. The disclosure was made to the father in just 39 cases, he was the informant in 53 cases and the complainant in 59 cases.

The analysis further highlights that cases of incest abuse by father comprises 11% of all cases (54/498). It turns out that in such cases, the mother has been the informant in 44% (24/54) cases and the complainant in 26% (14/54). In rest of the cases the child is the primary complainant.

The data also show only in 3% (17/498) cases the information to police is given by NGOs, including Childline and shelter home staff.

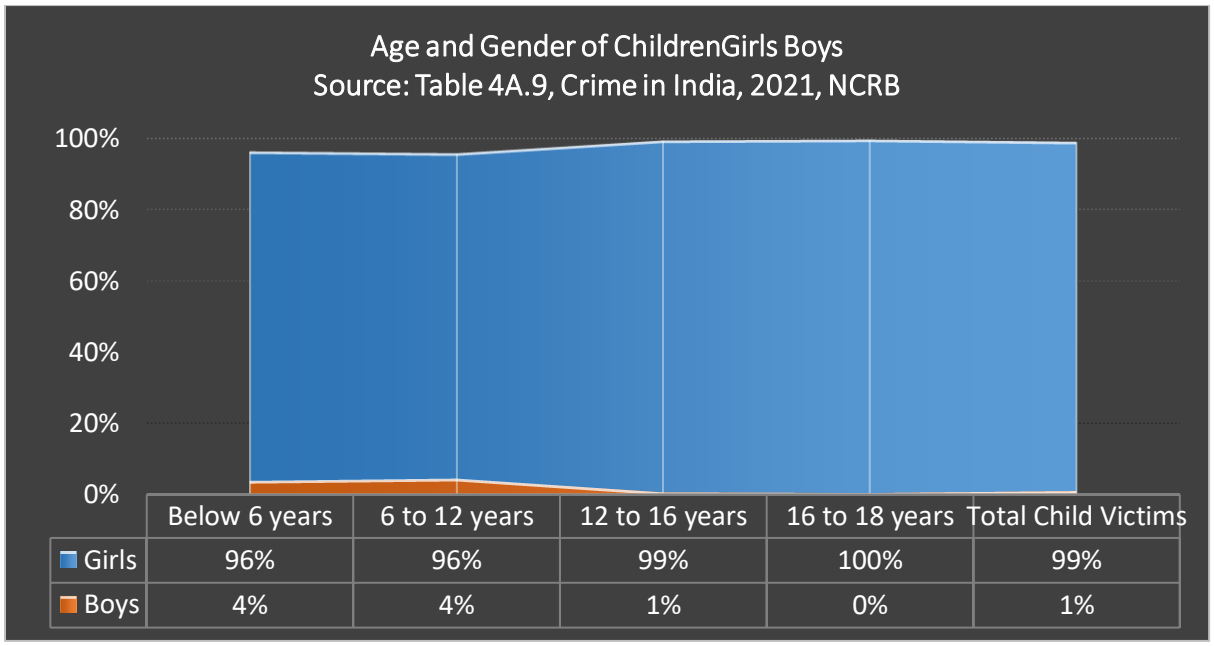
The data highlights among various concerns the struggles of mothers who have been fighting the odds. Case studies show how some turned hostile in the face of family pressure and there were others holding on even as the family turned their back on them and the survivor child.

However, the numbers also show that the trial process is marked by many challenges especially in incest abuse cases "Out of 11 disposed cases of incest abuse, four ended in acquittal. In three cases the mother, who was both the informant and the complainant, turned hostile and in the fourth case there were discrepancies found in the statements of the mother and the child," Bharti Ali, executive director, Haq: Centre for Child Rights, said. Emphasising the need to support family members who dare to speak up for the child, she said that holding up emotionally through the trial in cases of incest abuse is the most challenging part for the complainant.

A case in point is journey of girl who was abused for nearly 6 to 8 months by her own father when she was 15. Suhani (name changed) a resident of a resettlement colony in northwest Delhi suffered in silence out of fear of her father. The truth only came to light when Suhani complained of stomach pain to her mother and a medical check-up revealed that she was six months pregnant. When Suhani's mother who worked as a domestic worker informed her parents-in law about the abuse and said that she will file a complaint, her husband's family threatened to kill her and the girl. Undeterred the mother filed a case in 2019 but ended up losing her job and was thrown out of the house along with Suhani and was left with no choice but to seek refuge in her parents' house.

Development Directorate, Uttarakhand

CHAPTER 2
AGE DETERMINATION OF THE PROSECUTRIX/VICTIM OF CRIME



Age distribution of children by Gender					
Age Group (In years)	**Females**	**Females as % of all**	**Males**	**Males as % of all**	**Total**
0 to 3 years	8	100%	0	0%	8
3 to 6 years	38	90%	4	10%	42
6 to 10 years	84	76%	26	24%	110
10 to 12 years	57	90%	6	10%	63
12 to 15 years	119	88%	17	13%	136
15 to 18 years	146	96%	6	4%	152
Total	**452**	88%	**59**	12%	**511**

Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 1. Based on a study of 511 cases from 2013 to February 2023 supported by HAQ: Centre for Child Rights. Available at: https://www.haqcrc.org/wpcontent/uploads/2023/05/Factbook-2023_Access-to-Justice-

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?*

Age determination and its' relevance 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 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. However, what is the position of the law regarding the documents that can be relied upon to determine the age of the victim? 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 have time and again, through their judgments, clarified the issue of age verification of the victim, which is discussed in the later part of this chapter.

Age determination law for a Child in Conflict with the Law a Minor Prosecutrix

- Section 34, Protection of Children from Sexual Offences Act, 2012 (as amended in 2019)
- Section 94, Juvenile Justice (Care and Protection of Children) Act, 2015 (as amended in 2021)

Age determination and Section 34 of the POCSO Act

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 –

(ii) **<u>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.</u>**

The basis for a Special Court to 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 statues 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 Court may satisfy itself on the basis of practice established through law and interpretation of statutes.

[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)

Two important judgments 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

Applicability of age determination provisions of the JJ Act to both child victims of crime and a child 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 aforestated 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 judgment (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 prosecu*trix**".***

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.*"

The new law on age determination

It is pertinent to note that the JJ Act of 2000 and JJ Model Rules of 2007 have been replaced by the new Juvenile Justice (Care and Protection of Children) Act, 2015 as amended in 2021 (JJ Act, 2015) and the Juvenile Justice (Care and Protection of Children) Model Rules, 2016, as amended in 2022 (JJ Rules, 2016) respectively.

Section 94 of the JJ Act, 2015 (as amended in 2021), provides for the procedure to determinate the age 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."

Key changes in the new law on age determination

Section 7(A) of the 2000 Act provided that the claim of juvenility raised before any court shall be decided as per the provisions of the Act and rules made therein. The relevant rule in this respect was Rule 12 of the Rules of 2007. The corresponding procedure for age determination under the 2015 JJ Act is provided under section 94 of the said Act. At the outset, section 94 of the JJ Act of 2015 differs from Rule 12 of the JJ Rules of 2007 in the following aspects –

i) Unlike Rule 12(3)(a)(i) of the 2007 JJ Model Rules, the matriculation certificate does not enjoy primacy under section 94 of the JJ Act of 2015 as a relevant document for age determination. In **Gajab Singh v. State of Haryana**, CRR-767-2018, the High Court of Punjab and Haryana at Chandigarh held that the date of birth certificate from the school and

matriculation certificate have been put on par as far as evidentiary value is concerned under the JJ Act of 2015.

ii) Regarding medical age determination, Rule 12(3)(b) of the 2007 JJ Model Rules stipulated that, *only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted* ***Medical Board****, which will declare the age of the juvenile or child*." In contrast, section 94(2)(iii) provides that *"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."* The point to be noted is that while section 94 of the 2015 JJ Act specifically mentions an 'ossification test' or 'any other latest medical age determination test' it does not per se mention the requirement of a duly constituted Medical Board, as was specifically required under rule 12 of the 2007 JJ Model Rules.

iii) Rule 12(1) of the 2007 JJ Model Rules provided that the **Court or the Board or the Committee** as the case may be, shall determine the age of such juvenile or child or a juvenile in conflict with law within a **period of thirty days** from the date of making of the application for that purpose. While under the proviso of section 94(2) the age determination test conducted on the order of the **Committee or the Board** shall be completed within **15 days** from the date of such order and there is no reference to what a court other than a Board should do.

iv) Rule 12(3)(b) of JJ Model Rules 2007 further provided that in cases where the exact determination of the age cannot be done, the **benefit would go to the child or the juvenile** by considering his/her age on lower side within the margin of one year. Per contrast, section 94 of the 2015 Act does not provide for any such benefit to the child or the juvenile. In the absence of the benefit given to the child under Rule 12(3)(b), the courts have applied one of the fundamental principles of criminal law jurisprudence and held that other things being equal, the benefit of doubt shall go to the accused at all stages. This development will need further deliberation particularly in the context of child rights jurisprudence, which deviates from several accepted criminal justice principles to provide a child friendly legal provisions in respect of children in conflict with law as well as children in need of care and protection.

Age Inquiry based on Documentary Evidence

Even while the law on age determination clearly provided the documents to be relied upon for age determination, a lot of litigation has been around which document gains precedence and what is to be done if there is contradiction in different documents produced in evidence.

Much of such litigation has been in the context of children in conflict with the law, though of late some case law is also available on age determination of a minor prosecutrix in cases under the POCSO Act.

Age inquiry cannot be a roving inquiry

While using available case law on age determination, it is important to bear in mind the judgment of the Supreme Court of India in **Ashwini Kumar Saxena v. State of Madhya Pradesh** (supra), clearly dissuading implementers of law from making a roving inquiry on age and adopting a hyper technical approach.

In **Ashwini Kumar Saxena v. State of Madhya Pradesh** (supra), the Supreme Court discussed the 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.***"

The Hon'ble High Court thus held the prosecution has proved beyond reasonable doubt that the prosecutrix was a 'child' at the time of alleged incident and that she was forcibly taken away from the lawful guardianship of her parents and offence of sexual intercourse was committed on her repeatedly and forcibly. And thus upheld the order of conviction and sentence.

Courts should ensure that the objectives of JJ Act are not defeated by a hyper technical approach

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 the 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 under section 102 of the JJ Act, 2015 and argued for his juvenility.

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 matriculation certificate or a birth 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 in **Abuzar Hossain @ Gulam Hossain v. State of West Bengal**, Crl A No. 1193 of 2006, wherein the Supreme Court has stated 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."***

Discrepancy between two documents

In **Umesh Chandra v. State of Rajasthan**, 1982 AIR 1057, the Supreme Court was of the view that even if there are two dates of birth of a child mentioned in two different documents produced with regards to age, the **records should not be discarded presuming them to be forged without considering the reasons for the existence of the two and the variance therein**. The court held:

"*In our country, it is not uncommon for parents sometimes to change the age of their children in order to get some material benefit either for appearing in examination or for entering a particular service which would be denied to a child as under the original date of birth he would be either under-aged or ineligible.*

Thus, ***the appellant's father has given a cogent reason for changing the date of birth and there is no reason not to accept his explanation particularly because the offence was committed seven years after changing the date of birth****, and, therefore, there could be no other reason why the father should have gone to the extent of filing an affidavit to change the date, except for the reason that he has given*."

The Supreme Court, in **Daya Chand v. Sahib Singh,** (1991) 2 SCC 438, was faced with a situation where two different dates of birth were recorded in two different schools. The Apex Court held that medical report was to be relied upon, which was of was of definitive nature and stated the age to be not less than 20 years on the date of examination.

In **Shri Raja Durga Singh of Solan v. Tholu**, AIR 1963 SC 361, it was held that where there are conflicting entries in the official document, the entry made at a later stage has to be accepted and relied upon.

Section 94 of JJ Act, 2015 poses a difficulty if two sets of school related documents are produced disclosing different dates of birth as these are treated at the same level. In such a situation, the Board/Court may, after taking such minimum evidence as may be required, use its discretion to accept one document over the other, with a reasoned order.

Admissibility and Probative Value of Age Record

Formal proof of a document and probative value thereof are not the same thing. This has been reiterated by the Supreme Court in several judgments.

Birad Mal Singhvi v. Anand Purohit, 1988 Supp SCC 604

"15. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded."

Satpal Singh v. State of Haryana, (2010) 8 SCC 714

"20. A document is admissible under Section 35 of the Evidence Act, 1872 (hereinafter called as - the Evidence Act) being a public document if prepared by a government official in the exercise of his official duty. However, the question does arise as to what is the authenticity of the said entry for the reason that admissibility of a document is one thing and probity of it is different.

22. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case.

28. Thus, the law on the issue can be summarised that the entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the court/authority to examine its probative value. The authenticity of the entry would depend as to on whose instruction/information such entry stood recorded and what was his source of information. Thus, entry in school register/certificate requires to be proved in accordance with law. Standard of proof for the same remains as in any other civil and criminal case."

Brij Mohan Singh v. Priya Brat Narain Sinha, AIR 1965 SC 282

"18. … when a public servant makes it himself in the discharge of his official duty, the probability of its being truly and correctly recorded is high. That probability is reduced to a minimum when the public servant himself is illiterate and has to depend on somebody else to make the entry."

Many judgments have established that no probative value can be attached to school record based on affidavit filed by parents at the time of school admission unless and until the parents are examined or the person on whose information the entry may have been made, is examined.

In **State of NCT of Delhi v. Dharmender**, Crl A 1184/2017, decided on 23.08.2018, the Delhi High Court has stated:

> ***"29. Firstly, the affidavit had been given by the mother of the victim/child and not by a stranger who may not be aware of his date of birth. Secondly, the affidavit and the application form were processed and acted upon by the school, and the date of the birth of the victim/ child recorded in the school record by the school authorities in the discharge of the official duty. Thirdly, the date of birth of the child was disclosed by the mother as 16.07.2013 much before the incident took place*** *and thus, there was no occasion for the mother to falsely declare the date of birth of her child/ victim."*

A differing view is found in **K. Muthu Mariappan v. The State Represented by the Inspector of Police**, 2015 (3) MLJ (Crl) 429, where the Madras High 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 of 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…..***"

Rough estimation of the age of the victim given by her father cannot be used to rebut the documentary evidence

In **Mohd. Afsar v. State**, Crl A 274 of 2020, as per the deposition of the father of the victim, he was married in the year 1987 and had nine children in all, out of which, the youngest child had expired. He deposed that his first child was born after about two years of marriage and there was a gap of 2 to 2½ years between each child. As per the victim she was the third child in the family. Considering the age gap between first child and thereafter, the prosecutrix was

born in the year 1993 and as on the date of alleged incident i.e. 13th May 2013, she was approximately 20 years old and hence, major. The counsel for the appellant/accused contended that the learned trial court had failed to note that no birth certificate or hospital record or any municipal record was furnished at the time of the admission of the victim in the school and thus, date of birth recorded in the school record cannot be treated as the correct date of birth. The Hon'ble High Court of Delhi, after considering the facts and perusing the evidence furnished in the trial court, held:

> *"10. A perusal of Rule 12(3) of the J.J.Rules itself reveals that the first priority has to be given to the Matriculation or equivalent certificate and in the absence thereof, to the date of birth certificate from the school first attended other than a play school. PW-5 who appeared with the record of the school stated that the prosecutrix was admitted in her school in Class 1st on 14th July 2005 through an open test and at the time of her admission, her date of birth was mentioned as 10th January 2001. Thus, even if she had attended any play school or a Madarsa at the village, the same was irrelevant, for the reason, the school first attended other than the play school was the one where the prosecutrix was admitted in the 1st standard and her date of birth was mentioned as 10th January 2001. As per the record, prosecutrix further left the school on 1st May 2013 while studying in 8th standard. Thus, she had no matriculation certificate. Therefore, as per the date of birth recorded in the school first attended, the prosecutrix was a child in terms of Section 2(1)(d) of the POCSO Act as she was below the age of 18 years. Even if in the cross examination, the father of the prosecutrix stated that this was the third child and there was a gap of two years in each child and the first child was born after two years of marriage, the same cannot be taken as an exact estimation of the date of birth of the prosecutrix….**The testimony of this witness cannot be used to rebut the documentary evidence giving the age of the prosecutrix** who got admitted in the school in the year 2001 in Delhi at the school first attended."*

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 from school or birth certificate issued by a corporation/municipal authority/panchayat, the age shall be determined using medical examination. 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 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, **Babloo 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 an opinion.[5]

It is further upheld by the Gwalior bench of Madhya Pradesh High Court in **Rakesh v. State of Madhya Pradesh**, CRA No.1128/2016, 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*."

School certificate to prevail over medical opinion

The Supreme Court in **Shah Nawaz v. State of Uttar Pradesh**, (2011) 13 SCC 751, observed that in accordance with the erstwhile JJ Model Rules, 2007, "…***the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available***."

It is well established by now that where a school certificate is available, admissible and reliable, there is no need to seek a medical opinion on age.

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[3] Anant Kumar Asthana, *Age Determination, Chapter 8*. Part of the Reading Material prepared by Yogesh Pratap Singh, Research Fellow, National Judicial Academy for the *Workshop for Magistrates on Juvenile Justice (Care and Protection of Children) Act, 2015*, held on 21-23 September, 2018 at the National Judicial Academy, Bhopal.

[4] Ibid. Anant Kumar Asthana

[5] Ibid. Anant Kumar Asthana

In 2019, in **Rakesh v. State of Madhya Pradesh** (supra), stated that, "*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*."

In **The State through Grameen Police Station v. Sharanu @ Sharanappa @ Sharanabasappa**. Crl A No. 200058/2014, the Karnataka High Court has held that **the certificate issued by the school authorities stands on a higher footing than the medical opinion of a doctor.** The court reiterated the findings of various other High Courts, which held that as per Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules 2007 it is only in the absence of the matriculation or equivalent certificates or the date of birth certificate from the School or a birth certificate given by a Corporation or a Municipal authority or a panchayat, that the medical opinion would be sought from a duly constituted Medical Board, which will declare the age of the juvenile or the child.

Primacy of school certificate over medical opinion on age continues to prevail even in present times.

Whether the benefit of doubt in age determined through the bone ossification test should go to the accused or the 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:

> *"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]

The same principle is followed even in matters where medical opinion on age of the prosecutrix is in question. The Supreme Court in **Rajak Mohammad v. State of Himachal Pradesh**, (2018) 9 SCC 248, dealt specifically with the issue of medical opinion giving age between 17 to 18 years in respect of a victim. The case was of consensual intercourse and the prosecution had failed to prove that the victim was a minor on the date of occurrence. While setting aside the conviction order of the High Court, the three-judge bench held that:

[6] Ibid. Anant Kumar Asthana

"*While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused".*

In **Shweta Gulati v. State Govt. of NCT of Delhi**, Crl. Rev. P. 195/2018, the Delhi High Court has also held that while determining the age of the victim, the benefit of doubt at all stages should go to the accused.

In this 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.

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?*
- *What if giving benefit of doubt to the accused prejudice the rights of the victim?*

A differing view can be found in the following judgments:

State of NCT of Delhi v. Dharmender (supra), decided by Delhi High Court on 23.08.2018 has stated,

"though the priority/procedure laid down in Rule 12 of the JJ Rules would be attracted to determine the age of the victim/prosecutrix, the tendency to lean in favour of the accused (in the case of a juvenile in conflict with the law) would, in such situations, be to lean in favour of the minority of the victim/prosecutrix while determining the age of the victim/ prosecutrix."

Some Special Courts trying cases under the POCSO Act too have taken a similar view.

State of Assam v. Md. Abdul Kalam, *POCSO Case No. 23 of 2015, decided on 10.3.2016*[7]

The accused committed penetrative sexual assault on the victim on a couple of occasions, based on a promise to marry her. When she became pregnant, he refused to marry her. She was five months pregnant when the FIR was lodged. The medical report did not specify a range, but stated that she was below 18 years. In her statement under section 164, CrPC, which was recorded at least six months after the incident, the victim stated that she was 18 years old. Although she had attended school and had dropped out a year before the incident, no school records were produced or sought. Her father stated she was around 17 years at the time of the incident. According to the Special Court, the parents' testimony about the

[7] Swagata Raha (2018). *Challenges related to Age-Determination of Victims under the POCSO Act, 2012*. p. 93. Quoted in Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues, A study by the Centre for Child and the Law, National Law School of India University, Based on CCL-NLSIU's Studies on the Working of Special Courts in Five States.

sequence of birth of the children and the number of years they were married, would suggest that she was a minor at the time of the incident. With respect to the margin of error, the Special Court held:

> *"if benefit of doubt of variation of two years in estimation of age on the basis of the Radiological report by Doctor is given to the accused in POCSO cases, no child who do not have a birth certificate and who is above the age of 16 years will get justice under the Provisions of the Protection of Child from Sexual Offences Act, 2012*."

