

National Judicial Academy



REPORT

SEMINAR ON THE WORKING OF POCSO COURTS IN INDIA [P-1015]

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A two day Seminar was organized on working of POCSO courts in India by National Judicial Academy from 04 – 05 March 2017. The seminar provided a forum to participant Judges to discuss how POCSO is effectively address sexual abuse and sexual exploitation of children and also some issues regarding Child - Friendly POCSO Court, Recording & Appreciation of Evidence of Victim in Cases of Child Abuse. Judicial Discretion of Special Courts, Challenges in Adjudication by POCSO Courts, Presumption & Burden of Proof under POCSO Act, Obligation for Reporting of Child Abuse under the POCSO Act and Child Pornography & POCSO Law etc. District and Session Judges from across the states of India participated in the seminar. The programme was divided into 7 sessions.

Justice Roshan Dalvi, Dr. Justice Shalini Phansalkar Joshi, Ms. Pritarani Jha Ms. Vidya Reddy, Ms. Geeta Ramaseshan, Prof.(Dr.) Geeta Oberoi, Mr. M.C.Rao participated as Resource person in these various sessions and guided the participants.

Day 1.

- Session 1- Creating a Child - Friendly POCSO Court
- Session 2- Recording & Appreciation of Evidence of Victim in Cases of Child Abuse
- Session 3- Contours of Judicial Discretion & Special Courts
- Session 4- Challenges in Adjudication by POCSO Courts

Day 2.

- Session 5- Presumption & Burden of Proof under POCSO Act
- Session 6- Obligation for Reporting of Child Abuse under the POCSO Act
- Session 7- Child Pornography & POCSO Law

The Program Coordinator requested Hon'ble Justice Roshan Dalvi to carry forward the discussion for Session 1.

Session-1

Creating a Child –Friendly POCSO Court

Speaker: Justice Roshan Dalvi, Justice Shalini Phansalkar Joshi

Justice Roshan Dalvi, commenced the session by saying that we need to create a child friendly court and for creating it we requires humanity in ourselves. She said that child should be treated differently otherwise it will amount to violation of article 14 of the constitution. Now the POCSO court has strengthened the hand of judges to created child friendly court. Then she expressed that under POCSO we have specified statutory definition of various offence such as sexual assault, sexual harassment, pornography, aggravated penetrative sexual assault etc. which were not defined under the IPC.

She further talk about two test-

- Lesser numbers, Greater attention not only at Home, in School, in Countries but also In Courts because law require some matter special attention therefore. POCSO special court create for expeditiously disposal of cases on sexual offence against child.
- The test of 3 Rs
 - 1 Recognize the problem that may happen.
 - 2 Resist the bad habit firstly by child then by teacher and family.
 - 3 Report- if fail to resist the offence then they report.

She said that this is not only a legal problem but also a sociological problem therefore we must work as 'partner in system' for POCSO. She divides the partners in two parts such as-

- Awareness creation (for victim needs)- it include Parents, Teachers, Friends, NGOs
- Attitudinal change (for State goals)- it include Medical Officers, Police Officers, Legal Officers Judicial Officers, Criminal Justice Agencies

The object of the partnership are culture change, talking to men by men (gender neutral and not gender specific), it will convey anti-violence messages for Government, Faith-based organizations, Community groups and Work places.

The sexual violence against child generally have the huge negative impact on the child such as Destroying psychology, Devastating life, Bitter shock, Disgust, Disbelief, Suspicion, Helplessness, Frustration because of helplessness, Anxiety, Loss of security, Feeling of guilt, Fear of disclosure, Confusion, child may feel rejected all the time etc.

She added that Child has to go through re-victimization or secondary victimization at different stages such as at the time of police investigation, Medical examination and court trail (order of re-examination of witnesses, telling the story again and again). She further said that generally in courts we have two type of dilemma-

- Child v/s. adult syndrome- law provides to create a child friendly atmosphere but the expression is not in the statute whether child should be treated as adult or treated differently from adults. So there is a dilemma regarding this.
- Victim v/s. accused syndrome- there is dilemma regarding whom do we have better treatment. She said that we should give appropriate treatment to both of them provided under the respective law. Though we don't have victimology in our system which is very much developed in western societies.