In **State v. Varun**, SC 108 (2013), decided on 29.10.2013, the Delhi High Court held that in view of the objectives of the POCSO Act, 2012 if there is doubt about the age of the girl child we must lean towards juvenility of the victim.

At what stage in a criminal trial under the POCSO Act should the age of the prosecutrix be determined

In **LK (Prosecutrix) v. State of Delhi NCT and Anr.**, Crl. M.C. No. 4181 of 2016, taking consideration of section 7A of the JJ Act 2000 and Rule 12 of the JJ Rules 2007, the High Court of Delhi held that:

> "***the question as to whether the prosecutrix was a child or not would be one of the questions that would fall for final determination during the trial. The evidence on the basis of which clear conclusions on this subject could be reached would include the testimony or version of the prosecutrix*** *i.e. the petitioner.* ***In the inquiry held ahead of the trial - the question of charge not having been considered - the material gathered does not include the deposition of the prosecutrix. The approach of the Special Judge has in fact, condemned the version of the prosecutrix without she being heard***".

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 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 the High Court and the trial court dismissed her plea for prosecution of accused under the POCSO Act. Relevant extracts from the judgment are as follows:

"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 judgment, 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

Bail granted prior to child's testimony…

In 14% cases (74 of 511) where HAQ is providing legal support to children, bail is granted to the accused prior to the child's testimony in court

Those granted bail include step-fathers, landlords and doctors - persons in a position of trust and authority, who can influence the child or even impose emotional pressure on the child for carrying out the abuse.

91% of the accused in such cases are known to the child and their family, 49% of whom live in the neighbourhood of the child and 10% are school staff or teachers.

38% of these are cases of children under the age of 12 years.

- Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 5. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf

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 relating to bail. While section 437 provides for grant of bail from a Magistrate's Court, section 438 talks about grant of anticipatory bail to a person apprehending his/her arrest for commission of alleged offence. Section 439 of the CrPC confers special powers on 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 376 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.

Factors to be considered by 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 the 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
- Accused being falsely implicated / contradiction in child's statements

- Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 5. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.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!

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;* and
(viii) *Prima facie satisfaction of the court in support of the charge.*

Dealing with this aspect, in the case of **Central Bureau of Investigation v. Birendra Kumar Singh @ Virendra Kumar Singh @ Pandit,** 207 (2014) DLT 680, referring to the case of **Kalyan Chandra Sarkar v. Rajesh Ranjan,** (2004) 7 SCC 528, the High Court of Delhi 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 incarnation 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), in para 14, the Supreme Court has 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 is 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 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.,** Crl. 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."*

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: ABC 2016 (I) 43 BOM, the petitioner sought regular bail under section 439 CrPC for offences punishable under sections 376, 363, 366A of IPC and under sections 3, 4, 5 and 6 of POCSO Act. The High Court of Bombay 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 and stated that:

> *"**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, 2015 SCC OnLine Bom 5965, 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…."

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 adopted by the General Assembly on 29 November 1985**, the Jabalpur Division bench of 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.

Cases of sexual harassment of children under POCSO Act- whether bailable or non-bailable?

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 that 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 Rajeev 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****."*

Guidelines for Bail in POCSO Cases - Extension of Application of Section 439(1A) of the CrPC in cases under the POCSO Act

The Delhi High Court had issued Practice Directions to the District Judges on 24.09.2019 in terms of section 439(1A) of the CrPC, specifying how notice of the bail application was to be served on the informant/child's representative by the investigating officer (IO), and such proof of service was directed to be annexed by the IO in their reply to the bail application in any case under section 376(3) or 376AB or 376DA or 376DDB of the Indian Penal Code (IPC). However, the practice directions were not extended to cases under the POCSO Act, which are equally heinous in nature. Consequently, in January 2020, the Delhi High Court issued guidelines to be followed in cases under the POCSO Act in the Public Interest Litigation (PIL), **Reena Jha & Anr. v. Union of India & Ors.,** W. P. (C) No. 5011/2017. The petition was filed in May 2017 on behalf of aggrieved mothers of minor survivors of sexual abuse, through HAQ: Centre for Child Rights and iProbono. The PIL emphasised on Rules 4(11) and (12) of POCSO Rules, 2012, according to which, the police must inform the survivor's family about the arrests, bail hearings, the grant of bail etc. Upon submissions of lawyers for the petitioners,

on 27.01.2020 the Delhi High Court passed the final judgment with a **direction** that **the provisions of the Delhi High Court Practice Directions shall *mutatis mutandis* also apply to offences under POCSO Act**.

In relation to POCSO offences, **where the crime has been perpetrated by a close family member**, issuing a notice or giving information to such family members in line with the practice directions would not serve any purpose. Hence, on the suggestion of the lawyer representing the case, the court directed that in such cases, **notice be issued to the concerned Child Welfare Committee, and a copy of the notice/information also be sent to the Delhi State Legal Services Authority (DSLSA)**.

Implementation of the Guidelines issued in Reena Jha and Anr. v. Union of India

In May 2020, a minor victim aggrieved by the grant of interim bail in a case involving section 6 of the POCSO Act, filed a petition in the Delhi High Court through HAQ's panel lawyer. The case titled, **Miss G (Minor) through her mother v. State of NCT of Delhi & Anr.**, Crl.M.C. 1474/2020 & amp; Crl.M.As. 6330/2020, 6705/2020, sought quashing of the bail order and issuance of directions to the Special Courts to strictly comply with section 439(1A) CrPC and the Practice Directions of the Delhi High Court dated 24.09.2019. The court was informed that in a majority of bail applications in POCSO cases decided by district courts in Delhi during the COVID-19 lockdown, notice was not issued to the complainant/victim. The Delhi High Court requested a ***report from the Ld. Registrar General*** which collected ***data for the period between 22.04.2020 and 23.05.2020***, showing that of ***a total of 294 cases wherein bail was sought by the accused, notice was issued in only 79 cases.***

Observing that issuance of notice is a fundamental mandatory pre-condition, which cannot be neglected in any case, the court issued more detailed directions:

- Whenever an accused charged under sections 376(3), 376-AB, 376-DA or 376-DB of the IPC or the provisions of the POCSO Act, moves an application for regular bail or interim bail, notice shall be issued to the IO as also any counsel on record for the victim/complainant/informant.
- Upon receipt of the bail application or the notice of such application, the IO shall immediately issue a notice to the victim/complainant/ informant in the prescribed format as per Annexure A of the practice directions. The service of notice shall be certified by the SHO of the local police station by signing the annexure at the prescribed place.
- The duly completed Annexure A shall be filed along with the reply/ status report filed by the IO regarding the bail application and shall be presented to the court.
- If the IO cannot trace the complainant/victim/informant, it shall be mentioned in the status report. Further, if there is any specific reason for non-appearance of the complainant/victim/informant, the same shall be recorded and placed before the court.
- In case the complainant/victim/informant has not been traced, the IO shall try to ascertain the whereabouts of the individual and bring them before the court.

- Before proceeding to hear the bail application, the court will ascertain the service of notice. If the notice has not been served, either through the IO or the counsel on record, as a secondary safeguard, the court can issue summons to the complainant/victim/ informant.
- Once they appear before the court, adequate representation shall be ensured for the victim/complainant/ informant either through their own counsel or through a legal service authority counsel.
- All the relevant documents required for the victim/complainant/ informant to effectively represent the case for opposing the bail shall be provided.
- In every bail order, service of notice or reasons for non-service or non-hearing of the complainant/victim/ informant shall be specifically recorded before proceeding to pass orders.
- In case interim bail is sought for an emergency such as a death in the family or a medical emergency, and awaiting notice to the complainant/victim/informant appears non-feasible, in a rare case, reasons for the same shall first be recorded in the order.

Insistence on child's presence in bail hearings under the POCSO Act is not necessary if the child can be represented by an authorised person

The directions issued by the Delhi High Court have to be implemented with application of mind and sensitivity. The right of hearing afforded to the victim at the bail hearing has to be meaningful, keeping in mind the best interests, limitations and particular circumstances of the child. Victims/complainants are repeatedly summoned for hearings on successive bail applications insisting on their personal appearance when they can be represented by a legal guardian or a counsel in terms of section 40 of the POCSO Act.

A more recent judgment of the Delhi High Court in **Babulal v. State**, Crl A 198 of 2020, lays down further guidelines in respect of bail hearings in POCSO cases, in addition to the practice directions issued by the Delhi High Court earlier and the directions issued in Reena Jha & Anr. v. Union of India & Ors. (supra) and Miss G (Minor) through her mother v. State of NCT of Delhi & Anr. (supra). The need for such guidelines arose from the fact that the Special Courts were insisting on the presence of minor victims under the POCSO Act for every bail hearing even when the law allows for the child to be represented at the bail hearings by an authorised person. The judgment in Babula v. State (supra) is yet another move towards a more appropriate understanding of the Practice Directions of Delhi High Court and Guidelines issued in Reena Jha and Anr. v. Union of India (supra) and Miss G (Minor) through her mother v. State of NCT of Delhi & Anr. (supra) with respect to section 439(1A) of the CrPC.

Recognising that such insistence could put the child at the risk of coming in contact with the accused person and psychological trauma caused through the arguments on bail made in her presence, the High Court issued the following directions in Babulal v. State (supra):

"*(i) The IO shall ensure that timely service of notice of bail application is made on the victim/ prosecutrix, so that she gets reasonable amount of time to enter appearance and make her submissions.*

(ii) The Investigating Officer while serving notice/summons of the bail application to the victim/ prosecutrix shall make relevant inquiries about the victim and her circumstances and shall document the same in order to assist the court in the hearing of the bail application and to facilitate effective representation and participation on behalf of the victim. The IO should ensure that while making such enquiries the victim is not made to feel uncomfortable or questioned like an accomplice to a crime. Necessary sensitivity ought to be displayed by the IO ·while making these enquiries.

(iii) The victim can be produced virtually before the Court (either by the IO/ Support person before the Court) (by way of Video Conferencing) or by taking assistance of the District Legal Services Authority. Hybrid form of hearing of bail applications would suitably address the concerns of the victim while at the same time safeguarding the rights of the accused. Victim and the accused shall not come face to face in this manner and this can prevent the re-traumatization of the victim.

(iv) If the victim gives it in writing that her counsel/ parent/guardian/ support person shall appear on her behalf and make submissions on the bail application, insistence on physical or virtual presence of the prosecutrix shouldn't be made. A written authorization of the victim authorising another to make submissions on her behalf (after victim is duly indentified by the IO) and said authorization is forwarded by the SHO, should suffice.

(v) If the victim has appeared in court on one date of hearing of a bail application, her presence on subsequent dates can be dispensed with and RCC lawyer/ counsel/ parent/guardian/ support person representing the victim in court can be permitted to make submissions on behalf of the victim. On the day of the first appearance of the victim/prosecutrix, her submissions qua the bail application can be recorded by the Court and the same maybe used for the purpose of adjudicating on the bail application. The victim's opinion and objections regarding bail application on the first interaction can be mentioned in the order passed on the day of interaction between the Ld. Judge and the victim and this order can then be relied on at the stage of final disposal of bail application.

(vi) In certain exceptional cases, in- chamber interaction with the victim can be done and her submissions qua the bail application can be recorded in the order sheet passed on that day, so that the same maybe considered at a later stage.

(vii) While recording the submissions/ objections/ statement of the victim qua the bail application, appropriate questions may be put to the victim to elicit her responses instant of bluntly asking her "Do you want bail to be given to the accused or not?" Rather questions can be put to her to ascertain what her apprehensions and fears are in case the accused is granted bail in the matter, for bail is to be granted by the Court concerned on the basis of overall appreciation of facts and circumstances of the case and in the light of well settled principles governing the grant of bail.

(viii) Whenever the victim comes to court for a hearing on the bail application, the support person provided to her should be present with her so as to provide the necessary psychological or logistical support to the victim/prosecutrix.

(ix) It may further be clarified that victim's presence may not be insisted on in cases under POCSO Act, where the accused is a child in conflict with law, because the considerations for grant of bail to the child in conflict with law arc not dependant on the apprehensions of the prosecutrix. Section 12 of the Juvenile Justice (Care and Protection) Act, 2015 delineate separate parameters for considering grant of bail to children in conflict with law and giving an audience to the prosecutrix will not have any bearing on the same.

(x) Further, after the bail application is disposed off, the copy of the order should be mandatorily sent to the victim. This becomes important since the victim's main concern is her safety in case the accused is enlarged on bail. By providing her a copy of the bail order the victim is made aware about the status of the accused and the conditions of the bail and her right to approach the court for cancellation of bail in case of breach of conditions of bail.

(xi) It would further be in the fitness of things that the Judicial Officers are sensitized about the need to reduce interface of victim with the accused in court to the minimum possible and to permit victim to be represented through an authorised person in court at the time of hearing of bail application, instead of insisting for appearance of the victim in person (either virtually/physically). Judicial Officers maybe sensitized to the extent that Practice Directions issued by the Hon'ble High Court of Delhi on 24.09.2019 and judicial directions in 'Reena Jha v. Union of India' and 'Miss 'G' (Minor) through her Mother v. State of NCT of Delhi' were issued to ensure that victim doesn't remain unrepresented or unheard when the question of granting bail to the accused is being considered. However, it wasn't meant to invariably call for presence of victim on all dates of hearing in bail application so that the process itself becomes a punishment for the victim by exposing her to the accused/ his counsel frequently and reopening her emotional and psychological wounds."

The Bombay High Court, High Court of Karnataka and Allahabad High Court on application of Section 439(1A) in matters under the POCSO Act

In **Arjun Kishanrao Malge v. The State of Maharashtra and Ors**., Cr. PIL No. 52021, The High Court of Bombay observed that the POCSO Act read with Rules 4(13) and 4(15) recognises a statutory right of the child to legal assistance and representation as well as information to the parents or guardians regarding any application for bail made by an accused person.

The High Court disposed the petition with the following directions:

" i. The office of the public prosecutor shall issue a notice of hearing to the child's family, guardian or legal counsel along with all relevant documents and the record necessary for effective participation in the proceedings.

ii. The accused shall also issue the notice of hearing to the child's family, guardian or legal counsel.

iii. When an application is made on behalf of the prosecution, the Police Officer shall confirm to the court that the service of it along with all the documents has been undertaken and completed along with proof of service.

iv. It shall be the duty of the SJPU to inform the child's family, guardian or legal counsel of the reasons in writing if it has not been possible to serve the notice.

v. The court must ascertain the status of service of notice before the proceedings and if the notice has not been issued, the court may pass an order to secure the ends of justice.

vi. If the child's family, guardian or legal counsel, despite issuance of notice does not attend the hearing the court may proceed or issue a fresh notice.

vii. If the proceeding under the act relates to sections 376(3), 376-AB, 376-DA or 376- DB of the IPC, the notice to the victim shall be issued under Section 439(1-A) r/w rule 4(13) and 4(15).

viii. The Sessions Judges and Special Court Judges must be brought to notice about the order."

In **Bibi Ayesha Khanum v. Union of India,** WP No. 2318/2022**,** the mother of a child victim filed a petition in the High Court of Karnataka seeking effective implementation of the POCSO Act 2012 and the POCSO Rules, 2020 as also the amended provisions of section 438 and 439 of the CrPC. The issue raised was that in prosecution for offences under the POCSO Act when the accused move the court for grant of bail, the complainant and/or caregiver of the minor victim are not informed of the application filed for bail, thereby an opportunity to the complainant/victim or informants/caregiver to place their contentions and/or oppose an application for bail is denied.

The High Court of Karnataka had the following observations -

"*15. The benefit of Article 21 of the constitution is not only available to the accused but also to the victims and their families of any criminal offence. For an orderly society to exist it is but required that the victims of criminal offences more particularly heinous offences have a say in the criminal prosecution of the accused.*"

"*16. Though the prosecution of such offences rests with the State, who is to act impartially, the prosecution system is overburdened, many a time prosecutors not having been appointed, leading to inordinate delay. If a victim or complainant wants to*

and can effectively assist the prosecution, the same is required to be permitted, albeit with the caveat that the prosecutor would always be in charge of the prosecution and would be the deciding authority as regards the mode and manner of conducting of the prosecution. For this to happen it is essential that the complainant/Victim is aware of the proceedings in court."

With these observations, the court also issued the following guidelines-

"*17.1. The Investigation officer or the SJPU shall inform the Victim's parents/caregiver/guardian as also the legal counsel if appointed, about any application for bail or any other application having been filed by the accused or the prosecution in the said proceedings.*

17.2. The public prosecutor shall serve a copy of any application or objections to be filed in the said proceedings on the Victim's parents/caregiver/guardian as also the legal counsel if appointed and issue notice of hearing of such application on them, along with all relevant documents and records necessary for their effective participation in the proceedings, in this regard the prosecutor is entitled to take the assistance of the Investigating Officer or the SJPU and file necessary proof of service of copies and notice of hearing. In the unlikely event of service not being effected it shall be the duty of the Prosecutor to inform the reasons in writing to the relevant court.

17.3. The Accused or the counsel for the accused shall serve a copy of any application or objections to be filed in the said proceedings on the Victim's parents/caregiver/guardian as also the legal counsel if appointed and issue notice of hearing of such application on them, along with all relevant documents and records necessary for their effective participation in the proceedings. The Accused or the Counsel for the Accused to file necessary proof of service of copies and notice of hearing. In the unlikely event of service not being effected it shall be the duty of the Accused or Counsel for the Accused to inform the reasons in writing to the relevant court.

17.4. In the event of the accused being a close family member or an acquaintance of the family, in addition to the above a copy of any application or objections to be filed in the said proceedings shall be served on the jurisdictional Child Welfare Committee (CWC) and issue notice of hearing of such application on CEC, along with all relevant documents and records necessary for their effective participation in the proceedings.

17.5. The concerned Court, before proceeding to hear the application, shall ascertain the status of service of notice, and if it is found that notice has not been issued or though issued has not been served, the Court may make such reasoned order as it deems fit to secure the ends of justice, taking into account any emergent circumstances that warrant dealing with the application in the absence of the Victim's parents/caregiver/ guardian or legal counsel.

17.6. Despite service of the above notice, if none were to appear, the Court may proceed further or issue a fresh notice, as the Court may deem fit and proper, considering the interest of justice.

17.7. When the proceedings under the POCSO Act also involve offences under Sections 376(3), 376-AB, 376-DA or 376-DB of the Indian Penal Code, the notice to the victim shall be issued under Section 439(1-A) read with Rule 4(13) and 4(15).

17.8. Whenever an accused who is charged under Sections 376(3), 376-AB, 376-DA or 376 DB of the IPC or the provisions of the POCSO Act, moves an application for bail be it regular, interim, transit or any other classification, notice shall be issued by the Accused to the Investigating officer, SJPU, Public Prosecutor as also any counsel on record for the victim/ complainant/informant.

17.9. The victim/complainant/informant who appears before the Court may be represented by own counsel or by a counsel appointed by the Karnataka State Legal Service Authority or the concerned District Legal Services Authority/Taluka Legal Services Authority.

17.10. The State Government to provide for sufficient funds in order to make payments to the counsel so appointed."

Practices to be followed for serving notice upon the victim in bail matters under the POCSO Act, including timeline

In **State v. Junaid,** Crl Misc Bail App No. 46998 of 2020, the Allahabad High Court considered the various issues pertaining to the practice of serving notice upon the victim in bail matters under the POCSO Act including the timeline for serving notice and the consequence of issuing such notice keeping in mind the rights of both the victim and the accused under the law. The court observed that keeping in mind the right of the accused to expeditious bail hearing, the time for maturation of a bail application before it is placed in court has to be finite. At the same time the POCSO Act 2012 and the POCSO Rules 2020 provide certain rights to the minor victims of sexual assault regarding right to receive notice of bail and the mode of service. The court held that the following rights are available to the minor victims under the POCSO Act and POCSO Rules:

(i) Rule 4(13), 4(14) and (15) of the POCSO Rules 2020, cast responsibility upon the local police/SJPU to provide information about the status of investigations, developments and schedule of court proceedings and bail applications, and other entitlements and services to the child. Hence, the responsibility of serving notice of a bail application on the victim lies with the local police/SJPU. The court further held that notice to the child by the concerned court is not contemplated under the POCSO Act, and rightly so, as without the knowledge of and access to entitled information and services which the concerned police official provides to the child vide Form A, the court notice will be of

no avail to the child. The statutory mode of service is also conducive to protect the identity of the child, and is consistent with the requirement of section 33 (7) of the POCSO Act, 2012.

(ii) The concerned police officials shall duly fill up Form A appended to the POCSO Act that contains the list of entitlements of the child and has to be served upon the latter.

(iii) Similarly, duly filled up Form B, the preliminary assessment report, has to be submitted by the police to the Child Welfare Committee.

(iv) The court also clarified that the word "child" shall include child and child's parents/guardian / any other person in whom the child has confidence/support person. The court held that the persons who can act as the guardian of the child is mentioned in Rule 4(7) of the POCSO Rules 2020.

(v) Referring to section 439(1A) of the CrPC, the court held that the persons nominated in section 439(IA) CrPC may not be obligated to attend but are certainly entitled to be present at the hearing of the bail application in POCSO Act, 2012 offences.

(vi) The Allahabad High Court noticed that unlike the Delhi High Court that have issued practice directions in respect of bail applications under 439 (1A), no such practice directions have been issued by the Allahabad High Court. Hence, the court held that while the pertinent decisions and discussions of the Delhi High Court in Reena Jha v. State and Miss G (Minor) cannot be invoked by the Allahabad High Court to support the practice of issuing notices to the victims, the principles of law in these judgments of the Delhi High Court certainly have precedential value.

(vii) The court also recognised the right of the child victim to a legal counsel of her choice and free legal aid where the child is not able to afford a legal counsel, and held that right to legal counsel without right to hearing is illusory, as also highlighted by the Bombay High Court in **Arjun Kishanrao Malge v. State**.

Timeline for bail maturation -

The Allahabad High Court has been of the view that while deciding upon a timeline for maturation of bail before it comes up in court for hearing, the statutory rights of the victim and the constitutional liberties of the accused have to be balanced. The court held that the timeline for bail maturation is not prescribed under any statute and remains undefined but the authorities should perform their duties in a reasonable time frame. The quest of the court is for consistency and any silence on part of the legislature shall be interpreted by courts to bring consistency. The time line provided by the Allahabad High Court for maturation of bail is presented in the table that follows.

Sr.no.	*Information*	*Time period*
1.	*Information of crime is to be given by local police/SJPU to CWC (Ref: Section 19(6) of the POCSO Act 2012).*	*24 hours after the report of a crime*
2.	*The time period for CWC for creation of an assessment report and to identify the person from amongst the parents/ guardian/person in whom the child has trust or to nominate a support person (if required) who is best suited to protect the best interests of the child and receive bail notice on its behalf.*	*Within 3 days from date of lodgement of the F.I.R.*
3.	*The time period for service of notice of bail application by the local police/SJPU upon CWC.*	*Within 3 days from the date of service of notice of bail application upon the office of the Government Advocate at the High Court.*
4.	*The time period for service of notice of bail application by the local police/SJPU upon the child and to apprise it about information and services entitled under the POCSO Act, 2012 read with POCSO Rules, 2020.*	*Within 4 days from the date of service of notice of bail application upon the office of Government Advocate at High Court.*
5.	*The time period for CWC and District Legal Services Authority for providing legal aid before the hearing of the bail application in the District Court. CWC shall also provide details of information and services entitled to the child under the POCSO Act, 2012 read with POCSO Rules, 2020.*	*Within 5 days from the date of receipt of notice of bail application by CWC*
6.	*The time period for CWC and High Court Legal Services Committee, DLSA for providing legal aid before hearing of the bail application in the High Court and District Court respectively.*	*Within 5 days from the date of receipt of notice of bail application by CWC*
7.	*The time period for the child/child's parents/guardian/any other person in whom the child has trust and confidence/support person to engage counsel of choice for the hearing of the bail application before the High Court and the District Court.*	*Within 5 days from the date of service of notice of bail application by local police/SJPU upon the child.*

8.	*The time period for police authorities to provide instructions to the Government Advocate, along with the report of service of bail application upon victim and CWC, report apprising the child of entitled information and services under the POCSO Act, 2012 read with POCSO Rules, 2020 and other reports described earlier.*	*Within 8 days after the date of service of notice of bail application upon the office of the Government Advocate at the High Court. Under all circumstances, the same should be provided to the Government Advocate before the bail application is placed before the Court.*
9.	*The time period for CWC to submit the report before the High Court regarding the status of information and services including legal aid provided to the child.*	*Report to be produced when bail application is first placed before the Court.*
10.	*The time period for HCLSC and DLSA to inform the High Court and trial court respectively about the grant of legal aid to the victim and requisition in this regard by CWC.*	*When the bail application is placed before the court.*
11.	*Time for the Registry to place the bail application before the Court*	*On the 10th day after service of notice of bail application upon the office of the Government Advocate at the High Court.*

Is notice to the victim/complainant in a case under the POCSO Act necessary when considering application for suspension of sentence under Section 398(1) of CrPC

In **Akash Chandrakar v. State of Chhattisgarh,** CRA No.101 of 2021, an appeal was filed in the High Court of Chhattisgarh with the question whether notice to the victim/complainant of offence under the POCSO Act would be necessary while considering the application for suspension of sentence preferred under section 389(1) of the CrPC in pending criminal appeal against conviction of the appellants / accused persons.

The court allowed in favour of the appeal and issued the following direction:

> *"23…. It is directed that notice of the application for suspension of sentence be also issued to the victim or one of his/her parents or guardian or informant and it should be served on the address provided by the State Counsel. To secure the interest of victim, legal assistance may be provided by DLSA or SALSA or High Court Legal Services Committee, as the case may be, through their empanelled Advocate etc."*

Applicability of Sections 29 and 30 of the POCSO Act when a bail plea is considered before or after charges have been framed

In **Dharmander Singh @ Saheb v. State**, Bail Appl. No. 1559/2020, dated 22.02.2020, the High Court of Delhi delved into the applicability or rigour of presumptions under section 29 and 30 of the POCSO Act when a bail plea is being considered. The court held that *"If a bail application is being considered before charges have been framed, Section 29 has no application, and the grant or refusal of bail is to be decided on the usual and ordinary settled principles."* When an application for bail is being considered after framing of charges, the court opined that the presumption under section 29 of the POCSO Act would have to be taken into consideration, with the effect of raising the threshold of satisfaction required before bail is granted.

Relevant extracts from the judgment are as follows:

> *"**47.** At the stage of taking cognizance, a court may take cognizance of the offence vis-a-vis one accused but not against another. Since upto the stage of cognizance, it is the offence and not the offender that is subject matter of proceedings before court, it cannot be said that upto the stage of cognizance, an accused is being prosecuted. As a sequitur therefore, **a person must be deemed to be prosecuted only when trial commences against the accused, which, as the Supreme Court has held in Hardeep Singh (supra), happens only after charges are framed.** …*
>
> *48. …*
>
> ***49.** The question of **when the presumption of guilt gets triggered** has been addressed by the Supreme Court in the context of the NDPS Act and by various other High Courts in POCSO cases, holding that such presumption comes into play **only when the prosecution has established facts that form the basis of the presumption.***
>
> ***50.** Drawing from the verdict of the Supreme Court and the views taken by the various High Courts in the above cases, in essence, the position 14 (2011) 1 SCC 694 is that **to rebut a presumption, first, the presumptive proposition must itself be formulated based on relevant and credible material; and second, the accused must know what presumption he has to rebut.** It is not enough to say that the accused has been implicated by the police on charges under sections 3, 5, 7, and/or 9 of the POSCO Act. At the very least, **the charges should have been framed by court against the accused under one or more of those sections for the presumption to arise; and mere implication by the police is not enough.***
>
> ***51.** Only when the trial court frames charges, does it form a prima facie opinion that there is a case for the accused to answer and defend. **At the stage of framing charges, the trial court may decide not to frame charges against an accused under any of the sections mentioned in section 29 but under some other provision; or, it may not frame***

charges against all accused persons under those sections. So, the presumption under section 29 cannot arise before charges are framed.

52. If the presumption of guilt is taken to arise even before charges are framed, say when a court is considering a bail application, then the court will have to afford to the accused an opportunity to prove that he has not committed the offence; which would require the court to conduct a mini-trial, even when it is only considering a bail plea. *What then would remain to be done during the trial itself? In the opinion of this court it is not the purport of section 29 that a mini-trial should be conducted at the stage of deciding a bail application. No such concept is known to law.* ***Requiring production and analysis of evidence to form an opinion on the merits of the allegations; and to express a view on such evidence, is certainly not within the remit of a court considering a bail plea.***

53. *Since reasoning is the soul of every adjudicatory process****, if a court were to give reasons and express an opinion as to whether an accused had succeeded or failed to rebut the presumption of guilt when hearing a bail plea, even if on a prima facie consideration, it would prejudice the trial itself.***

54. … To demand that an accused lead defence evidence even before charges are framed and even before prosecution evidence is led, would be anathema to fundamental criminal jurisprudence. It would be anathema to his right of silence. It would also be anathema to the principle that the prosecution must first establish the foundational facts constituting the charge, as held by the Supreme Court and the High Courts *… Besides,* ***by invoking the presumption of guilt under section 29 before charges are framed, we would be enforcing only a half-portion of section 29, viz. the presumption of guilt, while ignoring the remaining half, viz. by not affording to the accused the opportunity to rebut the presumption.***

…

64. *As held by the Supreme Court in Hardeep Singh (supra), since 'trial' commences when charges are framed against an accused and not before that, it is clear that only at the stage when charges are framed does the court apply its judicial mind to whether there is enough evidence on record to frame a precise allegation, which the accused must answer. Therefore,* ***it is only once charges are framed that the accused knows exactly what he is alleged to be guilty of; and therefore, what guilt he is required to rebut.***

65. *Since a negative cannot be proved,* ***an accused cannot be asked to disprove his guilt even before the foundational allegations with supporting evidence that suggest guilt are placed by the prosecution before the court.*** *To be sure, at the stage of framing charges, what is seen is if there is evidence (documentary, electronic, oral) on record, not proof of such evidence.*

66. That section 29 has been engrafted in the POCSO Act does not mean that the presumption of innocence, which is a foundational tenet of criminal jurisprudence, is to be thrown to the winds. If section 29 is so interpreted as to apply it to the stage even before charges are framed, it would not pass constitutional muster since Article 21 of our Constitution requires that all substantive as well as procedural provisions must be reasonable, just and fair, as held inter alia in Maneka Gandhi (supra). Such interpretation of section 29 would also render the right of the accused to a fair trial nugatory and dead letter, which would again do violence to the constitutional guarantee contained in Article 21.

67. Applying section 29 to bail proceedings at a stage before charges are framed, would in effect mean that the accused must prove that he has not committed the offence even before he is told the precise offence he is charged with, which would do violence to all legal rationality.

68. *In view of the above discussion and after considering the opinion of the Supreme Court and the views taken by the other High Courts,* ***this court is persuaded to hold that the presumption of guilt engrafted in section 29 gets triggered and applies only once trial begins, that is after charges are framed against the accused but not before that. The significance of the opening words of section 29 "where a person is prosecuted" is that until charges are framed, the person is not being prosecuted*** *but is being investigated or is in the process of being charged. Accordingly,* ***if a bail plea is considered at any stage prior to framing of charges, section 29 has no application since upto that stage an accused is not being prosecuted.***

69. Therefore, if a bail plea is being considered before charges have been framed, section 29 has no application; and the grant or refusal of bail is to be decided on the usual and ordinary settled principles.

70. *Now* ***coming to a scenario where a bail plea is being considered at a stage after charges have been framed, in keeping with the observations of the Supreme Court in Rajballav Prasad (supra), the presumption of guilt contained in section 29 would get triggered and will have to be "taken into consideration".***

71. *However,* ***the dilemma would remain as to how the presumption of guilt contained in section 29 is to be applied even after charges have been framed, when the accused has not been given the opportunity to rebut such presumption.*** *When section 29 engrafts the presumption of guilt against the accused, it also affords an opportunity to the accused to rebut the presumption by proving to the contrary. It cannot possibly be that the court should invoke half the provision of section 29 while ignoring the other half, much less to the detriment of the accused. But* ***even after charges are framed, the accused does not get the opportunity to rebut the presumption or to prove the contrary by leading defence evidence, until prosecution evidence is concluded.*** *It would be anathema to fundamental criminal jurisprudence to*

ask the accused to disclose his defence; or, worse still, to adduce evidence in his defence even before the prosecution has marshalled its evidence. Again ***therefore, even for a stage after charges have been framed, section 29 cannot be applied in absolute terms to a bail plea without doing*** violence to the 'due process' and 'fair trial' tenets read into Article 21 of our Constitution.

72. It is a settled constitutional principle that, if there are two possible interpretations or applications, a statutory provision must be interpreted or applied in a way that preserves its constitutional validity rather than one that renders it unconstitutional (cf. Kedar Nath Singh vs. State of Bihar 26).

73. Another significant legal principle which we must not omit to consider, is that if a penal provision, whether substantive or procedural, is susceptible to two interpretations, it must be construed strictly, narrowly and in a manner that is favourable to the accused (cf. Bijaya Kumar Agarwala vs. State of Orissa 27).

74. *As always, when faced with such dilemma, the court must apply the golden principle of balancing rights.* ***In the opinion of this court therefore, at the stage of considering a bail plea after charges have been framed, the impact of section 29 would only be to raise the threshold of satisfaction required before a court grants bail. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, provided it is admissible in law, more favorably for the prosecution and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex facie appears that the evidence will not sustain the weight of guilt.***

75. If the court finds that the evidence adduced by the prosecution is admissible and ex facie credible, and proving it during trial is more a *26 1962 Supp (2) SCR 769: para 26; Constitution Bench 27 (1996) 5 SCC 1: paras 17, 18* ***matter of legal formality, it may decide not to grant bail. If,*** *on the other hand,* ***the court finds that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail.***

76. In a given case, the accused may, of his own volition, be willing to disclose his defence even while arguing for bail, to prevail upon the court; in which case, the task of the court would become easier. If however, the accused decides not to disclose his evidence at that stage, he would suffer the consequences of the presumption of guilt engrafted in section 29.

77. *Though the heinousness of the offence alleged will beget the length of sentence after trial, in order to give due weightage to the intent and purpose of the Legislature in engrafting section 29 in this special statute to protect children from sexual offences,* ***while deciding a bail plea at the post-charge stage, in addition to the nature and quality of the evidence before it, the court would also factor in certain real life***

considerations, illustrated below, *which would tilt the balance against or in favour of the accused :*

a. *the age of the minor victim : the younger the victim, the more heinous the offence alleged;*
b. *the age of the accused : the older the accused, the more heinous the offence alleged;*
c. *the comparative age of the victim and the accused : the more their age difference, the more the element of perversion in the offence alleged;*
d. *the familial relationship, if any, between the victim and the accused : the closer such relationship, the more odious the offence alleged;*
e. *whether the offence alleged involved threat, intimidation, violence and/or brutality;*
f. *the conduct of the accused after the offence, as alleged; g. whether the offence was repeated against the victim; or whether the accused is a repeat offender under the POCSO Act or otherwise;*
g. *whether the victim and the accused are so placed that the accused would have easy access to the victim, if enlarged on bail : the more the access, greater the reservation in granting bail;*
h. *the comparative social standing of the victim and the accused :*
i. *this would give insight into whether the accused is in a dominating position to subvert the trial;*
j. *whether the offence alleged was perpetrated when the victim and the accused were at an age of innocence : an innocent, though unholy, physical alliance may be looked at with less severity;*
k. *whether it appears there was tacit approval-in-fact, though not consent-in-law, for the offence alleged;*
l. *whether the offence alleged was committed alone or along with other persons, acting in a group or otherwise;*
m. *other similar real-life considerations.*

The above factors are some cardinal considerations, though far from exhaustive, these would guide the court in assessing the egregiousness of the offence alleged; and in deciding which way the balance would tilt. At the end of the day however, considering the myriad facets and nuances of real-life situations, it is impossible to cast in stone all considerations for grant or refusal of bail in light of section 29. The grant or denial of bail will remain, as always, in the subjective satisfaction of a court; except that ***in view of section 29, when a bail plea is being considered after charges have been framed, the above additional factors should be considered.****"*

Bail in POCSO cases where the accused is a minor

Section 34 of the POCSO Act lays down the procedure in case of an allegation under the POCSO Act against a child. According to section 34(1) of the POCSO Act, where any offence

under this Act is committed by a child, such child shall be dealt with under the provisions of the JJ Act, 2015.

In **Minor Mohit Shankarbhaai Vaghela Through Tejal Shankarbhai Vaghela v. State of Gujarat**, Crl. Rev. A. 537 of 2022, keeping in view section 12 of the JJ Act, a single Judge Bench of the Gujarat High Court granted bail to a 16 year old boy accused of forcibly committing unnatural sex (sodomy) with a minor boy, aged about 13 years.

Section 12 of the Juvenile Justice (Care and Protection) of Children Act, 2015 (as amended in 2021) is as follows:

> *"(1) When any person, who is apparently a child and is a alleged to have committed a bailable or non bailable offence, is apprehended or detained by the police or appears or brought before a Board, such Person shall, notwithstanding anything contained in the Criminal Procedure Code, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any person.*
>
> *Provided that such person shall not be released if there appear reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision."*

While allowing the criminal revision application under section 102 of the JJ Act to quash the order refusing bail passed by the Sessions Court and the JJ Board, the High Court imposed certain conditions including restraining the child in conflict with the law from entering the society where the alleged victim resides.

Whether a juvenile can file an application for Anticipatory bail?

In **Raman and Anr. v. State of Maharashtra & Anr.**, Anticipatory Bail No. 277 of 2022, the question before the Division Bench of the Bombay High Court at Aurangabad was that ***"in the absence of provisions of grant of anticipatory bail under the Juvenile Justice (Care and Protection of Children) Act, 2015, whether a juvenile in conflict with law can file such application under Section 438 of the Code of Criminal Procedure?"***

The Ld. Single Judge had dismissed the anticipatory bail application of the child in conflict with the law on the grounds that:

- there is no provision for anticipatory bail in the JJ Act and that section 12 of the JJ Act 2015 was a complete code in itself and it was not permissible to travel beyond the scope of the said Act, particularly section 10 and section 12

- the concept of “arrest” is not acceptable under the JJ Act, the word “arrest” is not used with reference to a child in conflict with law in the JJ Act

A proviso to section 12 of the JJ Act mentions that in certain cases instead of granting bail to a child in conflict with law, he has to be kept in the observation home or place of safety, as the case may be. The Division Bench however, disagreed with the Ld. Single Judge and held that Article 14 of the Constitution of India as well as sections 3(ii) and 3(x) of the JJ Act give a valuable right to a child to be treated equally with others. A child defined under the JJ Act enjoys equal rights with other persons. Therefore, it would be in violation of all these principles and provisions to deny him an opportunity to exercise his right of preferring an application under section 438 of the CrPC.