She further pointed out some of the troubles generally faced by judiciary-

- Number of cases not reported
- Number of cases not pursued
- Some child witnesses tutored
- Some witnesses turn hostile
- Some cases doctored- she made the distinction between statutory rape and real rape.
- Collusive investigation

For creating a child friendly atmosphere we require these things-

- Infrastructure. It includes Victim Support Centers, Victim Examination Suites, Video recording of statements and Video recording of evidence
- Interpretation of sentencing policy and child friendly atmosphere by the judges.
- Sensitivity at the time of granting bail, recording the evidence and while giving decisions. The sensitivity creates a child friendly Court climate i.e. creating special court, take real rape cases first than statutory rape case, victim support, victim representation, no contact with the accused etc. and Court room conduct i.e. victim confidentiality, frequent break.

She suggested that we should understand the true meaning of 'in camera' used under the act, in a common man language, therefore the dictionary meaning of 'in camera' is 'in chamber', 'in room' etc. she concluded the session by expressing that identification need not necessarily be through oral statement, finger, it can also be through by seeing, expression or any other mode. Child should not come in contact with the child.

Session-2

Recording and Appreciation of Evidence of victim in cases of Child Abuse

Speaker: Justice Shalini Phansalkar Joshi, Justice Roshan Dalvi

Justice Shalini Phansalkar Joshi commenced the session with the view that the minimum sensitivity is required to conduct the trial process in our judicial system. Earlier there were only two provisions on sexual offence i.e. section 354 and section 376 of IPC but they are not sufficient because many aspects of child sexual abuse were not considered by the legislation. Regarding section 354 there were three different views taken by the Supreme Court of India viz child cannot have sense of modesty unless they attain puberty, another says that female child is born with modesty, some say it depends upon the intention of the accused, therefore the provision is very vague & obscure. Many aspects of substantive law (e.g. inserting of object, sexual organ not developed etc.) are not included under Section 376 of the Act. So it was a trauma not only on child but also on judicial system. It was explained by the RP that with the amendment to the IPC and POCSO Act we have come a long way strengthening the hand of judicial officers. The object of the POCSO Act clearly lays down the contours of the Act while dealing with the child victim. It ensures them to take every precaution against the re-victimization of the child, once (s)he comes to the court for trial. One such example is recording of evidence in chamber. The object and reasons of the POCSO Act were to be considered as:

- To incorporate child-friendly procedures for recording of evidence, investigation and trial. Therefore, child's right to privacy and confidentiality should be protected by each and every stage of trial.
- To safeguard best interest and well-being of the child at every stage of the judicial process. Therefore recording of evidence in chamber or any other place must be adopted in each stage.

The statutory options regarding the recording and appreciation of evidence of victim in cases of Child Abuse was discussed. Section 33 of the Act provides that while recording the evidence the following things should be kept in mind-

- Question should be put by the judges, in the case of [*Sakshi v. Union of India*, (2004) 5 SCC 518] Court held that incident should not be asked directly by defense council but by the court itself.
- Frequent breaks. Regarding this, it was suggested that the judge should not give breaks at the crucial points such as at the time of cross-examination or when examination-in-chief is in process so that accused or any such person is unable to de-moralized or brainwash the mind of the child or tutor the child.
- Allowing a family member as a guardian, friend or relative to be present in Court. The judge should ensure that the support person does not manipulate the statement of child by their gestures etc. and also the support person must be informed in advance that such

person's role is only to ensure the feeling of a sense of confidence in the child. It is not to manipulate the statement of child.

Yet another statutory measure is provided under Section 35 of the Act. It provides for expeditious hearing, wherein within 30 days evidence should be recorded and within one year, the trial should be preferably completed. However, it was further debated that the expeditious disposal of cases is little difficult because of accumulation of cases, though this can be reduced by recording the evidence of child on the very first day, as it will be easier for the child to recall the incident and thereby protecting the children from re-victimization. The Section 36 of the Act provides that Child should not to be exposed in any way to the accused. It was suggested that it would be best, if evidence is recorded through use of video-conference or through utilizing single-visibility-mirror or curtain. Moreover, if evidence is recorded in Court, then there should be separate entrance provided to child so that accused cannot contact the child anywhere in the Court premises.

Another measure has been provided under Section 37 of the Act, which lays down that the Special Court shall try cases *in camera* and in the presence of the parents of the child or any other person in whom the child has trust or confidence. Justice Shalini Phansalkar Joshi suggested that it must be ensured while recording the evidence *in camera* that, only one counsel is present avoiding a crowd consisting of juniors etc. POCSO Act under Section 38 provides for the assistance of expert or interpreter or facilitator; whenever child is unable to explain the incident, judges can take the help of these experts. It was suggested the Court must facilitate the child to help the victim explain their statement what had happened.