The court further held:

> *“**26.** The argument that the JJ Act does not make provision in the nature of Section 438 of the Cr.P.C. and that Sections 10 and 12 of the JJ Act are complete Code in themselves; is also not acceptable. **Sections 10 and 12 operate “after” a child alleged to be in conflict with law is apprehended. Thus, they refer to “post” apprehension stage. They do not refer to “pre” apprehension stage.** Therefore, they cannot be in conflict with the provisions of Section 438 of the Cr.P.C. The non-obstante clause used in Section 12 operates only when there is a conflict between the provisions of the Cr.P.C. and the provisions of Section 12 of the JJ Act. However, as we see it, **there is no conflict between the provisions of Section 438 of the Cr.P.C. and Section 10 or 12 of the JJ Act, therefore, availability of right under Section 438 of the Cr.P.C. is not taken away to the detriment of a child**.*
>
> ***27. It is well settled that the non-obstante clause has overriding effect only in case of inconsistency.** In that connection, reference can be made to a judgment of the Honourable Supreme Court in the case of Chief Information Commissioner Vs. High Court of Gujarat and another, reported in, (2020) 4 Supreme Court Cases 702. In that case, the Honourable Supreme Court was considering Section 22 of the Right to Information Act, 2005, which lays down that the provisions of the RTI Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act. In paragraph 34 and 35, it was observed that in case of inconsistency of any law with the provisions of the Right to Information Act, overriding effect has been given to the provisions of the Right to Information Act. The non-obstante clause of the RTI Act does not mean an implied repeal of the High Court Rules and orders framed under Article 225 of the Constitution of India; but only has an overriding effect in case of inconsistency.*
>
> ***28.** The non-obstante clause can be found in Section 1 Sub- Section (4) as well as in Section 12 of the JJ Act. That would only mean that in case of inconsistency alone, this provision under the JJ Act would prevail. The JJ Act, as mentioned earlier, is enacted as*

a beneficial legislation and therefore, ***if a child under the JJ Act has any right under the general law, it cannot be taken away to the child's detriment by relying on these non-obstante clauses; particularly when there is no inconsistency between the JJ Act and the provisions of Section 438 of the Cr.P.C.***

29. Section 5 of the Cr.P.C. is also relevant *in this context, which reads thus:*
"5. Saving.– Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

This section makes it very clear that the Cr.P.C. shall not affect any special form of procedure prescribed by any other law for the time being in force. ***If the JJ Act was to provide for procedure in the nature of Section 438 of the Cr.P.C., that procedure would have overridden the Cr.P.C. But if no special form of procedure is prescribed in the nature of Section 438 of the Cr.P.C., then the provisions of the Cr.P.C. shall operate. Only when there is a special procedure, which is departure from the procedure laid down in the Cr.P.C. for a particular remedy, then only the special procedure would operate to the exclusion of the Cr.P.C.*** *But in the JJ Act there is no special provision, which could operate in the field of Section 438 of the Cr.P.C. and therefore, the provisions of Section 438 of the Cr.P.C. can operate in case of child in conflict with law.*

30. *As is provided* ***under Section 8 (2) of the JJ Act, the High Court and the Children's Court can exercise the same powers, which can be exercised by the Board. These powers can be exercised in appeal, revision or otherwise. The proceedings under Section 438 of the Cr.P.C. are covered under these powers.*** *Because these powers are also available besides proceedings of appeal or revision. Therefore, when deciding the anticipatory bail application,* ***the High Court or the Sessions Court will have to give due importance to the considerations mentioned in the proviso to sub-Section (1) of Section 12 of the JJ Act. However, that proviso does not make the Section 438 of the Cr.P.C. inconsistent with Sections 10 and 12 of the JJ Act.*** *The inconsistency between Cr.P.C. and these two provisions is in respect of Sections 167 and 437 of the Cr.P.C. mainly because the child will have to be produced before the Board and not before any other Court. In those cases, the special procedure provided under Sections 10 and 12 of the JJ Act will have to be followed. But Section 438 of the Cr.P.C. is enacted for a different purpose as discussed earlier and there is no inconsistency.*

31. *As mentioned earlier,* ***if accusations are made against a child with ill intention to cause humiliation and harassment, then the right to prefer application under Section 438 of the Cr.P.C. should be available to a child.*** *Section 12 of the JJ Act provides for steps to be taken for production before the Juvenile Justice Board after apprehension. There is a possibility that the child can be detained for some period. However,* ***in cases where accusations are false or are made with oblique motive, then it would be travesty of justice to keep the child away from the protection of his parents and from***

his usual environment and shelter. There is no reason why he should be deprived of such protection even for a single minute. *At that stage application under Section 438 of the Cr.P.C. is the effective remedy available to such child."*

A divergent view is taken on the question of anticipatory bail to a minor by a Single Judge bench of the Allahabad High Court in **Minor 'X' through his Guardian/Father**, Crl. Misc Anticipatory Bail Application No. 11542 of 2022. After looking into Section 12 of the Juvenile Justice Act, 2015, the court observed that ***"…….the apprehension of arrest which is a necessary pre-requisite for applicability of Section 438 Cr.P.C. is altogether out of place in cases of juveniles. The word 'arrest' is not replaceable by the word 'apprehension' in the sense used under the provisions of the Juvenile Justice Act……"*** The court further held that an **anticipatory bail application on behalf of a minor will not be maintainable in the light of section 12 of the JJ Act, 2015**, which has been enacted keeping in mind the best interest of a child. The court also observed that, ***"there may be circumstances where keeping a child in a child care institution may be the best option to serve the best interest of a child, a principle which finds place in the opening of this Act under Section 3."*** These principles, very importantly include the principle of safety which says that all measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter. As such, ***"a holistic machinery of law has been put in place to deal with the child in conflict with law."*** By implication, such gaps, if any, need to be excluded where a child can be dealt with under regular law of procedure. ***"The interpretation of law cannot be devised in a way, so as to put a hurdle in the broader and solemn aim which is sought to be achieved by this enactment."***

New and Emerging Issues

Does a victim's right to be heard include an obligation to be impleaded as a party-respondent in criminal proceedings?

In a recent matter before the Delhi High Court, **Saleem v. State of NCT of Delhi and Ors**., Bail Application No. 3635 of 2022, the court considered the question whether giving intimation to a victim or complainant of sexual offences under IPC and POCSO Act, also requires impleadment of such person as a party to a bail plea or appeal. This question assumes importance in the light of the fact that victims of sexual offences often face harassment and discrimination; the law therefore requires the identity of victims of sexual offences to be kept confidential.

In this case, a bail application was filed under section 439 CrPC read with section 482 CrPC seeking regular bail. On the date of issuing notice, the High Court of Delhi observed that the victim was made a party-respondent in the matter. As per the counsel for the applicant, this was done on the specific directions of the Registry of the Court. A report was thereafter called from the Registry, wherein the Registry cited that the applicant was directed to implead the victim as a party-respondent as per section 439 (1A) CrPC as well as the Practice Directions dated 24.9.2019 issued by the Delhi High Court and previous verbal directions by the High

Court that "*the victim/complainant be arrayed in the Memo of Parties as respondent after hiding the identity of the victim...*"

The court observed that maintaining confidentiality and privacy of a victim/prosecutrix in sexual offences is a mandate of the law *inter alia* under section 228 IPC and section 23 of the POCSO Act, and hence, ordinarily the victim is not required to be impleaded in such cases. The Delhi High Court appointed Sr. Adv. Ms. Rebecca Mammen John as Amicus Curiae to assist the court on the following queries -

i. whether the requirement of giving intimation to victim/prosecutrix/informant as contained in section 439 (1A) CrPC read with the Delhi High Court Practice Directions dated 24.9.2019, also requires the victim/prosecutrix/informant to be impleaded as a party respondent in a bail petition and/or criminal appeal, particularly in the light of the recent Supreme Court judgment in Jagjeet Singh and Ors v. Ashish Mishra @Monu and Anr.?
ii. whether any other judicial verdict or statutory provision required such impleadment?

The law on the position of a victim in relation to the prosecution of a criminal offence -

The Delhi High Court observed that the victim of a criminal offence no longer has a peripheral role in a criminal prosecution as highlighted by the Hon'ble Supreme Court in its various judgments. In **Mallikarjun Kodagali represented through legal representatives v. State of Karnataka and Ors.,** (2019) 2 SCC 572, the Hon'ble Supreme Court observed that victims can no longer be sidelined and have a right to file an appeal against acquittal of the accused without having to seek leave from the court. In **Jagjeet Singh and Ors. v. Ashish Mishra alias and Anr**., (2022) 9 SCC 321, the Hon'ble Supreme Court observed that victims have "*... a legally vested right to be heard at every step post the occurrence of an offence ...; (they have) unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision ...*"; and that the mere presence of the State "*... does not tantamount to according a hearing to a 'victim" of the crime'*."

The law on keeping the identity of the victim confidential -

Section 228-A IPC clearly prohibits printing or publishing the name or any matter, which may make known the identity of the person. Under section 327(2) CrPC, trial in respect of an offence under section 376, 376 A, 376 B and 376 C shall be conducted in camera. As per section 327(3) CrPC it shall not be lawful for any person to print or publish any matter in relation to any such proceedings held under sub-section 2 except with the previous permission of the court.

In **Nipun Saxena v. Union of India**, (2019) 2 SCC 703, the Hon'ble Supreme Court emphasised that "…not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim." It was further observed by the Supreme Court that:

"12. A victim of rape will face hostile discrimination and social ostracisation in society. Such victim will find it difficult to get a job, will find it difficult to get married and will also find it difficult to get integrated in society like a normal human being. Our criminal jurisprudence does not provide for an adequate witness protection programme and, therefore, the need is much greater to protect the victim and hide her identity…"

The Hon'ble Supreme Court in Nipun Saxena (supra) case issued the following directions regarding anonymity of victims of crime:

"50.1. No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large.

50.2. In cases where the victim is dead or of unsound mind the name of the victim or her identity should not be disclosed even under the authorisation of the next of kin, unless circumstances justifying the disclosure of her identity exist, which shall be decided by the competent authority, which at present is the Sessions Judge.

50.3. FIRs relating to offences under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E IPC and the offences under Pocso shall not be put in the public domain.

50.4. In case a victim files an appeal under Section 372 CrPC, it is not necessary for the victim to disclose his/her identity and the appeal shall be dealt with in the manner laid down by law.

50.5. The police officials should keep all the documents in which the name of the victim is disclosed, as far as possible, in a sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised in the public domain.

50.6. All the authorities to which the name of the victim is disclosed by the investigating agency or the court are also duty-bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the court.

50.7. An application by the next of kin to authorise disclosure of identity of a dead victim or of a victim of unsound mind under Section 228-A(2)(c) IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228-A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organisations.

50.8. In case of minor victims under POCSO, disclosure of their identity can only be permitted by the Special Court, if such disclosure is in the interest of the child.

50.9. All the States/Union Territories are requested to set up at least one "One-Stop Centre" in every district within one year from today."

While section 439 (1A) of the CrPC, the Practice Directions dt. 20.9.2019, ratio in Jagjeet Singh (supra) case, Reena Jha (supra) case and Miss G (Minor) case provide for unbridled rights of a victim to participate in all criminal proceedings related to a crime, there is also a legal mandate so far as sexual offences are concerned, that the victim's identity must be kept confidential as per the law laid down in Nipun Saxena (supra) case and provisions of section 228 A IPC as well as section 327 (2) and section 327 (3) CrPC.

Recognising this, the Hon'ble Delhi High Court held that while a victim has unbridled participatory rights in a criminal proceeding, the victim must not replace or substitute the State as a prosecuting agency and hence the victim must not be placed as an impleaded party to the proceedings so as to make the victim answerable in all aspects. The court further held that:

"29.The role of the victim, even on being afforded the right to be heard, however must vary with the context and the stage of criminal proceedings. In relation to bail proceedings for e.g., the victim may assist the court in clarifying relevant facts, such as any threats received by the victim or other witnesses; or the possibility of evidence tampering; or even flight risk. However, the victim would have no role in determining, say, the necessity of custodial interrogation, which would be the job of the investigating agency.

30. To reiterate, the right to be represented and be heard is distinct from the right or the obligation to be a party to criminal proceedings.

31. Indeed, there may be times where a victim may not seek a hearing before the court, and making a victim a party to the proceedings, mandating them to appear and 'defend', so to speak, various proceedings that the State or the accused may initiate, may cause additional hardship and agony to the victim."

Based on the discussions above, the following are the conclusions by the Hon'ble Delhi Court in respect of impleading a victim in a criminal matter arising from or concerning sexual offences:

"33.1. There is no requirement in law to implead the victim, that is to say, to make the victim a party, to any criminal proceedings, whether instituted by the State or by the accused;

33.2. In accordance with the mandate of the Supreme Court in Jagjit Singh (supra), a victim now has unbridled participatory rights in all criminal proceedings in relation to which the person is a victim, but that in itself is no reason to implead a victim as a party

to any such proceedings, unless otherwise specifically so provided in the statute; Section 439(1A) Cr.P.C. mandates that a victim be heard in proceedings relating to bail, without however requiring that the victim be impleaded as a party to bail petitions;

33.3. In light of the decision of the Supreme Court in Jagjit Singh (supra), section 439(1A) Cr.P.C. must now be expanded to include the victim's right to be heard even in petitions where an accused seeks anticipatory bail; a convict seeks suspension of sentence, parole, furlough, or other such interim relief;

33.4. To obviate any ambiguity, though section 439(1A) Cr.P.C. makes the "presence of the informant" obligatory at the time of hearing, what is clearly mandated thereby is the right of the victim, whether through the informant or other authorised representative, to be effectively heard in the matter. If necessary, legal-aid counsel may be appointed to assist in representing the victim; and the mere ornamental presence of the victim, or their representative, without affording them an effective right of hearing, would not suffice."

In keeping with the above decision, certain directions issued by the High Court for action are as follows:

1. The Registry must carefully scrutinize all filings relating to sexual offences, to ensure that the anonymity and confidentiality of the prosecutrix/victim/survivor is strictly maintained;

2. In order to maintain confidentiality as aforesaid, the following must be done:

   (i) The name, parentage, address, social media credentials and photographs of the prosecutrix/victim/survivor must not be disclosed in the filings made in court, including in the memo of parties;

   (ii) The Registry must ensure that such particulars do not get reflected in the cause list of the court in any manner;

   (iii) The name, parentage and address of family members of the prosecutrix/victim/ survivor - through whom the prosecutrix/victim/survivor could be identified - must not be disclosed in the filings, including in the memo of parties, even if they are accused in the case, since this may indirectly lead to the identification of the prosecutrix/victim/ survivor;

   (iv) The files/paper-books/e-portfolio of matters relating to sexual offences filed in this court must not be provided to any person other than the parties to the litigation, to the prosecutrix/victim/survivor and their respective counsel, after due verification of the identity credentials of such persons;

(v) At the stage of scrutiny of the filings, in the event the Registry finds that the identity credentials of a prosecutrix/victim/survivor are disclosed in the memo of parties or anywhere else in the filings, such filings must be returned to counsel who have filed the same, to undertake requisite redactions, before the filings are accepted;

(vi) To obviate the dissemination of identifying particulars to any other person or agency even within the High Court, all service to be effected upon the prosecutrix/victim/survivor shall only be through the Investigating Officer in accordance with Practice Directions dated 24.09.2019 and not through the process serving agency, though a copy of the petition or application must be served upon the prosecutrix/victim/survivor;

(vii) In effecting service as aforesaid, the Investigating Officer must remain in "plain clothes" so as to avoid any unwarranted attention;

(viii) Furthermore, the Investigating Officer must also inform the prosecutrix/victim/ survivor that they have the right to free legal-aid/representation in accordance with the mandate of the Supreme Court in Delhi Domestic Working Women's Forum v. Union of India & Ors.;

(ix) If the parties wish to cite in court any identifying particulars of the prosecutrix/ victim/survivor, including photographs or social media communications etc., such party may bring the same to court in "sealed cover"; or file the same in "sealed cover" or in a "pass-code locked" electronic folder and share the pass-code only with the concerned Court Master.

CHAPTER 4
INVESTIGATION, CHARGESHEET, FRAMING OF CHARGES AND TRIAL

Police Investigation

"… while setting timelines for special courts to complete trials, it is important to remember that they are not immune from the systemic issues affecting the entire criminal justice system where delayed proceedings are the norm and not the exception. These courts are part of a complex ecosystem that requires multiple actors (state governments, investigating authorities, forensic Science Laboratories, Special Public Prosecutors, etc) to work together to ensure that the system works efficiently.

According to data recorded in a Supreme Court order in 2020, it takes more than six months to complete investigation in over a third of POCSO cases. Delays in receiving reports from Forensic Science Laboratories can also increase the length of trials."

- Jyotika Randhawa and Apoorva, 10 years since the POCSO Act, cases continue to be delayed, but courts are not solely to blame. Scroll.in. Dec 28, 2022. Url: https://scroll.in/article/1039775/10-years-since-the-pocso-act-cases-continue-to-be-delayed-but-courts-are-not-solely-to-blame

Things to know and understand

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.

The POCSO Act does not specifically contain any provision regarding time for completion of police investigation and section 31 of the Act clearly suggests that in such situations the provisions of the Code of Criminal Procedure, 1973 shall apply.

Under section 173(1A) of the CrPC 1973, inserted by Criminal Law Amendment of 2018, the police is mandated to complete the investigation within 2 months from the date on which the information with respect to the family of offences under section 376 of the IPC is recorded by the officer in charge at the police station. By virtue of section 42A of the POCSO Act (as amended in 2019), in cases of sexual offences against children, provisions of the POCSO Act apply in addition to those under the IPC and therefore police investigation in cases under the POCSO Act must also be completed within 2 months from the date of FIR.

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

In **State of Rajasthan v. Kishore,** 1996 1 Crimes (SC) 156, it was held by the Hon'ble Supreme Court that "*It is equally true that the investigating officer PW.8 committed grave irregularity in omitting to send the burnt clothes and other incriminating material for chemical examination to lend corroboration to the evidence.* ***Mere fact that the investigating officer committed irregularity or illegality during the course of the investigation would not and does not cast doubt on the prosecution case nor trustworthy and reliable evidence can be cast aside to record acquittal on that account***."

In a similar vein, in **Amar Singh v. Balwinder Singh and Others**, AIR 2003 SC 1164, the Supreme Court held that "***If the prosecution case is established by the evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful***."

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 not in a 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.

The court 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.

> *"56. … 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, (1998)****, 3 JT (SC) 290:*
>
> *'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'."*

Two objections were raised in appeal against the order of conviction and sentence under 8 of the POCSO Act in **Shri Deoraj Dewan v. The State of West Bengal**, CRA 108 of 2015. One of these was that the investigation in the case was carried out by an Assistant Sub-Inspector of Police, who is not competent to investigate into a case under the POCSO Act and therefore the entire investigation and filing of charge-sheet against the appellant is vitiated being not done in accordance with law. Reliance was placed on section 24 of the POCSO Act, which states that the statement of the child should be recorded "as far as practicable by a woman police officer not below the rank of sub-inspector." It was also argued that the standard operating procedure in respect of investigation of an offence under the POCSO Act is that the investigation is to be carried out by a woman police officer and the investigating officer is expected to possess knowledge of child psychology and psychiatry. The Calcutta High Court hearing the appeal was of the view that nowhere does the POCSO Act mention that the investigation cannot be carried out by an officer below the rank of a Sub-Inspector and an Assistant Sub-Inspector is empowered to conduct investigation to a criminal case. While rejecting the objections raised, the Calcutta High Court held that "***a case under the Penal Code or under a Special Act cannot be thrown away on the ground of irregularity of investigation***."

What are the implications of a defective investigation?

In **Karnel Singh v. State of M.P.**, AIR 1995 SC 2472, the prosecutrix, a labourer in a factory, was working with another labourer, when the accused along with another person walked in and asked the co-worker of the prosecutrix to get some tea. During that time, the accused took the prosecutrix inside a room and committed rape upon her while the other person accompanying him 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, had told one person other than her co-worker about the incident. The IO did not add the name of relevant witnesses i.e. her co-worker and the person with whom she had shared the incident before going to her husband. Therefore, they were not examined. Further, the seizure of the underwear with semen stains was not proved, thus there was no evidence in this regard. However, despite the negligence and omissions on the investigation, the lower courts convicted the main accused and acquitted the co-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 **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 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 based on the said lapses, the accused was granted the benefit of doubt, and was acquitted.

The Delhi High Court noted that the statement of the child was not recorded in the police station but on an isolated road at the place where the incident had occurred. The court reiterated that the POCSO Act is "*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*." It further observed that the child's statement should be taken in accordance with sections 24 and 25 of the POCSO Act, which require "*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.*"

Relevant extracts from the judgement are as follows:

> *"**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 aforenoted 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 mean 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.***
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> ***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 contained in Sections 24 and 25 of the said Act.** Special Courts have to be created under Section 28 which is contained in Chapter VII.…*
>
> ***15. 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, the 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.)

The investigators, during the workshop, were made aware of how to collect electronic evidence, such as a hard disk, in a way that prevents any damages to it and its contents until its production in the court.(HT Photo)

The district legal services authority (DLSA) conducted a workshop on Thursday to train about 100 police officers, especially those investigating cases under the Protection of Children from Sexual Offences (POCSO) Act, on collection of evidence and fixing loopholes in the investigation which may lead to acquittals.

Source: https://www.hindustantimes.com/gurugram/cops-trained-to-deal-with-pocso-cases/story-5Gam70mlTA8odEH7J8BKOO.html

Filing of Charge sheet

Time taken for Filing Charge sheet from Date of First Arrest made in the case			
Number of days	**Children < 12 years**	**Children aged 12 to 18 years**	**All children**
Within 30 days	22	24	46
30 to 60 days	92	101	193
60 to 90 days	75	115	190
90 to 120 days	13	19	32
120 to 150 days	1	8	9
150 to 180 days	0	3	3
180 to 210 days	2	4	6
Above 210 days	13	10	23
Total	**218**	**284**	**502**
Average time taken	**81**	**77**	**79**
Charge sheet filed within 90 days of First Arrest (in percent)	**87%**	**85%**	**85%**

Note – In additional 9 cases, the accused is not arrested.
Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 4. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf

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/concerned Judge 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.

Impact of seeking extension of period of investigation and statutory bail u/s 167(2) CrPC

Time taken by police for filing of charge sheet is linked to an accused's right to "default bail".

The Supreme Court in **Jigar @ Jimmy Pravinchandra Adatiya v. State of Gujarat**, 2022 0 AIR (SC) 4641, has held that the indefeasible right to default bail is an integral part of right to personal liberty under Article 21 and such right cannot be suspended even during pandemic situation. It also held that when extension of period of investigation is sought, the accused has right to oppose prayer for extension of remand and **extension of time for investigation is not an empty formality**. The court has further clarified that if the accused is unable to furnish bail as directed by the Magistrate, then continued custody of accused even beyond specified period will not be unauthorised, and if during that period investigation is complete and charge sheet is filed then indefeasible right of accused would stand extinguished.

Important parts from the judgment are as follows:

- ***When Special Court*** *exercises power under proviso added to sub-section (2) of Section 167 of Cr.P.C. and* ***extends time of investigation up to 180 days, accused will be entitled to default bail only if charge sheet is not filed within extended period.*** (Para 17)

- ***On expiry of period of 90 days or 60 days, as the case may be, indefeasible right accrues in favour of accused for being released on bail on account of default by investigating agency in completion of investigation within period prescribed*** *and accused is entitled to be released on bail, if he is prepared to and furnishes bail as directed by Magistrate.* ***If the accused is unable to furnish bail as directed by Magistrate, then continued custody of accused even beyond specified period will not be unauthorised*** *and* ***if during that period investigation is complete and charge sheet is filed, then indefeasible right of accused would stand extinguished.*** (Paras 19(a) and 19(b))

- *Requirement of law is that* ***while extending remand to judicial custody, presence of accused has to be procured either physically or virtually****. This requirement is sine qua non for exercise of power to extend judicial custody remand. Accused has the right to oppose prayer for extension of remand.* ***Extension of time is not an empty formality****.* ***Firstly, in the report of the Public Prosecutor, the progress of the investigation should be set out and secondly, the report must disclose specific reasons for continuing the detention of the accused beyond the said period of 90 days. Public Prosecutor has to apply his mind before he submits a report/ application for extension. The prosecution has to make out a case in terms of both the aforesaid requirements and the Court must apply its mind to the contents of the report before accepting the prayer for grant of extension. It cannot be accepted that the accused is not entitled to raise any objection to the application for extension. The scope of the objections may be limited. The accused can always point out to the Court that the prayer has to be made by the Public Prosecutor and not by the investigating agency. Secondly, the accused can always point out the twin requirements of the report in terms of proviso added to subsection (2) of Section 167 of CrPC. The accused can always point out to the Court that unless it is satisfied that full compliance is made with the twin requirements, the extension cannot be granted. Logical and legal consequence of grant of extension of time is deprivation of indefeasible right available to accused to claim a default bail. Failure to procure presence of accused either physically or virtually before Court is not a mere procedural irregularity, it is gross illegality that violates rights of accused under Article 21.*** *Prejudice is inherent and need not be established by accused.* (Paras 28, 29, 30 and 31)

- *The orders passed by the Special Court of extending the period of investigation are rendered illegal on account of the failure of the respondents to produce the accused before the Special Court either physically or virtually when the prayer for grant of extension made by the Public Prosecutor was considered. … Moreover, the oral notice, as contemplated by this Court in the case of Sanjay Dutt, was also not given to the accused.* ***Once it is held that orders granting extension to complete investigation are illegal and stand vitiated,***

appellants become entitled to default bail. *Grant of default bail does not prevent re-arrest of petitioners on cogent grounds after filing of charge sheet. Thereafter, accused can always apply for regular bail. However, re-arrest cannot be made only on the ground of filing of charge sheet. It all depends on facts of each case.* (Paras 33, 35, 36, 37 and 38)

In **R Henry Paul v. State of Tamil Nadu**, Crl. (OP) No. 14316 of 2021, a Criminal Original Petition under section 482 CrPC was filed before the Madras High Court for directions to the Ld. Sessions Judge, Special POCSO Court to receive the application of the petitioner/accused filed under section 167(2) of CrPC and entertain the same and release the petitioner/accused on default bail.

In this case the complainant, who is the mother of the child victim aged about 15 years, is a singer by profession. Due to her professional requirement, she left her daughter under the care and custody of her sister, A4, from the age of 6 years. While the victim girl was under the care and custody of A4, she was subjected to sexual assault and harassment by A1, who is A4's husband, A2, the petitioner, a pastor in a church, and A3, relative of A1. The victim was subjected to harassment till the age of 15 years. But A4, the maternal aunt of the victim girl, was a silent spectator. In January 2020, the victim girl, unable to bear the sexual assault and harassment, informed her mother who then lodged a complaint with the police regarding the same. As such, complaint under section 10 read with section 9(1) (m) (n) and section 17 of POCSO Act and section 506 (ii) of IPC was registered based on the complaint of the mother of the child victim dated 12.04.2021. The petitioner was arrested on 23.4.21 and remanded to judicial custody on 24.04.2021.

As charge sheet was not filed within 60 days. First default bail application was filed by the petitioner A2 under section 167(2) CrPC after the period of 60 days. However, the same was dismissed on the ground that the child victim disclosed offence under section 6 POCSO Act, and hence assumed that the statutory period is 90 days as per section 167(2) (a) (i). The same was mentioned in the alteration report filed by the police on the 62nd day. Therefore, the petitioner filed another default bail application, which was returned on the ground that only 89 days from the date of remand was completed on the date of filing the application, i.e., 22.07.2021. The counsel for the petitioner A2, contended that the date of remand should be included while considering statutory bail application.

The Madras High Court held that **when 60 days default bail was filed and no alteration report was filed, the petitioner is entitled to statutory bail, which is an accrued and indefeasible right.** The court was of the view that "***in the matters of personal liberty of an accused not to be too technical and be in favour of personal liberty. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled."***

Reliance was placed on the judgment of the Hon'ble Apex Court in the case of **Bikramjit Singh v. The State of Punjab**, 2020 10 SCC 616, which referred to various decisions of the Apex Court and reiterated and confirmed the right of the accused and the principles and guidelines to be followed while considering statutory/default bail under section 167(2) CrPC. Relevant extracts are hereunder:

"22. The second vexed question which arises on the facts of this case is the question of grant of default bail… A beginning may be made with the judgment in Hitendra Vishnu Thakur v. State of Maharashtra (1994) 4 SCC 602, which spoke of "default bail" under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "TADA") read with Section 167 of the Code as follows:

'19. ...

*20. … There is yet another obligation also which is cast on the court and that is to inform the accused of his right of being released on bail and enable him to make an application in that behalf. (Hussainara Khatoon case [Hussainara Khatoon v. Home Secy., State of Bihar, (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : AIR 1979 SC 1369]). This legal position has been very ably stated in Aslam Babalal Desai v. State of Maharashtra [(1992) 4 SCC 272 : 1992 SCC (Cri) 870 : AIR 1993 SC 1] where speaking for the majority, Ahmadi, J. referred with approval to the law laid down in Rajnikant Jivanlal Patel v. Intelligence Officer, Narcotic Control Bureau, New Delhi [(1989) 3 SCC 532 : 1989 SCC (Cri) 612 : AIR 1990 SC 71] wherein it was held that : (SCC p. 288, para 9): '**The right to bail under Section 167(2) proviso (a) thereto is absolute. It is a legislative command and not court's discretion. If the investigating agency fails to file charge- sheet before the expiry of 90/60 days, as the case may be, the accused in custody should be released on bail. But at that stage, merits of the case are not to be examined. Not at all. In fact, the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bonds**.'*

21. ... **In our opinion an accused is required to make an application if he wishes to be released on bail on account of the 'default' of the investigating/prosecuting agency …No other condition like the gravity of the case, seriousness of the offence or character of the offender, etc., can weigh with the Court at that stage to refuse the grant of bail to an accused under Sub-Section (4) of Section 20T TADA on account of the "default" of the prosecution**.'

24. The question as to whether default bail can be granted once a charge sheet is filed was authoritatively dealt with in a decision of a Three Judge Bench of this Court in Uday Mohanlal Acharya v. State of Maharashtra (2001) 5 SCC 453. The majority judgment of G.B. Pattanaik, J. reviewed the decisions of this Court and in particular the enigmatic expression "if already not availed of" in Sanjay Dutt (supra).

The Court then held:

> *'13. ...**we are of the considered opinion that an accused must be held to have availed of his right flowing from the legislative mandate engrafted in the proviso to sub-section (2) of Section 167 of the Code if he has filed an application after the expiry of the stipulated period alleging that no challan has been filed and he is prepared to offer the bail that is ordered, and it is found as a fact that no challan has been filed within the period prescribed from the date of the arrest of the accused... even if the application for consideration of an order of being released on bail is posted before the court after some length of time, or even if the Magistrate refuses the application erroneously and the accused moves the higher forum for getting a formal order of being released on bail in enforcement of his indefeasible right, then filing of challan at that stage will not take away the right of the accused... But so long as the accused files an application and indicates in the application to offer bail on being released by appropriate orders of the court then the right of the accused on being released on bail cannot be frustrated on the off chance of the Magistrate not being available and the matter not being moved, or that the Magistrate erroneously refuses to pass an order and the matter is moved to the higher forum and challan is filed in interregnum.'***

27. In a fairly recent judgment reported as Rakesh Kumar Paul v. State of Assam (2017) 15 SCC 67, a Three-Judge Bench of this Court referred to the earlier decisions of this Court and went one step further. It was held by the majority judgment of Madan B. Lokur, J. and Deepak Gupta, J. that even an oral application for grant of default bail would suffice, and so long as such application is made before the charge sheet is filed by the police, default bail must be granted. This was stated in Lokur, J.'s judgment as follows:

> *'39. ... This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. **Reference was made to Mohd. Iqbal Madar Sheikh v. State of Maharashtra [Mohd. Iqbal Madar Sheikh v. State of Maharashtra, (1996) 1 SCC 722: 1996 SCC (Cri) 202] wherein it was observed that some courts keep the application for "default bail" pending for some days so that in the meantime a charge-sheet is submitted. While such a practice both on the part of the prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for "default bail" during the interregnum when the statutory period for filing the charge-sheet or challan expires and the submission of the charge-sheet or challan in court.***

28. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such

application wrongly before such charge sheet is filed. … The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled."

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 of 2016. In the present case, the court held that a statement under the POCSO Act can only be made to a police officer or a Magistrate, and the provisions of the 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.

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."

Can documents that are not a part of the charge sheet be received as part of evidence for 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**, CP 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) of CrPC 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) of CrPC 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.

Obligation of Magistrate to record statement under Section 164 of CrPC

Criminal Law Amendment Act 2013 and 2018

By virtue of insertion of clause (a), sub-section 5A to section 164 of the CrPC through the Criminal Law (Amendment) Acts of 2013 and 2018, it is mandatory for the Magistrate to record the statement of the victim in cases under sections 354, 354A, 354B, 354C, 354D, 376(1), 376(2), 376A, 376AB 376B, 376C) 376D, 376DA, 376DB, 376E and 509 of the IPC

In case of a victim who has a permanent or temporary physical or mental disability –

- It is the duty of the Magistrate recording the statement under section 164(5A) to provide assistance of an interpreter or special educator to the such victim and to videograph the same [Proviso 1 and 2 to section 164 (5A) (a)]

- Such videographed statement shall be considered as the examination-in-chief at the time of trial [clause (b) to section 164(5A)]

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."

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.)

Framing of Charges

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

HAQ' analysis shows that FIRs are not recorded properly and the nature of offence changes from the stage of FIR to charge sheet to framing of charges in many cases.

Change in the Nature of Offence from FIR to Framing of Charges									
Offence as per FIR		**PSA**	**APSA**	**SA**	**ASA**	**SH**	**377 IPC**	**363 IPC**	**Total**
No. of Cases		85	304	51	46	21	2	2	**511**
Offence as per Framing of Charges	**Change in the Nature of Offence (changes are in Blue colour)**								
	PSA	40	**7**	**2**	0	0	**1**	**1**	**51**
	APSA	**39**	267	**7**	**8**	0	0	0	**321**
	SA	0	0	19	**1**	**3**	0	0	**23**
	ASA	**1**	**3**	**14**	28	**4**	0	0	**50**
	SH	0	0	**2**	0	9	0	0	**10**
	377 IPC	0	0	0	0	0	1	0	**1**
	63 IPC	0	0	0	0	0	0	1	**1**
Charges not framed		5	23	6	9	4	0	0	**47**
Cases Discharged before framing of charges		0	1	0	0	1	0	0	**2**
Abated before framing of charges		0	1	1	0	0	0	0	**2**
Police Filed Closure Report before framing of charges		0	2	0	0	0	0	0	**2**
Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 4. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf									

Reason for change in nature of offence	Nature of offence changed from PSA to APSA	Nature of offence changed from SA to APSA	Nature of offence changed from SA to ASA	Nature of offence changed from SH to ASA	Total
Age of child below 12 years	18	5	10	3	**36**
Incest case	4	0	0	0	**4**
Abuse by person in position of authority e.g. school teacher or staff of shelter home	0	0	1	0	**1**
Abuse by person trusted by child	2	1	0	0	**3**
Combination of any of the above	7	1	2	1	**11**
Repeated abuse	5	0	0	0	**5**
Others	3	0	1	0	**4**
Total	**39**	**7**	**14**	**4**	**64**
Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 4. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf					

Whether an accused can 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, POCSO Act. On the issue that there was a difference in sections under which conviction was given and the sections under which charges were framed, the High Court held that the ingredients under section 9 of the 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 the POCSO Act.

Trial

Statement of accused under Section 313 of CrPC

In **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; and

(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 the Indian Evidence Act (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 that come forth during the cross-examination and is extended to the party who has 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 be followed while holding trial in cases of child sexual abuse or 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;

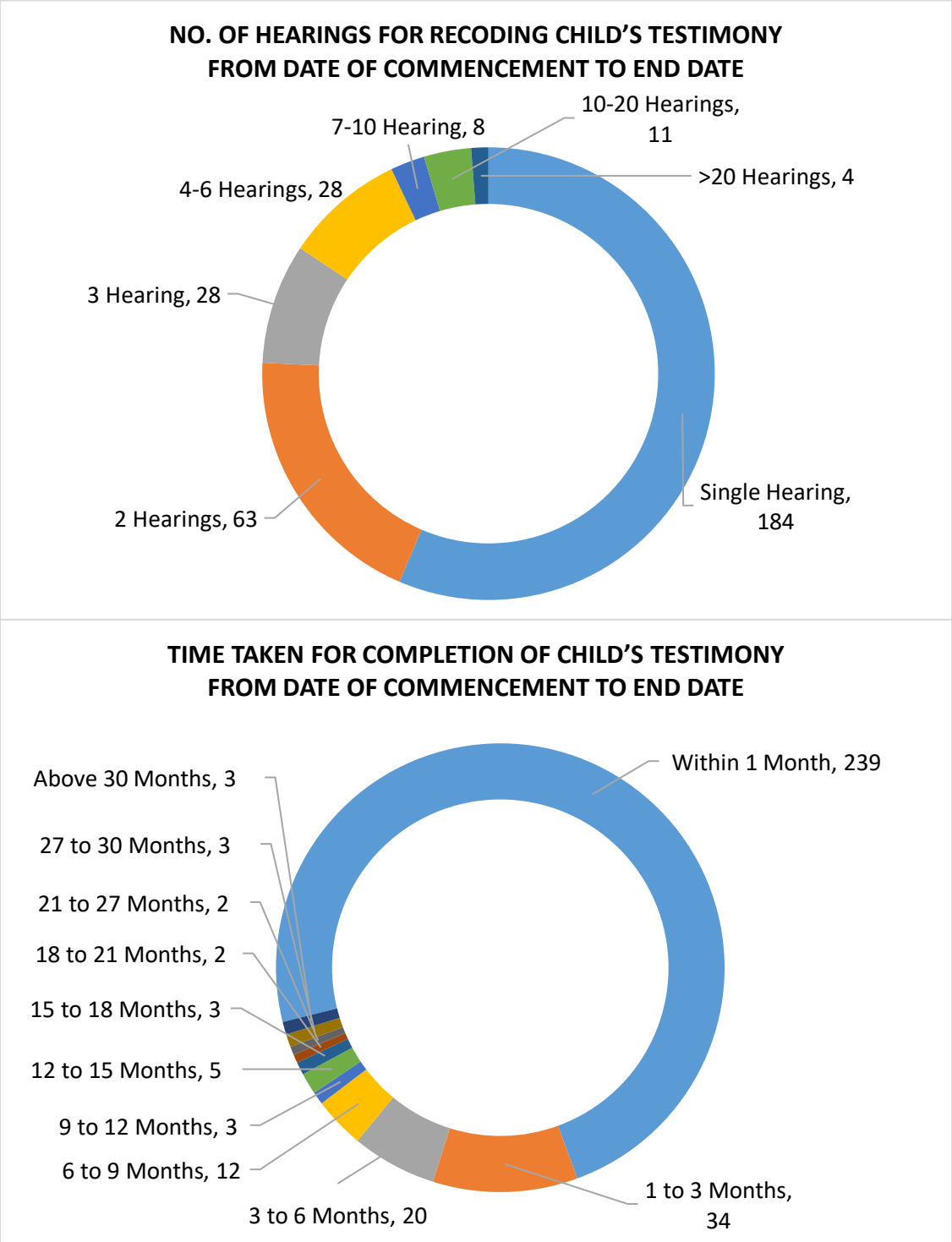
(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(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

Analysis of 326 cases from 2013 to February 2023 supported by HAQ: Centre for Child Rights, in which testimony of the child has been completed shows …



Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 6. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf

In 56% of the cases where the child's testimony stands completed, children had to appear in court only once for the testimony. In another in 19% cases, they had to go to the court twice and in 24% cases, thrice or more to get their testimony recorded. In 98% cases, the testimony of the child was recorded in more than 30 days from the date of cognizance of the offence, extending to more than 18 months in 28% of the cases.

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**. Section 35 of the POCSO Act provides that *the evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court*. The Bombay High Court in **Atul Gorakhnath Ambale v. State of Maharasthra**, Crl Bail App 3242 of 2019, observed that, *"…delay in examination of the child/victim would only stand to benefit the accused. ….Due to passage of time, the child/victim who has undergone the sexual trauma, may not be able to recall the incident vividly, giving an undue advantage to the accused. Delay in trials in cases of sexual abuse of victims, often leads to re-victimization and ignominy, as the trial process itself makes the victim re-live the horrific experience."*

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**, Crl. 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 High Court of Delhi …

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***."

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

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.

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 stated 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 by no means should this imply that the testimony of the victim child should be treated as the gospel truth in all cases. The court clarified 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.

Credibility of Child Witnesses

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

In **Chaitu Singh Gond v. State of Madhya Pradesh**, Crl. A. No. 344 of 2014, the Madhya Pradesh High Court observed that the child prosecutrix was merely 5 or 6 years old and 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 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."

Multiple statements given by a 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 was of the view 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)."

Whether inability of the child to disclose specific particulars of the incident i.e. date and place, is fatal to the case?

In **Balaji Sarjerao Kamble v. State of Maharashtra**, 2017 ALLMR (Cri) 4232, the Bombay High Court held that the inability of the child prosecutrix to disclose specific particulars of the incident cannot 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."***

Whether refreshing memory of child witness during trial is a 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 counsel 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 sections 161 and 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…*

29. ***Another important aspect while recording the testimony of a child witness is about the vocabulary used by the child. This assumes much importance in as much 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.*

30. 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 depositing. 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**, Crl. 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 and that she had seen the occurrence, the court found her to be a truthful witness.