Justice Shalini Phansalkar Joshi also suggested some other measures for recording the evidence, such as:

- To assess the competency of child to record evidence, by asking and recording developmentally appropriate questions of her age throughout the testimony in order to know that whether the child is really able to understand the question. If Court finds that child is unable to understand the language of Court or other situations, it can pass an appropriate order by recording the finding.
- Pre-trial visit of the child and support person to the Court to familiarise them with the layout of the Court and procedures.
- Before recording of evidence, the Judge should explain the Court process to the child in order to enable him/her to understand the procedure, make aware of rights of the child provided under the Act.
- If possible, to appoint *Guardian ad litem*, who can be a member from NGO, Bar, or a Professional, who will remain present with the child throughout and assist the child.
- To provide legal assistance either on the requestor on *suo motu*.
- To provide waiting area, which is separable, and furnished with essential requirements, like, water, wash-room etc.

- To provide comfortable environment at the time of recording evidence e.g. providing separate room, recording evidence in Chamber; allowing victim to testify from any other place than the witness box, judge should be at the same eye-level with child.
- To maintain an in-formal atmosphere; If evidence is recording in chamber then should allow the child to sit near the Judge; also an out-stretched hand-shake goes a long way in confidence building and should dispense with Gown and Robes by everyone.
- Testimony to be recorded at the earliest, without making the child to wait for hours
- Such cases should be given priority in order to avoid adjournment so that child need not have to come for recording the evidence time to time.,
- the date and time for recording evidence should be fixed and followed.
- Victim should be brought from a separate entrance.
- Accused not to be brought in contact with child.
- Child's memory should be refreshed, left it open for discussion.
- Child's memory should be refreshed.
- Judge should make the child comfortable by asking preliminary questions.
- Judge should set ground rules for examination of child for each case individually. Defence council should not ask question directly from the child but through the court.
- The evidence of a child below 5 – 6 years should be dispensed with or Can be limited only for identification of Accused which should be done at the end.
- Cross-examination should be relaxed, done gently and with respect.
- Everyone should take care of body language, tone of voice, facial expressions etc.

Regarding the Appreciation of Evidence, we must be sensitive towards the child. It was suggested that:

- Regard must be had to the age of the child, the time period, trauma suffered by the child.
- Proper evaluation of medical evidence.
- Giving weight-age to medical, forensic and circumstantial evidence.
- Sentence must be stringent.
- Compensation should be granted invariably.
- Rehabilitation of child.

Justice Joshi cited some of the cases on the sensitivity of judges towards the children. In *Kishanlal v. State of Haryana* [AIR (1980) SC 1252] where Court held that a socially

sensitized Judge is a better statutory armor against gender outrage than long clauses of a complex section with all protection written into it and in case of *State of Punjab v. Gurmeet Singh* [1996 (2) SCC 384] Court held that “It is the sensitivity of a Judge, which prevents the justice from being a casualty.” It was said that the law can only strengthen the hands of the judge and the society at large, but whether the same is achieved in the form of a sensitized system or not depend on internalization.

Justice Roshan Dalvi continued the discussion with the suggestion that a judge should stop the defense counsel or any other person, whenever they ask unnecessary, irrelevant and useless question while recording the evidence.

The session moved onto the question and answer round. A question raised by the participant was, that as to which law shall prevail whenever there is conflict between exception provided under Section 375 of IPC (Sexual intercourse by a man with his own wife who is below fifteen years of age, is not rape) and Section 4 of POCSO Act (sexual intercourse below 18 year of age will constitute rape)? Justice Roshan Dalvi expressed that generally under Section 375, judges used to have the leverage to exercise “judicial discretion” by awarding less than the minimum sentence to the accused but now under the POCSO Act the discretion has been taken away. She further said that POCSO Act is a special law and IPC is general law, therefore, the special law will always prevail over the general law.

Another question was raised regarding the punishment. It was as to when a person is held liable under both, i.e. the IPC as well as POCSO Act, in such a situation under which statute law punishment should be awarded? Justice Shalini Phansalkar Joshi clarified that, under Section 42 of the POCSO Act it has been clearly provided that whenever there is alternative punishment provided under the different law, the punishment which is greater in degree must be awarded.