"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**."*

Child witnesses with physical or mental disability

Statement and Testimony of a child with mental and/or physical disabilities

In the case of **Court on its Own Motion v. State** Crl. Ref. No. 2/2016, the Delhi High Court stated that:

> *"The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child."*

Rule 5(1) of the POCSO Rules 2020 provides that the District Child Protection Unit (DCPU) shall maintain a register with names, addresses and other contact details of interpreters, translators, experts, special educators and support persons for the purposes of the POCSO Act 2012, and that such register shall be made available to the SJPU, local police, magistrate or Special Court, as and when required.

The assistance of translators, interpreters, special educators, experts and support persons may be taken at the time of reporting of offences under section 19(4), for the purpose of recording the statement of the child under section 26(4) and while recording evidence of the child under section 38(2) of the POCSO Act, 2012.

Credibility of a deaf witness

In the case of **Chander Singh v. State**, Crl. A. 751/2014, the appellant challenged his conviction on the ground that a deaf and mute 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 mute child be discarded if it has not been recorded under Section 164 CrPC?

In **Shahid Ali v. State**, Crl. A. 850/2015, the convict had preferred an appeal before the Hon'ble Delhi High Court against the judgment and order of conviction passed by the trial court for offences under section 366 IPC and section 10 POCSO Act. The child prosecutrix was a deaf and mute girl, aged about 8 years old, who had not learnt the sign language as taught in school and was more used to the sign language taught by her mother. The Hon'ble High Court held 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. The relevant portion of the judgment of the Hon'ble Delhi High Court is reproduced below –

"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."

Guidelines on how to examine a child witnesses

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

International Legal Framework

The Universal Declaration of Human Rights, 1948, Article 25, provides that children as a category need special care and assistance. Alongside this there are the '*UN Guidelines on Justice in matters involving Child Victims and Witnesses of Crime, 2005*', which prescribe 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 the 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 recognised 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 para 49 of **State v. Sujeet Kumar** (supra), the Delhi High Court listed the difficulties faced while assessing the competence of a child witness. Recognizing 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; passing 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 that govern a competency examination of a child witness before a court and also referred to the judgment from other countries to highlight the importance and precautions to be taken at the time of recording a 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****."*

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

- 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.

In the case of **Hunny v. State**, Crl. A. 841/2016, the child prosecutrix responded to all the questions posed to her expect the one where she was asked about how the appellant had sexually assaulted her. She responded to the said question by referring to a 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 not communicate the same in words, and 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 of 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, 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.

(g) 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 have 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.

Reliance on testimony of close relatives

Evidence cannot be discarded on the 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 **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."

The Supreme Court in **Subal Ghorai and Ors. v. State of West Bengal**, (2013) 4 SCC 607, analysed 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, ***"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?*

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.

Section 45, Indian Evidence Act - 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***.'***

Difference between an 'expert witness' and an 'ordinary witness'?

In **Dayal Singh v. State of Uttaranchal**, AIR 2012 SC 3046, the Supreme Court observed:

> *"**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 Supreme Court in **Malay Kumar Ganguly v. Sukumar Mukherjee,** AIR 2010 SC 1162, had stated:

> *"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."*

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 eye witnesses, 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 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 witnesses, 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) and another direct evidence, the court may reject both the expert evidence and direct evidence.

Supreme Court's judgments in **Piara Singh v. State of Punjab**, AIR 1977 SC 2274 and **Makhan v. State of Gujarat**, AIR 1971 SC 1797, suggest that in the event of a contradicting opinion from two equally competent medical witnesses, the opinion of the medical witness whose evidence is corroborated by direct evidence and whose testimony is consistent with the prosecution version should be accepted.

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

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*."

In **Sri Kishan Poddar v. The State (Govt. of NCT of Delhi),** Crl. 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 the 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 **Manoj Kumar and Ors v. State (GNCT of Delhi) and Ors.**, Crl. A. 1393 and 1348/2013, the prosecutrix was allegedly 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. The MLC report did not match the DNA of the fetus with the accused. The High Court of Delhi did not find the testimony of the prosecutrix reliable and set aside the order of conviction and sentence, observing 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."*

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 N, 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.[8] 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.

[8] 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 woman 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, any discussion or deliberation upon the sexual history of a rape victim is immaterial in rape cases.

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***".[9]

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 or dropped 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*

[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.

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 pans. 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.

Value of reliable medical evidence when direct evidence is unreliable or 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 eye witness, 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 Supreme 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*.”

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, with the following conclusions:

(i) The hymen of the deceased victim was found torn;

(ii) Semen of the accused found on the slide prepared from the vaginal swab of the victim was 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. The 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*."

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 sections 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 on grounds of the victim found 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:

(i) **Narayanamma (Kum) v. State of Karnataka and Ors.,** (1994) 5 SCC 728 - *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 - *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 woman'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.*

In the said case, the Supreme Court also made reference to the International Covenant on Economic, Social, and Cultural Rights 1966 and the 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 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.**

Medical Examination of an Accused Person

The Supreme Court in **Sr. Sephy v. CBI & Ors.,** W.P.(Crl.) 1729/2009 [2023 LiveLaw (Del) 127], dealt with a petition filed by Sister Sephy challenging the virginity test conducted on her in relation to the 1992 Sr. Abhaya Murder case. In 2020, the petitioner was found guilty for the murder of Sister Abhaya. The CBI Court placed reliance on the virginity test reports to corroborate its finding that the murder was a cover-up to hide the secret relationship of the petitioner and another accused Father Kottoor. In the judgement pronounced on February 7, 2023, the Supreme Court held that:

> *"78. …there is no procedure, under any law for the time being, which provides for virginity test of a female accused. Virginity testing is a form of inhuman treatment and the same violates the principle of human dignity. The test, being violative of right to dignity of an individual, cannot be resorted to by the State and the same shall be in teeth of the scheme of Indian Constitution and the right to life enshrined under Article 21.*
>
> *81. … Strangely, though the word virginity may not have a definite scientific and medical definition, it has become a mark of purity of a woman. The intrusive testing procedure, as been held in several judgments of the Hon'ble Apex Court, does not have a medical standing. Despite being inaccurate and their being definite studies that in some women hymen may not tear during vaginal intercourse, while in others they may tear even without vaginal sexual intercourse due to sports and other activities and some women may not even have one, such test has been conducted.*

82. This Court, therefore, holds that this test is sexist and is in violation of human right to dignity even of a female accused if she is subjected to such a test while being in custody. The long term and short term negative effects of such a test have been reported in many reports.

84. It will be difficult for this Court to hold being guided by the Constitutional principles of fundamental rights that a person in custody of the authorities surrenders right to bodily integrity and submits to bodily intrusion for the prosecution to find evidence through its body. The feeling of being demeaned by such treatment in custody by bodily invasion through conducting a virginity test also brings forth the undesirable and abhorable notion of differentiation on the basis of gender and stereotypes.

86. The conducting of virginity test not only amounts to interference of the investigating agency with the bodily integrity but also psychological integrity of a woman which will have serious and profound effects on the mental health of a woman.

89. … on the same analogy as laid down in the judgment of Lillu v. State of Haryana (supra) and State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai (supra), conducting such tests on a female accused in custody will also amount to violation of her right to dignity and, therefore, in violation of Article 21 of the Constitution of India. Needless to say, rights of an accused in custody are also to be safeguarded even if some rights have to yield to the safety of the State."

The court also referred to an authoritative reference book on Medical Jurisprudence titled, "A Textbook of Medical Jurisprudence and Toxicology" by Jaising P Modi. The book clearly states that even by the court orders if a woman is compelled to undergo virginity tests, it is a serious threat to her privacy that is enshrined to her as fundamental right. DNA test is scientific but virginity test is never conclusive and thus such vague tests are violative of human rights and must be discarded.

Selvi & Ors. v. State of Karnataka, AIR 2010 SC 1974, (2010) 7 SCC 263, deals with the legal questions related to the involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. In this case, the Apex Court held that extracting testimonials through neuroscientific investigative technique violative of Article 20(3) (Right to be protected against self-incrimination) as also Article 21. It further directed that "extraction of bodily substances" should be done as per the direction of the court only, not according to the whims and fantasies of the investing agency. Section 53 of the CrPC empowers use of 'reasonable power' and the power can be used only if the court has directed to undergo any such tests only not otherwise. The court further added that physical tests such as blood, semen, phlegm, nail, hair, are different from confirmative acts. The physical tests are of ejusdem generis, which means of the same nature, but testimonial tests are of different nature. Section 53 CrPC recommends modern and scientific test for the ends of justice but per-vaginum tests are archaic and unreasonable (K G BalaKrishnan, 2004).

Though section 53A CrPC states that use of reasonable force is allowed for medical examination of accused of rape, nowhere does the law state what constitutes reasonable force. Hence, to be ethical and legal in their practice, all doctors are required to seek informed consent before doing such examinations.

If any accused does not give consent (inspite of being explained the consequences of not getting medically examined and its possible adverse inferences by the courts) then informed refusal must be documented.

The doctor should also keep in mind 'medical examination' as per explanation to section 53 CrPC shall include collection of blood, semen, saliva, hair, body fluids, etc. Therefore, such information also has to be given to the accused before seeking informed consent.

Is it relevant to document the POTENCY of the Accused?

Section 53A CrPC, which specifically deals with medical examination of accused of rape does not mention anything about potency examination.

Section 375 IPC describes penetration of penis to any extent into woman's genitals constitutes rape and 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.

It's time to stop doing these potency tests which, in the current sexual violence law, have no role, are medically impossible to state with certainty, and violate individual rights when forcefully done,"

- Jagadeesh N., Professor of Forensic Medicine & Toxicology, Vydehi Institute of Medical Sciences and Research Centre

Contrary to the earlier law, digital penetration (fingering) or penetration by objects and non-penetrative sexual acts also now fall under the definition of rape/penetrative sexual assault. This must be borne in mind before insisting on a potency test of the accused.

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 section 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 led 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 High Court 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.

While passing the said order, the court stated that the report prepared by the FSL has grave consequences for both the victim and the 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?

Medical practitioners are mandated to conduct medical evaluation of victims of sexual assault 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**, Crl. 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.**)

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. 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 was 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, 2012 (as amended in 2019) and Rule 6 of the POCSO Rules, 2020 also make 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 a 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**.

DNA Test Results as evidence in Penetrative Sexual Assault cases

Failure to conduct tests on DNA samples of accused or to prove the report of DNA tests of such samples would not necessarily result in failure of prosecution case. The DNA test cannot be said to be the conclusive evidence regarding a rape, but it can only be used as a corroborative evidence. Though a positive result of DNA would constitute clinching evidence against the accused, if however, the result is in negative, the other material available on record will still have to be considered independently.

Section 53(A) of the CrPC, inserted through the Criminal Law Amendment Act of 2005, provides for examination of person accused of rape by medical practitioner and authorises collection of DNA sample of the accused in such cases. In **Krishan Kumar Malik v. State of Haryana**, Crl A 1252 of 2011, the Supreme Court observed that, *"…after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006… it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused."* While the Code provides for collection of DNA samples of the accused in an offence of rape, the admissibility of the DNA test results to ascertain the guilt or innocence of the accused has been an important question for consideration by the courts. One has to keep in mind that the accuracy of a scientific test and the admissibility of the same as evidence in law are two different subjects. Hence, though DNA test results are considered to be accurate scientifically, the said test results may not be admissible as conclusive evidence under the law.

In **Sunil v. State of Madhya Pradesh**, Crl. A. Nos 39-40 of 2014 : 2017 (4) SCC 393, the appellant accused was convicted under sections 363, 367, 376(2)(f) and 302 of the IPC and was sentenced to death for conviction under section 302 IPC. The order of the trial court was upheld by the Madhya Pradesh High Court. The Appellant/accused preferred an appeal to the

Supreme Court and argued that the report of the DNA testing of the blood and spermatozoa samples of the accused under section 53(A) CrPC was not proved by the prosecution and therefore the prosecution failed to prove its case beyond reasonable doubt. Relying upon Krishan Kumar Malik v. State of Haryana (supra), the Supreme Court held that positive result of DNA test would constitute clinching evidence against the accused. If, however, result of test is in the negative, the weight of other material, evidence on record will still have to be considered.

> *"4. From the provisions of Section 53A of the Code and the decision of this Court in Krishan Kumar Malik v. State of Haryana [(2011) 7 SCC 130] it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44) Section 53A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favoring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to."*

The Supreme Court held that the prosecution has been able to establish the sum total of the evidence against the accused even though the report of the DNA test result is not proved against the accused and upheld the order of the Madhya Pradesh High Court regarding the conviction of the accused, while commuting the sentence of death to that of life imprisonment.

In **Abbas Asmat Ali v. State of Maharashtra**, Bail Application 1810 of 2021, the applicant/ accused had established physical relationship with a 14 year old girl and assured her that he would marry her and offered her ₹ 200 to establish physical relationship. The accused continued to commit forcible sexual intercourse with the victim for around 10 days which resulted into a pregnancy. The DNA analysis of the foetus was conducted and report excluded the applicant to be the biological father of the baby of the victim. The Bombay High Court held that the statement of the girl was recorded under section 164 of CrPC and she maintained her stand that the applicant forcibly committed sexual intercourse with her. On the subject of DNA evidence, the High Court held as under:

> *"6. It is not in dispute that the evidence of DNA analysis can be used for the purpose of corroboration. The statement of the victim girl as well as her mother is recorded u/s.164 of Cr.P.C. The victim has specifically narrated about the incident of repeated sexual assault committed on her by the applicant. She has specifically stated that he lured her by paying some amount and even threatened her not to disclose the incident to any person, which compelled her to keep mum. When her pregnancy was disclosed, she revealed to her parents that the applicant is responsible for the pregnancy and he had forced himself upon her. The DNA test exclude the applicant as the father of the child, but that do not discredit the victim who has reiterated in her 164 statement that the*

applicant forcibly committed sexual intercourse with her. As per the charge-sheet, the applicant has taken undue advantage of the situation of the victim girl, who was working in his house. There is no reason to disbelieve the testimony of the victim who has narrated the act of sexual assault upon her at the instance of the applicant. The DNA test cannot be said to be the conclusive evidence regarding a rape, but it can only be used as a corroborative evidence."

The High Court relied on the observations of the Supreme Court in **Sunil v. State of Madhya Pradesh** (supra).

Progress in 258 cases where FSL samples are collected	
Progress	***No. of Cases***
FSL Sample(s) submitted for testing	258
FSL Examination conducted and report prepared	194
FSL Examination report submitted in court	194
Abatement before FSL report could be submitted	2
FSL Examination Result Awaited	62
Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 8. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf	

Analysis of court orders and FSL reports in 511 cases where HAQ: Centre for Child Rights has provided psychosocial and legal support to children between 2013 and February 2023

- On an average, 493 days are taken from the date of collection of sample for FSL examination to its submission in court
- Average time taken by the police from sample collection to depositing it with the FSL Laboratory for testing is 29 days
- Average time taken by the FSL Laboratory from date of receipt of sample to date of preparation of FSL report is 306 days
- Average time taken by police from date of preparation of FSL report to date of filing the report in court is 158 days
- In 62 cases where FSL result is awaited, average waiting time has been 868 days

There are several cases that highlight the casual, insensitive and irresponsible approach of the police, FSL laboratories and doctors in cases of sexual violence. This could be damaging for the victim as well and the accused alike because the investigation creates confusion instead of aiding in extracting the truth.

It is the duty of Special Public Prosecutors in the Special Courts under the POCSO Act to ensure lapses on the part of police are addressed and failures relating to FSL reports do not affect the outcome of the case if there is other material evidence on record, the most critical being the testimony of the child to support the case of prosecution.

Medical Termination of Pregnancy in cases of minor victims of sexual offences

While dealing with the question of right of unmarried women have the right to terminate their pregnancies under Rule 3B of the MTP (Medical Termination of Pregnancy) Rules, the Supreme Court in **X v. The Principal Secretary Health and Family Welfare Department, Delhi NCT Government & Anr.**, Special Leave Petition (Civil) No 12612 of 2022 : 2022 SCC OnLine SC 905, also held that Rule 3B(b) includes minors within the category of women who may terminate their pregnancy up to twenty-four weeks. It further held that:

> "*84. To ensure that the benefit of Rule 3B(b) is extended to all women under l8 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act. The RMP who has provided information under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor's identity in any criminal proceedings which may follow from the RMP's report under Section l9(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 2l of the Constitution. It could not possibly be the legislature's intent to deprive minors of safe abortions.*"

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 legal representation by a lawyer of their choice?*

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 the 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 or situation; rights of children living in 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, surrendered and other children without parental care 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 proceedings."

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 sexual offences against children and while defining a 'guardian', 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 care 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 the United Nations Office on Drugs and Crime (UNODC), 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***', 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 judgments 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 **Arsheeran Bahmeech 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. The court held:

"*16. 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."*

17. 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.

…

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****. …* ***Even if the Learned ASJ was of the opinion that a guardian appointed by the CWC cannot act as a guardian in the proceedings before it, the Court should have appointed a Guardian Ad Litem for the proceedings going on before it****. 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

In 2019, vide **SUO MOTO WRIT (CRIMINAL) NO. 1/2019**, the Supreme Court observed, "*Virtually, no support persons are provided and no compensation is paid to the victims. Almost two-third of the cases are pending trial for more than one year.*"

As per the report submitted to the Apex Court by Shri Surinder S. Rathi, Registrar of the Supreme Court, in 99 per cent of POCSO cases considered, child victims did not receive any interim compensation from the government. Paragraph 7.8 presented the following data:

Percentage of cases in which interim compensation/final compensation provided:
Interim Compensation NOT provided - 99%
Interim Compensation provided - 1%
Final Compensation NOT provided - 99%
Final Compensation provided - 1%

- Supreme Court Order in Suo Moto Writ (Criminal) No. 1/2019, dated 13 November, 2019. Available at: https://main.sci.gov.in/supremecourt/2019/24308/24308_2019_1_305_18187_Order_13-Nov-2019.pdf

The other concerning trend amongst the Special courts is to award compensation only if the accused is convicted. CCL-NLSIU's Delhi Report revealed that Special Courts parked the decision to award compensation till after the evidence of the victim is recorded.

Questions for consideration:

- *Are the Special Courts fulfilling their duty to award compensation under the POCSO Act?*
- *What is the practice regarding interim compensation in cases of child sexual abuse? Should the payment of interim compensation only be granted after the child testifies?* Should it be granted only once?
- *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.

The Law on Compensation for Victims of Sexual Violence

The Constitution of India 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.

Section 357 (3) of the CrPC states, *"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 court 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 held that the ***"compensation is not ancillary to other sentences but is in addition to other sentences."***

Recognition of the need to delink victim compensation from 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 neither does it cater to the relief and rehabilitation necessary for the victims nor does it address the failure of the state in its duty to protect its people.

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***". The court held:

"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."

The judgment in this case delinked the question and quantum of compensation from the financial capability of the accused and also took the approach that a victim's rehabilitation should not be dependent or contingent on the accused's financial ability or inclination. The 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 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 child birth if this occurred as a result of the rape."

Keeping in view the rehabilitation needs of a victim and the limitations of section 357 of CrPC, section 357A CrPC brought in with effect from 31.12.2009 vide Criminal Law Amendment Act, 2008, (Act 5 of 2009). It is for the State Governments to make funds available for payment of compensation to a victim of crime upon recommendation of the court. By virtue of section 357A of CrPC, every State Government and Union Territory Administration has to "*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*."

The 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**."*

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 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.

Victim Compensation under the POCSO Act

Being a welfare state, India is duty bound to protect people living on the Indian Territory and in case an offence is committed against its people, the state compensates for the injury or loss to the victims by providing compensation. The loss may be direct (e.g. medical expenses accruing from the incident) or indirect (e.g. 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 needs of survivors (and sometimes of the family of survivors as well) to help recover from the loss suffered.

Section 33 (8) of the POCSO Act read with Rule 9 of the POCSO Rules, 2020 implies that - the Special Courts "*may, on their own or on receiving an application*," direct payment of compensation to the child "*for any physical or mental trauma caused*", or "*for immediate rehabilitation of such child*", and "*recommend the award of compensation*" and "*make a direction for the award of compensation to the victim*", which includes determining the quantum of compensation.