Session-3

Judicial Exercise of Discretion

Speaker: Justice Roshan Dalvi , Dr. Justice Shalini Phansalkar Joshi

Justice Roshan Dalvi commenced the Session by pointing out that in POCSO Act, 2012 victim representation is allowed as a contrast to the fact that it is not allowed in Criminal Procedure Code, 1973 (except under Section 301). Therefore, a judge can apply the judicial discretion here and can take the help of the POCSO Act, in order to allow victim representation under Cr.P.C. It was further deliberated that judges should apply judicial discretion while considering frequent breaks to the child. Discretion must be applied so as to disallow breaks during crucial stages of trial such as cross examination etc. in order to prevent any chances for the accused or any other person manipulate or tutor the child. Discretion must be exercised to allow only reasonable questions or put a check upon the unreasonable questions.

Under the POSCO Act it has been provided that any question should not be put directly to the victim by the defense counsel but it must be routed through the judge. Justice Shalini Phansalkar Joshi said that nowhere in the POCSO Act it has been provided that the communication of questions must be routed through the judge which should be either in written form or oral form. Therefore, judges can apply their discretion in allowing the question to be asked in writing via the sitting judge. This will additionally help negotiate the often hectoring tone used as a tool by the defense lawyers.

Justice Roshan Dalvi suggested that Judge can use their discretion in streamlining the procedure of recoding the evidence such as they can lay down the norm that only subsequent to the questions and answers, the objections (if any) should be raised against the victims' statement and not intermittently during the question and answer session.

Another issue raised and discussed was, when in a tribal area, where child marriage is permissible as a custom, what will be the implication of applicability of the POSCO Act ? Justice Dalvi addressed the query by highlighting that whenever a husband forces himself upon his wife, it will amount to an offence under Section 42A of amended POSCO Act. This is because, it provides that whenever any statute is in derogation or conflict with any other statutory provision (here justifying a "voidable" child marriage), the POSCO Act will prevail.

Yet another query posed was "can the magistrate give the first remand?" It was answered affirmatively that magistrate cannot exercise their discretion if a case falls under the POSCO Act, they had to send to the POCSO Court. Justice Shalini Phansalkar Joshi added that under Section 33(1) of POCSO Act it provides that the Special Court may take cognizance of any offence without the accused been committed. Therefore, Special Court can do everything i.e. not only the trail but also the remand, bail etc.

The other cases where judges of the POCSO Court may applied their discretion includes:

- Differentiation between the *Statutory Rape* and *Actual Rape* and must be done by the POCSO judge and cases relating to actual rape must be given priority using discretion.

- Judge must apply the discretion to record any appropriate mode for recording of evidence (such as recording evidence considering gestures made by the victim).
- Special judge must exercise discretion to refer the victim for counselling and rehabilitation.

She also suggested that:

- Sensitization and awareness at public places, ashrams, schools etc. must be done and the legal service authority must be assigned to run awareness programme regarding the importance of POCSO Act.
- Sensitize and propagate to teach *good touch* and *bad touch*.

Discussions on awarding compensation to the victim was done. Case law such as: *Ankush Shivaji Gaikwad v. State of Maharashtra* [(2013) 6 SCC 770] wherein Court held that every single case of sexual offence one has to consider compensation was referred to. Rule 7 of POSCO Rule was discussed which provides for compensation as a right, with the rider that there would be no compensation awarded if the case is proved to be false.

It was further insisted by the RP that while in real rape cases bail must not be granted, but in the case of statutory rape a POCSO Court judge must grant bail at the first available opportunity using his/her discretionary power. There is a real need for sensitization on the part of judges in this matter.

A question was raised by the participants that, Section 12 of POCSO Act provides punishment, which may extend to three year, therefore, amounting to a bailable offence under the Cr.P.C. Now, under such a situation whether a judge should give bail or not? It was answered in affirmative by the RP along with certain necessary conditions.

Session-4

Challenges in Adjudication by POCSO Courts

Speaker: Justice Pritarani Jha

The speaker commenced the session by saying that the silence around the child sexual abuse is the biggest hurdle, because often in such cases the family don't support it or the police don't report the cases etc. The report of Women and Children Department Research, 2007 was cited wherein, around 12000 children were interviewed which showed that around 53% children suffered some kind of sexual assault and 73% of them did not reported the same to anyone. Cases are not reported because of cultural norms, fear of stigmatization specially in rural areas. It was further discussed that in order to prevent the child sexual abuse family members, teachers etc, should teach a child about *good touch* and *bad touch*.

Some of the key features of POCSO Act discussed included:

- The Act defines a child as any person below the age of 18 years and provides protection to all children under the age of 18 years from the offences of sexual assault, sexual harassment and pornography.
- The POCSO is gender neutral law for the protection of children against sexual offences. Both boys and girls fall within the purview of the Act.
- The definition of sexual offences is broad and not restricted to rape alone.
- The POCSO Act ensures effective access to justice. It provides for special procedures for reporting cases, special procedures for recording statement of child victim, and Special Courts for trial of such offences.
- Burden of proof regarding the sexual offence has been shifted onto the accused for serious offences.

It was further discussed that as per Rule 4(5) of the POCSO Rules, 2012 the Child Welfare Committee (herein after CWC) under Section 31(1) of the Juvenile Justice, it should take into account the opinion of the Child and prior to making such determination, an inquiry should be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience. Also under the Rule 2(f), it provides that the CWC can appoint a support person (NGOs, Social Worker, Probation Officer and any other person found fit by the CWC) who follows the case from beginning to end. Though many States do not have such designated support persons on one hand and moreover, in some cases CWC is not even informed. Therefore, the law is unable to work effectively and lacks proper implementation. Yet another common place implementation problem pointed out in the discussion was that, although the Act provides for no confrontation between the child and offender even in police station, in reality it's not the case.

It was suggested by Justice Dalvi that, every jurisdiction should make a list of NGOs, Social Worker, Probation officer, who can be contacted for as a support person for the child and judgment must essentially include directions to such support persons for rehabilitation of the

victim child. Referring to Rule 4(4) wherein it is provided that whenever there is apprehension from the family person who is likely to commit sexual abuse, it was suggested that in such cases, directives must be ordered to the support person or CWC to pull out the child from such family and help in rehabilitation under the close vigil of the Court. It was added that under Section 38 the District Child Protection Unit (DCPU) should have a list of experts or support persons, so that whenever need arises of any counselor, expert or support person they can be easily made available by the database maintained at the DSPU in order to assist the Court.

It was deliberated that police has a huge role in making a cases successful. The POCSO Act and the Rules if followed augment to evolve a special relationship congenial to the victim child and the police. The Rule 4(2) provides for child friendly procedure to transform and develop a police and child relationship as under:

- Copy of FIR should be given to the complainant free of cost.
- They must inform the child and his/her parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief. [Rule 4(2)(f)].
- The child may be referred for counseling either by Police or by a Doctor if so desired.
- FIR should be in simple language so that child could understand [Section 19(3)].
- Translator must be provided [Section 19(4)]
- Access to lawyer must be facilitated by the police to the victim.
- The statement of the child to be taken at his/her residence or at a place where the child is comfortable in presence of person(s) whom the child trusts [Section 19(5)]

It was argued that the above procedures are not being properly implemented by the police. Therefore there is a need to sensitize such stake holders in order to comply with the object and the provisions of the Act.

Under the Section 357A of Cr. P.C. every State has a Victim Compensation Scheme, if the trial Court at the conclusion of the trial, is satisfied, that the compensation awarded 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, it may make recommendations for compensation, provided under section 357(3) of Cr.P.C. The circular of State of Gujarat was exhibited, which defines the 'victim' as 'who has suffered loss or injury and requires rehabilitation and the expression 'victim' includes his/her dependents'; it means that even in cases where perpetrator is missing, the State can award a compensation. Therefore, this kind of definition may be inquired for from the Govt. of every State. The provisions in the POCSO Act relating to 'interim compensation' was discussed, underscoring the fact that it is not just at the conclusion of trial but compensation is to be as an interim measure too as per Rule-7, to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Reference to Section 33(8) was made, wherein it has been provided that Special Court may direct compensation for any physical or mental trauma caused to him or for immediate rehabilitation of such child. It was emphasised to sensitize victims about such provisions relating to victim compensation for the implementation of the POCSO Act in letter and spirit.

The Session was concluded with the observation that, the infrastructural support created by the Act is not there. Therefore, urgent steps needs to be taken at each Special court level within available limitations to best suit for proper implementation.