As per rule 9(1) and 9(2) of the POCSO Rules, 2020, a victim is entitled to 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 or, if the accused remains untraced or unidentified.

To mitigate the delays in interim compensation, rule 8 of the POCSO Rules, 2020 provide for Special Relief to meet the immediate needs of the victims. The responsibility to provide Special Relief under rule 8 lies with both DSLSA and DCPU, through the JJ Fund and upon the recommendation of the CWC.

Rule 8. Special Relief

(1) For special relief, if any, to be provided for contingencies such as food, clothes, transport and other essential needs, Child Welfare Committee (CWC) may recommend immediate payment of such amount as it may assess to be required at that stage, to any of the following:-

(i) the District Legal Services Authority (DLSA) under Section 357A; or;
(ii) the DCPU out of such funds placed at their disposal by state or;
(iii) funds maintained under section105 of the Juvenile Justice (Care and Protection of Children) Act,2015 (2 of 2016);

(2) Such immediate payment shall be made within a week of receipt of recommendation from the CWC.

Rule 9(4) of the POCSO Rules, 2020 states that *"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".*

Right of child survivors to access victim compensation under multiple laws and schemes

Rule 9(6) of the POCSO Rules, 2020 reads as under:

"Nothing in these rules shall prevent a child or child's parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

Compensation applied for by a child under any existing scheme or law does not restrict the child from applying for compensation under the POCSO Act. In other words, victim compensation under the POCSO Act cannot be rejected or denied on the grounds that the child is receiving or has received compensation under some other law or scheme nor can grant of compensation under the POCSO Act be used for denying the child the right to claim compensation entitled under any other law or scheme. Payment of compensation under the POCSO Act is concurrent with compensation that a child may avail under any other law or scheme.

Compensation for male child victims

This aspect of victim compensation had been overlooked by most legislative schemes on victim compensation until recently, but was addressed by the Delhi High Court in **The Minor Through Guardian Zareen v. State (Government of NCT Delhi)**, W.P. (Crl) 798/2015, a case supported by HAQ.

The Delhi Victim Compensation Scheme, 2015 as it existed then, was not amended suitably to address the gender neutrality of sexual offences against children as built into the POCSO Act. It provided for compensation in cases of rape but not male child sexual abuse that was booked under section 377 of the IPC. The only other provision that could be used was the provision of compensation for physical abuse. The concerned JJB (trial court) thus had no option but to compensate the child for physical abuse.

Hearing the appeal, the Delhi High Court recognised the right to compensation of a male child victim of sexual abuse and addressed the issue of discrimination in the state scheme. Taking into account the provisions laid down under section 33 of POCSO Act read with Rule 7 of the POCSO Rules, the High Court awarded the child a sum of ₹ 3,00,000/- for his physical and mental suffering.

The provisions regarding compensation under the POCSO Act and Rules are based on section 357A of CrPC, with suitable modifications to ensure relief and secure rehabilitation of the child, including immediate relief. For instance, under section 357A CrPC, 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. However, under the POCSO Act and Rules, the Special Courts can decide the question of victim compensation, both interim and final, 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.

Duty of the Special Courts to decide the question of victim compensation and determine the amount of compensation

Granting Final Compensation: The Law and the Process			
Final Compensation	**Filed before the Special Court + Granted by the Special Court + Amount of compensation also decided by the Special Court**	**Filed before the Special Court + Special Court forwarded to DLSA for further action (to decide on whether to grant or not as well as the amount)**	**Filed before DLSA + Awarded by DLSA**
Section 357A CrPC	24	3	1
Rule 7 POCSO Rules, 2012	1	0	0
Section 33(8) POCSO Act	2	0	0
Section 33(8) POCSO Act r/w Rule 7 POCSO Rules, 2012	14	0	0
Rule 9 (3) POCSO Rules, 2020 r/w Section 33 (8) POCSO Act	11	0	0
Rule 9 (2) POCSO Rules, 2020 r/w Section 357 CrPC	6	0	0

Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 10. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf

In **State v. Rameshwar Dayal**, SC No.07/02/2013, Dwarka District Court, Delhi, the accused was convicted for aggravated penetrative sexual assault and the Special Court granted compensation of Rs. 1,50,000 under section 33 (8) of the POCSO Act, directing the DLSA to pay the same. The court further directed that since the child had crossed the age of 18 years, the survivor was at liberty to utilise the compensation amount in the manner he liked. Further,

the Special Court also directed payment of compensation of INR 15,000 to the child out of the fine of INR 25,000, imposed on the accused under section 357 (1) (b) of CrPC.

In Delhi, the practice of Special Courts passing on the decision of determining the quantum of compensation to the SLSAs/DLSAs as seen in **State v. Rameshwar Dayal** (supra) has come to an end. Delhi in fact, is the first state to have settled the confusion regarding who is to decide the question of victim compensation and the amount of 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 of victim compensation to the SLSA/DLSA instead of using their powers under section 33 (8) of the POCSO Act and Rule 7 of the POCSO Rules, 2012.

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 prescribed under the Delhi Victim Compensation Scheme. The matter was settled by the Delhi High Court in **The Minor Through Guardian Zareen v. State** (supra) as the judgment clarified:

> ***"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".***

In October 2017, the Supreme Court took cognizance of discrepancies in the victim compensation schemes of different states and UTs in **Nipun Saxena v. Union of India**, Writ Petition (Civil) No. 565/2012 : (2019) 2 SCC 703**.** 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 in the Home Ministry's Central Victim Compensation Fund Scheme titled, "Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes", which has been operation since October 2, 2018. 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 the absence of any specific guidance for the Special Courts to follow on deciding the quantum of victim compensation under the POCSO Act and Rules, the Supreme Court held vide its order dated 5 September 2018 that:

> "***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. … the legislation is gender neutral and, therefore, the Guidelines will be applicable to all children***."

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 from some other fund.

Rule 9(3) of the POCSO Rules, 2020 - the basis on which the compensation amount is to be decided

While establishing that the amount of compensation is to be determined by the Special Courts, Rule 9(3) of the POCSO Rules, 2020 requires the Special Courts to *"… take into account all relevant factors relating to the loss or injury caused to the victim, including the following:*

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on child's medical treatment for physical and/ or mental health;

(iii) 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;

(iv) the relationship of the child to the offender, if any;

(v) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vi) whether the child became pregnant as a result of the offence;

(vii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(viii) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(ix) any disability suffered by the child as a result of the offence;

(x) financial condition of the child against whom the offence has been committed so as to determine such child's need for rehabilitation;

(xi) any other factor that the Special may consider to be relevant."

On 20 October 2022, the Delhi High Court, in the case of **X v. State of NCT of Delhi (acting through its Secretary) & Anr**., Crl A 63 of 2022, held that survivors of child sexual abuse will be entitled to interim compensation of 25% of the maximum awardable compensation for rehabilitation purposes within a period of 60 days from the date of filing of the charge sheet. Raising the minimum compensation of ₹ 7 lakhs under the Delhi Victim Compensation Scheme, 2018, the single-judge bench of Justice Jasmeet Singh held that the final compensation should not be less than ₹ 10.5 lakhs.

Right to Interim Compensation

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

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

> *"****On being satisfied on an application or on its own motion, the Court ought to direct grant of interim compensation****, subject to final compensation being determined later. Such* ***duty continues at every stage of a criminal case*** *where compensation ought to be given and has not been given,* ***irrespective of the application by the victim****. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case."*

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 CrPC.

> *"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."*

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 the POCSO Act to apply their mind to the question of awarding compensation.

The court further held that section 7(1) of POCSO Rules, 2012 (revised Rule 9 of the POCSO Rules, 2020) 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.**

Multiple Applications for Interim Compensation

In **Mother, Minor Victim No 1 & 2 v. State and Ors.,** WP (Crl) 3244 of 2019, the Hon'ble Delhi High Court held that since the provision for compensation under the POCSO Rules are beneficial in nature, it should be considered liberally. Holding that there is no bar on the Special Courts from considering subsequent application for interim compensation, the Hon'ble Court held as under. –

> *"Although Sub Rule (1) of Rule 7 of the said Rules (2012 Rules, and corresponding Rule 9(1) of the POCSO Rules 2020) does not indicate that multiple applications for interim compensation can be made; nonetheless, since the said provision for compensation is a beneficial provision, the same must be considered liberally. Since there is no express bar which restricts the Special Courts to grant interim compensation only once, an application for futher further interim compensation can be considered by the Ld ASJ, provided there are sufficient grounds for seeking further interim compensation. Needless to state that any further interim compensation awarded would also be liable to be adjusted with the compensation as awarded at the final stage as postulated in Sub-rule (1) of Rule 7 of the said Rules."*

Right to Final Compensation

In **Karan v. State N.C.T. of Delhi & Anr.,** Crl. A. 352 of 2020, and **Sunny v. State N.C.T. of Delhi,** Crl. A. 353 of 2020, the Delhi High Court mandated Victim Impact Report (VIR) to be filed by the Delhi State Legal Services Authority (DSLSA) in every criminal case after conviction. The VIR shall disclose the impact of the crime on the victim. The court further held that a summary inquiry is necessary to ascertain the impact of crime on the victim, the expenses incurred on prosecution as well as the paying capacity of the accused. Such summary inquiry shall be conducted by DSLSA. The court further elaborated the process for compensation as follows:

> *"173. After the conviction of the accused, the Trial Court shall direct the accused to file the affidavit of his assets and income in the format of Annexure-A within 10 days.*
> *174. After the conviction of the accused, the Court shall also direct the State to disclose the expenses incurred on prosecution on affidavit along with the supporting documents within 30 days.*
> *175. Upon receipt of the affidavit of the accused, the Trial Court shall immediately send the copy of the judgment and the affidavit of the accused in the format of Annexure-A and the documents filed with the affidavit to DSLSA.*
> *176. Upon receipt of the judgment and the affidavit of the accused, DSLSA shall conduct a summary inquiry to compute the loss suffered by the victims and the paying capacity of the accused and shall submit the Victim Impact Report containing their recommendations to the Court within 30 days. Delhi State Legal Services Authority shall seek the necessary assistance in conducting the inquiry from SDM concerned, SHO*

concerned and/or prosecution who shall provide the necessary assistance upon being requested.

177. The Trial Court shall thereafter consider the Victim Impact Report of the DSLSA with respect to the impact of crime on the victims, paying capacity of the accused and expenditure incurred on the prosecution; and after hearing the parties including the victims of crime, the Court shall award the compensation to the victim(s) and cost of prosecution to the State, if the accused has the capacity to pay the same. The Court shall direct the accused to deposit the compensation with DSLSA whereupon DSLSA shall disburse the amount to the victims according to their Scheme.

178. If the accused does not have the capacity to pay the compensation or the compensation awarded against the accused is not adequate for rehabilitation of the victim, the Court shall invoke Section 357A CrPC to recommend the case to the Delhi State Legal Services Authority for award of compensation from the Victim Compensation Fund under the Delhi Victims Compensation Scheme, 2018.

179. In pending appeals/revisions against the order on sentence in which Section 357 CrPC has not been complied with, the Public Prosecutor shall file an application seeking a direction from the Court for directing the accused to file his affidavit of assets and income in the format of Annexure A and directions to DSLSA to conduct a summary inquiry to ascertain the loss/damage suffered by the victim(s) and the paying capacity of the accused in the format of Annexures-B/B- 1 in terms of Sections 357(4) CrPC in accordance with procedure mentioned hereinabove"

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 v. 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.

- There is a delay between grant of interim and actual receipt of money in the child's bank account. Some common reasons for delay include delay in disbursement order from DLSA, lack of bank account in the child's name, absence of documents such as Aadhar Card in the child's name to open a bank account, errors or discrepancies in the child's name in the order of the court or mismatch in the name spelling of the child between court order or DLSA order or DLSA letter and Bank Account. A constant follow-up is thus required even after a Special Court awards victim compensation.

- There is no clear process for children who belong to a different country and are repatriated. DSLSA has in the past worked out some measures such as cash cards, but once the victims are repatriated, it is difficult for them to come back and collect the cash card.

Reasons for delay of receiving interim compensation	Reasons for delay of receiving final compensation
• All formalities completed. DLSA is yet to pass the order for disbursement. • Earlier Bank Account of the child has been closed. Now the support person has received an order from the CWC to help the child open a new bank account. • Family belonged to Nepal and therefore did not have the necessary documents to open a bank account for the child in India. Family has now shifted to Nepal as they could not find any work in India to sustain themselves. • All documents have been prepared, but are yet to be submitted to the DLSA. • File not received by DLSA from the court. • Family refused compensation.	• Pending for police verification. • All formalities completed. DLSA is yet to pass the order for disbursement. • Bank and PAN card have been prepared. Child needs to be taken to DLSA. Notice from DSLA is awaited for the same. • Correction is required in the court order. Listed in court for the same on 06.03.2023. • Bank account details and other documents need to be submitted in the DLSA. • Bank account has been rejected by DLSA. A new account has to be opened. • Final Compensation order not received by DLSA from the court. • File closed by DLSA and sent back to JJB to decide the compensation amount and status application filed in the JJB is pending.

Source: The 2023 Factbook: Children's Access to Justice & Restorative Care. Factsheet 10. Available at: https://www.haqcrc.org/wp-content/uploads/2023/05/Factbook-2023_Access-to-Justice-and-Restorative-Care_08.05.2023.pdf

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.

Importance of witnesses

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. A victim's family member, police officer who steered the investigation, doctor who conducted the medical examination or any witness who was present at the time when an offence was committed, can also be a witness in a criminal trial.

Bentham is quoted in several judgements of the Supreme Court of India to reiterate 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 a threat to an individual, but also a violation of the fundamental right of a citizen to have a free and fair trial.

Important Judgments:
Zahira Habibullah Sheikh v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8
Himanshu Singh Sabharwal v. State of Madhya Pradesh and Ors., AIR 2008 SC 194
Mahender Chawla and Ors. v. Union of India and Ors., (2019) 14 SCC 615

Testimonies of witnesses play an important role and every witness has a distinct role to play. These testimonies ultimately effect the judgment 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 part of criminal proceedings. Just as it is the duty of a 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."*

Reasons for witnesses turning hostile

Threat to the lives of witnesses is one of the primary reasons for them to turn hostile or retract their earlier statements given to the police or the presiding judicial officer of a court. Apart from these sections, the law does not provide protection of witnesses from external threats, inducement or intimidation. Political pressure, apprehensions regarding police and the legal system, lack of understanding or 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. (2015). *Witness Protection: Problems Faced and Need for a Protection Programme in India*. National Law 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/

The need to protect the witnesses

A witness is an indispensable part of the criminal justice system since their 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 the 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 witnesses.

In light of the alarming situation of low rate of conviction in criminal cases and considering the accused's access to witnesses as one of the reasons for witness hostility, the Supreme Court in **National Human Rights Commission v. State of Gujarat & Ors.,** (2009) SCC 342 SC, gave a direction to all the 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. In certain cases of rape and murder, some courts have granted police protection to the witnesses, though the effort is not enough. The Bengal Suppression of Terrorist Outrage Act, 1932 was one of the first statues in India to have a provision regarding '**protecting identity of witness**'. Apart from that, the **Universal Declaration of Human Rights** and **Article 14** of the **International Covenant on Civil and Political Rights (ICCPR)** to which India is a signatory, consider right to fair trial as a privilege, which is ultimately connected to the protection of witnesses.

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

Type of protection witnesses may 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.

[11] Ibid.

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.

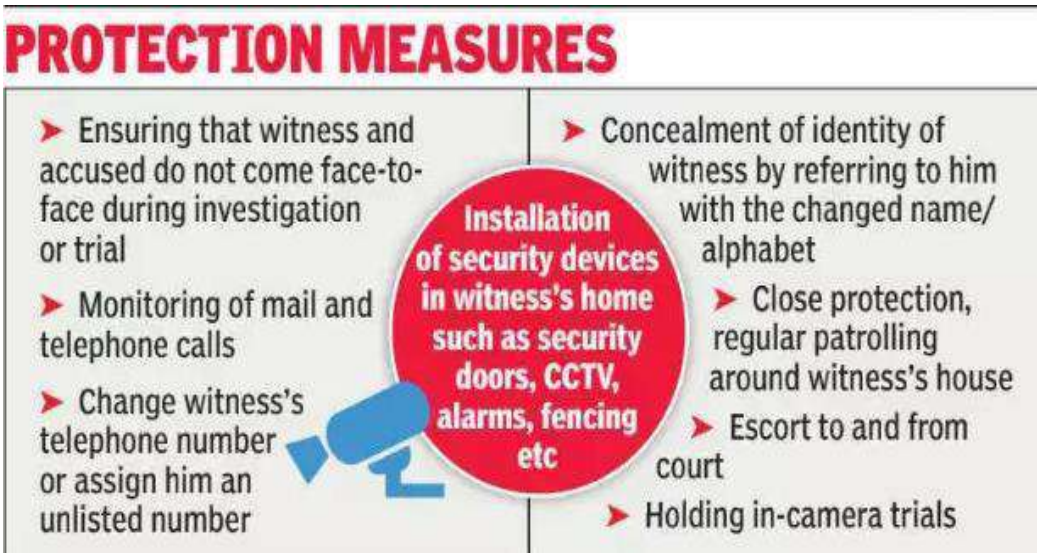
Considering the responsibility of state to provide witness protection the Delhi High Court in **Ms. Neelam Katara v. Union of India**, (2003) ILR 2 Delhi 377, held that:

> "*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 was subsequently revised to **Delhi Witness Protection Scheme, 2018**, post judgment of the Supreme Court in **Mahender Chawla & Ors. v. Union of India & Ors.,** Writ Petition (Crl.) No. 156 of 2016. In this case, the Supreme Court approved a **Witness Protection Scheme** prepared by the Bureau of Police Research Development (BPR&D) in consultation with the National Legal Services Authority (NALSA). In its judgment dated 5 December 2018, the Apex Court directed all the States and Union Territories to **implement the scheme with immediate effect** and **set up Vulnerable Witness Deposition Complexes (VWDCs) by the end of 2019**.

The scheme provides for a "Threat Analysis Report" (TAR) to be prepared by the concerned ACP/DSP, on the basis of which various protections can be provided to the victims/survivors, depending upon the category of threat identified. These include provision of a police escort to the witnesses and their family members facing threats, relocation to a safe house 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

Categorisation of threats under the Witness Protection Scheme, 2018

On the basis of the level of danger to a witness and to give priority and protection as per the need of a witness, threats have been categorised as follows:

(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.

How to apply for witness protection?