Session-5

Presumption and Burden of Proof under POCSO Act

Speaker: (Dr.) Geeta Oberoi, Mr. M.C. Rao

The Session was an activity base session, in which the participating judges broke up into five groups. Each group was provided with a hypothetical case law (with same facts) with instructions. After the groups arrived at their collective unilateral or differential opinions, they were requested to make a brief presentation elaborating upon the reasons leading to a certain conclusion. The exercise revealed the variety of differences which judges in a group relied upon to base their judgments upon. It was discussed as to how to reduce the differences in application of the same law, in order to rope-in uniformity may be done. However, there was a point of contest as to opposing the idea of uniformity of opinion. It was argued that every judge interprets the law according to circumstances and condition of particular case. Hence, in that situation difference of opinion are bound to arise and is unavoidable.

Mr. M.C. Rao continued the session by adding that Section 105, Section 76 of Indian Evidence Act, Section 138 and 139 of Negotiable Instrument Act, Section 20 of Prevention of Corruption Act etc., all the statutes provided that the burden of proof (hereinafter BoP) is on the accused to establish his innocence. The BoP cannot be equated with the preponderance of probability and must be beyond preponderance of probabilities. Under Section 30(2) of the POCSO Act provides that the BoP on the accused should be beyond reasonable doubt. He further added that Section 30 of POCSO Act seems to be practically replicating the Section 35 of the NDPS Act (i.e. the language of both the Sections are same). Therefore, in order to understand the meaning of 'presumption of culpable mental state' one can consider the decisions under Section 35 of NDPS Act. In the case of *Abdul Rashid v State of Gujarat*, [AIR 2000 SC 821] the Court held:

The burden of proof cast on the accused under Section 35 can be discharged through different modes. One is that, he can rely on the materials available in the prosecution evidence. Next is, in addition to that he can elicit answers from prosecution witnesses through cross- examination to dispel any such doubt. He may also adduce other evidence when he is called upon to enter on his defence. In other words, if circumstances appearing in prosecution case or in the prosecution evidence are such as to give reasonable assurance to the court that appellant could not have had the knowledge or the required intention, the burden cast on him under Section 35 of the Act would stand discharged even if he has not adduced any other evidence of his own when he is called upon to enter on his defence.

Therefore by the interpretation of Section 35, Court has diluted the language of the of the Act namely proof beyond reasonable doubt. The Supreme Court by its interpretation provided condition under which accused can be discharged from burden of proof. Hence still the approach is innocence of accused is law of the land.

It was suggested that whenever you are throwing a 'statutory burden' a judge must be actively probing the accused to understand and find out whether accused has committed an offence or not.

It was discussed that the 'mental state' under Section 30 of the Act includes motive, knowledge, intention etc. and the language under Section 7, 9 and 11 uses the word 'sexual intention'. Therefore, conclusion can be drawn that so far as these Sections are concerned the presumption under Section 30 will apply. Moreover, so far as other provisions are concerned (e.g. Section 3, 5 and 9) Section 29 of the Act will apply which provided for reverse burden of proof i.e. If foundational facts are proved by prosecution then only burden shall shift to the accused.

Question raised was that "Can lawyer take plea of general exceptions under IPC when charged under the POCSO Act?" It was answered affirmatively by the citing the judgment; *Vinod Alais Dinesh v State of Himachal Pradesh* [(2016) (0) HP 893], Wherein accused was framed under the Section 76(f) and Section 506 of IPC and Section 6 of POCSO Act, and the plea of insanity was taken by the accused.

Session-6

Obligation for Reporting of Child Abuse under the POCSO Act

Speaker: Ms. Geeta Ramaseshan, Ms. Pritarani Jha

Chair: Mr. M.C. Rao

Ms. Geeta Ramaseshan commenced the session by pointing out some of objectives of mandatory reporting viz act of sexual abuse cannot be concealed and victimization of child needs to cease. She also pointed out some of the guidelines were inspired from the practices followed by different countries on mandatory reporting such as definitions as to who must report (teacher, family member, doctor etc.), consideration of the state of mind of the reporter, consideration of the extent of harm caused etc. However, the intention is remains the same as to provide the child right with protective legislative framework and punish the perpetrator. Unwarranted or false reporting was acknowledged to remain a problem area with mandatory reporting.

The Section 19 of POCSO Act which provides for mandatory reporting of offences was discussed, which states that “Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to either to the Special Juvenile Police Unit; or the local police.