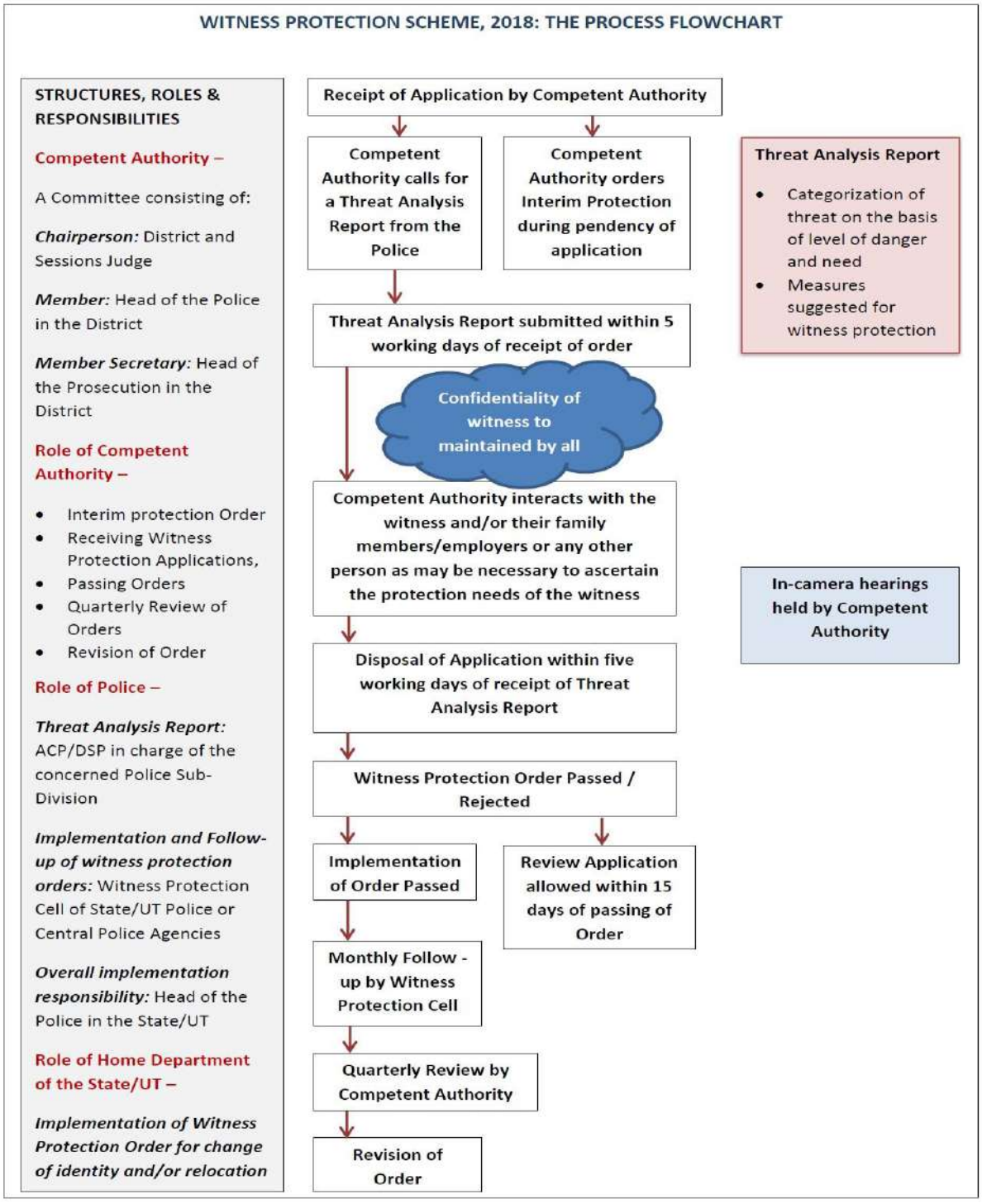
Under the Witness Protection Scheme of 2018, as approved by the Supreme Court, an application can be moved in the prescribed form before the **Competent Authority** of the concerned District where the offence is committed, addressed to the Member Secretary of the Competent Authority. The Head of Prosecution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

Who can apply for witness protection?

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.

Procedure for processing an application under the Witness Protection Scheme, 2018



(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 categorise the threat perception and shall suggest measures for providing adequate protection to the witness or family of the witness. 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.

(v) All the hearings on witness protection application shall be held in-camera in the chamber of the Competent Authority while maintaining full confidentiality.

(vi) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.

(vii) 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.

(viii) Upon passing of a Witness Protection Order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.

(ix) 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 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://haqcrc.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://haqcrc.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 the victim in rape cases to reduce the sentence of the convict is impermissible.

The court was of the view 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 registered by the respondent against him under section 377 of IPC. 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.

However, in **Ganesh Shankar Pilane v. The State of Maharashtra & Ors**., WP 272 of 2022, the Bombay High Court quashed an FIR against a man charged with rape and sexual assault against a minor after she gave her consent to quash the criminal proceedings, claiming she wanted to focus on her academic career. The victim and the accused met and became acquainted as students at a private institution. The victim at the time was pursuing her education in class 12 while the accused-petitioner was enrolled as an external student in the first year of a bachelor's degree programme. Their friendship resulted in a relationship and it was alleged that in November 2019 the accused took the victim to an unknown place and forcibly had sexual intercourse with her. The victim told her grandfather about the incident due to mental anguish, and an FIR was filed against the accused for rape under section 376 of IPC and penetrative sexual assault and aggravated penetrative sexual assault under sections 4 and 5 of the Protection of Children from Sexual Offences Act (POCSO Act). The accused then went to the High Court, requesting that the FIR against him be quashed with the victim's consent.

The Prosecution opposed the plea, arguing that even if the parties had reached an agreement, the nature of the offences were such that the case should not be quashed. The High Court observed in its judgment that it could not ignore the fact that the victim had expressed her desire to continue her academic career and focus on her studies and had filed an affidavit in

this regard before the court. The court also observed that if the Prosecution is permitted to continue, there is hardly any chance of conviction being recorded against the petitioner and the continuity of such prosecution would be nothing but futile exercise.

"11. … It is stated in the affidavit of Respondent No. 2 that in her desire to prosecute the academic course and further studies, the pendency of the criminal proceedings and trial would be an hurdle. It seems that the Respondent No. 2 is adopting an approach of leaving behind her baggage of past and proceeding further in the life concentrating on the positive side for better future. In view of no objection for quashing of the report and proceedings by Respondent No. 2, it can safely be said that in the prosecution if permitted to continue there is hardly any chance of conviction being recorded against the Petitioner and the continuity of such prosecution would be nothing but futile exercise."

The court further referred to the observations of the Apex Court in the matters of **State of Madhya Pradesh v. Laxmi Narayan and Others,** (2019 (5) SCC 688, and **Prabatbhai Aahir v. The State of Gujarat,** 2018 SCC Crl 1, which were reproduced in its judgment as follows:

"13. … For ready reference, we may refer to those observations as under:

15.5 While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of noncompoundable offences, which are private in nature and do not have a serious impart on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had 3 (2019) 5 SCC 688 4 (2018) SCC (Cri) 1 Umesh Malani Page 9 of 12 Judgment.WP.272.2022.doc managed with the complainant to enter into a compromise etc.

10. …
…
…

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court;

16.2 The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal

Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non- compoundable.

16.3 In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction Umesh Malani Page 10 of 12 Judgment.WP.272.2022.doc under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

16.4 While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

16.5 The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

16.10 There is yet an exception to the principle set out in propositions 16.8 and 16.9 above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

In **Kundan and Anr. v. State and Ors.**, Crl MC 27 of 2022, the Delhi High Court quashed the FIR against the accused under sections 363, 376 IPC and section 6 POCSO Act. The court observed that Petitioner No. 2/ victim had stated in her statement under section 164 of CrPC that she was in love with Petitioner No. 1/ accused and she eloped with him out of her own volition. They got married in a temple in Uttar Pradesh on the next day. Petitioner No.2 /victim subsequently gave birth to a baby boy. The families of Petitioners No. 1 & 2 accepted the marriage. The court further observed that ordinarily the High Courts must show restrain in quashing FIRs for offences under sections 376 IPC and POCSO Act and that the purpose of section 482 CrPC is to prevent the abuse of the process of law and more particularly, to secure the ends of justice. The High Court referred to the Supreme Cpourt's decision in **Gian Singh v. State of Punjab**, (2012) 10 SCC 303, wherein it has been observed as under:

"55. In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be

supplied by necessary intendment. ***Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists.*** *The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection.*

56. It needs no emphasis that exercise of inherent power by the High Court would entirely depend on the facts and circumstances of each case. *It is neither permissible nor proper for the court to provide a straitjacket formula regulating the exercise of inherent powers under Section 482. No precise and inflexible guidelines can also be provided. (emphasis supplied)"*

Cases Compounded or Compromised	
Protection of Children from Sexual Offences Act	**327**
Section 4 & 6 of POCSO Act or POCSO Act (Section 4 & 6) r/w Section 376 IPC	195
Girls	195
Boys	0
Section 8 & 10 of POCSO Act or POCSO Act (Section 8 & 10) r/w Section 354 IPC	125
Girls	125
Boys	0
Section 12 of POCSO Act or POCSO Act (Section 12) r/w Section 509 IPC	5
Girls	5
Boys	0
Section 14 & 15 of POCSO Act	1
Girls	1
Boys	0
POCSO Act r/w Section 377 IPC	1
Girls	0
Boys	1
Sections 17 to 22 of POCSO Act	0
Girls	0
Boys	0
Source: Table 4A.5, Court Disposal of Crime against Children (Crime Head-wise) – 2021, Crime in India Report, 2021, NCRB.	

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*'.

Section 30 of the POCSO Act presumes the existence of "*a culpable mental state on the part of the accused*" for any offence under the POCSO Act, but also cautions that the Special Court has to believe in the existence of a fact only if it "*exists beyond reasonable doubt and not merely when its existence is established by a preponderance of probability*."

The Supreme Court of India in **Seema Silk and Saree v. Directorate of Enforcement**, Criminal Appeal No. 860 of 2008, while dealing with a case under the Foreign Exchange Act, 1973, observed that in all the cases where legislation provides a reverse burden of proof, the initial burden of proving the allegations always rests upon the prosecution, and only after successful discharge of initial burden by the prosecution, the accused person would be entitled to rebut the presumption.

The High Court of Bombay in **Navin Dhaniram Baraiye v. State of Maharashtra**, Criminal Appeal No. 406 of 2017, held that:

> *"It becomes clear that although the provision states that the Court shall presume that the accused has committed the offence for which he is charged under the POCSO Act, unless the contrary is proved, the presumption would operate only upon the prosecution first proving foundational facts against the accused, beyond a reasonable doubt. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under the POCSO Act, the presumption under Section 29 of the said Act would not operate against the accused."*

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.

In **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.

In **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 the burden of proof to prove innocence on the accused, 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.

Presumption of guilt not an inviolable presumption

In **C.M Girish Babu v. CBI Cochin**, AIR 2009 SC 2022, the Supreme Court held that the presumption of guilt under section 20 of the Prevention of Corruption Act, 1988 is 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 the 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 fair and judicious, and there should 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.

Scope and meaning of presumption of guilt under Section 29 of the POCSO Act

The scope and meaning of section 29 of the POCSO Act was considered by the Delhi High Court in **Dharmander v. State**, Bail Application No. 1559 of 2020. The High Court held that the **presumption under section 29 of the POCSO Act comes into action at the stage when**

charges are framed by the Special Court as it is only when the trial court frames the charges, that it forms a prima facie opinion that there is a case for the accused to answer or defend. In the words of the court:

"50. Drawing from the verdict of the Supreme Court and the views taken by the various High Courts in the above cases, in essence, the position is that to rebut a presumption, first, the presumptive proposition must itself be formulated based on relevant and credible material; and second, the accused must know what presumption he has to rebut. It is not enough to say that the accused has been implicated by the police on charges under sections 3, 5, 7, and/or 9 of the POSCO Act. At the very least, the charges should have been framed by court against the accused under one or more of those sections for the presumption to arise; and mere implication by the police is not enough.

51. Only when the trial court frames charges, does it form a prima facie opinion that there is a case for the accused to answer and defend. At the stage of framing charges, the trial court may decide not to frame charges against an accused under any of the sections mentioned in section 29 but under some other provision; or, it may not frame charges against all accused persons under those sections. So, the presumption under section 29 cannot arise before charges are framed."

Further, considering the implication of section 29 of the POCSO Act on a bail plea after charges have been framed, the High Court held:

"74. ….In the opinion of this court therefore, at the stage of considering a bail plea after charges have been framed, the impact of section 29 would only be to raise the threshold of satisfaction required before a court grants bail. What this means is that the court would consider the evidence placed by the prosecution along with the charge-sheet, provided it is admissible in law, more favorably for the prosecution and evaluate, though without requiring proof of evidence, whether the evidence so placed is credible or whether it ex facie appears that the evidence will not sustain the weight of guilt.

75. If the court finds that the evidence adduced by the prosecution is admissible and ex facie credible, and proving it during trial is more a 26 1962 Supp (2) SCR 769: para 26; Constitution Bench 27 (1996) 5 SCC 1: paras 17, 18 matter of legal formality, it may decide not to grant bail. If, on the other hand, the court finds that the evidence before it, is either inadmissible or, is such that even if proved, it will not bring home guilt upon the accused, it would grant bail."

CHAPTER 12
MANDATORY REPORTING UNDER THE POCSO ACT

Things to know and understand

The POCSO Act is the first child-rights legislation that places a mandatory duty on all persons having knowledge of commission of a sexual offence against a child or likelihood of commission of such an offence, to report it to the police. Failure to report is also an offence and is penalised with incarceration or a fine, or with both.

Under section 21 sub-section (1) of the 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.[12]

Duty to report sexual crimes against children

In the case of **Shankar Kisanrao Khade v. State of Maharashtra**, Criminal Appeal Nos. 362-363 of 2010, 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 child. In order to address this issue, the court issued directions to various stakeholders of such offences.

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

[12] Ali, Bharti, Maharukh Adenwalla and Sangeeta Punekar. (2017, November). *Implementation of the POCSO Act, Goals, Gaps and Challenges: Study of Cases of Special Courts in Delhi & Mumbai (2012 - 2015)*. HAQ: Centre for Child Rights and Forum Against Sexual Exploitation of Children (FACSE). Available at: https://haqcrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf

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 upmost 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.*

7) *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 SJPUs 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 to report under Section 19(1) of the POCSO Act

In **Dr. Sr. Tessy Joe v. State of Kerala,** Crl. No. 3712 of 2018, the appellants (Gynaecologist, Paediatrician and a Hospital Administrative Staff), had appealed against the initiation of proceedings against them in the Sessions Court, based on charges under section 19(1) read with section 21(1) of the POCSO Act and section 75 of the Juvenile Justice Act. The appellants had been accused of not fulfilling their duty of mandatory reporting 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 Supreme 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).

The Supreme Court has taken the view that ***section 19(1) of the 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***.

Prosecution for failing in the duty to report under Section 21 of the POCSO Act

The Chhattisgarh High Court in **Kamal Prasad Patade v. State of Chhattisgarh**, WP(Cr) No. 8 of 2016, held that ***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 this 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 the POCSO Act. In the writ petition, the petitioner questioned the initiation of prosecution against him for non-reporting of the offence, stating that it 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 this 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 the POCSO Act, the prosecution first had to establish beyond reasonable doubt that the co-accused had committed the alleged offence(s). After establishing this, the prosecution 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**, CRA 69 of 2017 : 2017 SCC OnLine Bom 1772.

In this 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 the 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 in mind the objective of the POCSO Act along with the duty enshrined under section 19 and held that the prosecution had established a prima facie case against the petitioner, which resulted in framing of charges against him.

> *"14. 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.'*
>
> *15. 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 …*

17. *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*."

CHAPTER 13
ROMANTIC RELATIONSHIPS AND THE POCSO ACT

Mandatory reporting under section 19 of the POCSO Act (see chapter 12) implies that any information about a sexual activity with a child comes under the scanner of the investigating agencies. Section 2(d) of the POCSO Act defines a "child" as any person below the age of 18 years. Before the enactment of the POCSO Act in 2012, the age of consent was 16 years as provided for under the Indian Penal Code. In 2013, vide the Criminal Law Amendment Act, the age of consent under the IPC was raised to 18 years to bring it in line with the POCSO Act – a special legislation to protect children from sexual exploitation and abuse. Presumption of guilt (section 30 of the Act) and presumption to certain offences (section 29 of the Act) inevitably imply that the accused in a consensual relationship with a child/minor will be incarcerated while the trial is on.

Under the current law, a sexual activity involving adolescents (especially those in the age group of 16-18 years), even if consensual in nature, sets into motion criminal prosecution of the accused with a possibility of jail term and even death! The courts have thus had to grapple with the goals of securing justice in cases of romantic relationships involving consenting minors. Flagging this shortcoming, the Madras High Court in **Sabari v. The Inspector of Police**, Crl A 490 of 2018, observed that *"(the) Court (has become) concerned about the growing incidence of offences under the POCSO Act on one side and also the Rigorous Imprisonment envisaged in the Act. Sometimes it happens that such offences are slapped against teenagers, who fall victim of the application of the POCSO Act at an young age without understanding the implication of the severity of the enactment."* The court further observed:

> *"28. When the girl below 18 years is involved in a relationship with the teen age boy or little over the teen age, it is always a question mark as to how such relationship could be defined, though such relationship would be the result of mutual innocence and biological attraction. Such relationship cannot be construed as an unnatural one or alien to between relationship of opposite sexes. But in such cases where the age of the girl is below 18 years, even though she was capable of giving consent for relationship, being mentally matured, unfortunately, the provisions of the POCSO Act get attracted if such relationship transcends beyond platonic limits, attracting strong arm of law sanctioned by the provisions of POCSO Act, catching up with the so called offender of sexual assault, warranting a severe imprisonment of 7/10 years."*

Referring to the severity of sentences provided for in the Act, the Madras High Court in **Vijayalakshmi v. State**, Crl. O.P. No. 232 of 2021, observed that irreparable damage could be caused to the reputation and livelihood of the youth whose actions would have been only innocuous. The court further held:

> *"11. There can be no second thought as to the seriousness of offences under the POCSO Act and the object it seeks to achieve. However, it is also imperative for this Court to*

draw the thin line that demarcates the nature of acts that should not be made to fall within the scope of the Act, for such is the severity of the sentences provided under the Act, justifiably so, that if acted upon hastily or irresponsibly, it could lead to irreparable damage to the reputation and livelihood of youth whose actions would have been only innocuous. What came to be a law to protect and render justice to victims and survivors of child abuse, can, become a tool in the hands of certain sections of the society to abuse the process of law.

12 … A reading of the Statement of Objects and Reasons of the POCSO Act would show that the Act was brought into force to protect children from offences of sexual assault, sexual harassment and pornography, pursuant to Article 15 of the Constitution of India and the Convention on the Rights of the Child. However, a large array of cases filed under the POCSO Act seems to be those arising on the basis of complaints registered by the families of adolescents and teenagers who are involved in romantic relationships with each other. The scheme of the Act clearly shows that it did not intend to bring within its scope or ambit, cases of the nature where adolescents or teenagers involved in romantic relationships are concerned.

19. … The Hon'ble Supreme Court in the case of Parbathbhai Aahir @ Parbathbhai v. State of Gujrath, reported in (2017) 9 SCC 641 and in case of The State of Madhya Pradesh v. Dhruv Gurjar reported in (2019) 2 Mad LJ (Cri) 10, has given sufficient guidelines that must be taken into consideration by this Court while exercising its jurisdiction under Section 482 of Cr.P.C, to quash non-compoundable offences. One very important test that has been laid down is that the Court must necessarily examine if the crime in question is purely individual in nature or a crime against the society with overriding public interest. The Hon'ble Supreme Court has held that offences against the society with overriding public interest even if it gets settled between the parties, cannot be quashed by this Court.

20. In the present case, the offences in question are purely individual/personal in nature. It involves the 2nd Petitioner and the 2nd Respondent and their respective families only. It involves the future of two young persons who are still in their early twenties. The second respondent is working as an Auto driver to eke his livelihood. Quashing the proceedings, will not affect any overriding public interest in this case and it will in fact pave way for the 2nd Petitioner and the 2nd Respondent to settle down in their life and look for better future prospects. No useful purpose will be served in continuing with the criminal proceedings and keeping these proceedings pending will only swell the mental agony of the victim girl and her mother and not to forget the 2nd Respondent as well."

In **Rama @Bande Rama v. State of Karnataka,** Crl. Pet. No. 6214 of 2022, the Karnataka High Court quashed a complaint under the POCSO Act filed by the father of the girl who was about 17 years old at the time of the alleged incident, while the accused was around 20 years old. The girl filed an affidavit before the court that she was in a consensual relationship with the accused. While quashing the criminal proceedings on account of marriage between the victim

and the accused, the court held that "*if the victim is going to turn hostile in a trial at a later point in time and the petitioner gets acquitted of all the offences, the sword of crime would have torn the soul of the accused.*"

In **X v. GNCT of Delhi & Ors.**, Bail Appln. 3618/2022, the Delhi High Court granted bail to the accused in a matter under section 376(2) IPC and section 6 POCSO Act after the victim, who was now married to the accused, submitted before the court that they were in a consensual relationship and offered to stand as surety for the accused. In July 2020, the victim's mother filed a missing person's complaint. The victim was around 17 years at the time of the complaint and the accused was 18 years old. The victim was subsequently found in February 2021 from a jhuggi living with the petitioner. The Hon'ble High Court noted that while the mother of the victim had supported the prosecution case, the victim had submitted in her section 164 CrPC statement as well as in her testimony before the trial court that she had accompanied the accused on her own volition, got married to him and has a child with the accused. Considering the facts and circumstances of the case, the court held that prima facie there was a consensual physical relationship between the victim and the accused. The court further noted that since charge sheet has been filed and charges have been framed, section 29 of the POCSO Act would get triggered, raising the threshold of satisfaction required for grant of bail. Relying upon the decision in **Dharmander Singh @Saheb v. State** *(supra)*, the High Court held that the case favoured the grant of bail to the accused.

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