The issue as to how does one defines the phrase ‘likely to be committed’ was raised. Other relevant provisions pointing towards the concept of mandatory reporting were also discussed such as:

- Section 19(7) of the Act, which provides that no person shall incur any liability, whether civil or criminal, when person report in good faith;
- Section 21 which says that if any person fails to make a report or record the information, shall be liable to be punished with imprisonment and
- Section 22 provides for false complaint and false information.

Complexities with the mandatory reporting such as: what should doctors or NGOs or activist do, when he/she while carrying out his/her professional duty and bound under professional ethics fail to report a case. Moreover, when parents of child do not want to report a case because of reasons such as apprehension of social stigma attached, fear of perpetrator, fear of police harassment during investigation or inadequate support etc. The conflict between *moral v. statutory responsibilities* was discussed as an area of perpetual concern which serves as a serious impediment in implementation of the provision of the Act. A serious debate on the contours and significance of the idea of mandatory reporting was felt as a area which needed legislative attention.

Issue regarding Section 16 of the POCSO Act, which provides that person who intentionally aid or do an act or omission in committing that offence, will amount to an abetment of an

offence was raised. It was argued that often in a typical case wherein an offence is committed by the father but the mother or other dependent family member is apprehensive to report the matter for some reasons as per the provision may attract serious penal consequences, which may not be just. Similarly under the Section 7 which provides that any kind of sexual touch would amount to an offence under the Act, may not justify a case of a love affair particularly where the parents don't like their relationship. Often under such a situation parents indiscriminately file police report under Section 19. It was underscored that there is a necessity to differentiate between the 'sexuality of young people' (between 16-18 year) and 'sexual violence' because the mandatory reporting under Section 19 should not be allowed in case of sexual relation between young people, which may be some day challenged as violative of their fundamental rights.

It was also discussed that since 'child marriage' has not been specifically dealt with under the Act therefore, if there is post marital sexual intercourse below the POCSO defined age to be considered as a child, then it would constitute the following inclusive list of violations of law under the POCSO Act:

- Against the couple, owing to their minority.
- POCSO being a gender neutral Act, what would be the mechanism to determine as to who must be treated 'victim' and whom to be charged as 'accused'?
- Any person including the parents, relatives, etc. who have such knowledge and may consent, may be held liable for not reporting under Section 19.

It was opined by one of the RPs that it should be a duty of professionals to report the matter even if family refuses to report the case. The RP exemplified and stated that we don't have system in place regarding the issue of mandatory reporting, RP gave the example wherein a 12 year girl was raped by her father but she threatened that if anybody report the matter she will commit suicide because she really loves his father. In such cases how does the system deal with? Hence there exists many complexities which serves as bottlenecks with regard to mandatory reporting which requires attention. It was suggested that the State must invariably arrange to provide shelter to the victims as an important measure whose family do not support for reporting so that victim themselves are motivated to come forward and report the matter.

She added that POCSO lays down for a whole set of guidelines and procedures to transform the police-child (victim) relationship and at the same times lays down some stringent provisions to ensure administrative accountability. Police is the public face of the State and how State protects, treats and enables the abused children is determinative, as to whether the Act succeeds in its transformatory vision of changing the way we see our children as autonomous beings with rights rather than dependents to be protected.

The issue of police not reporting a matter owing to corrupt practices and power influences was discussed. It was noted that there are very few cases where police is charged under Section 166A of IPC and Section 19 of POCSO Act. It was agreed that strict action should be taken against police officers on their failure to report or record a case, which has been provided under the Section 21 of the Act. It was advised that the police should assess the need for emergency medical intervention plus if required take the child to the nearest medical facility even though

it if the nearest facility is not a government hospital (it can be Private hospitals also). Therefore, the police are duty bound to give emergency care, protection and treatment to the victim, if they fail, they can be prosecuted under section 166 B of the IPC. Also, it was highlighted as a matter of fact that there is no need to register FIR first (Section 19(5), Rule 4(2)(b)(c) and Rule 5.) by the police before imparting such mandatory support to the victim child.

A few child friendly procedures to be followed by the police on mandatory recording were discussed, such as:

- Copy of FIR to be given free of cost to the complainant or the parent/guardian if they have made the complaint.
- Inform child/guardian/parents or the person in whom the child has trust that that the child has right to be assisted and represented by a lawyer of his choice (Rule 4(2)(f).) This right applies from before making the statement to Police till end of case.
- SJPU or the local police should ensure whether the child needs emergency medical care, under Sub-Section (5) of Section 19 of the Act or under these rules, arrange for the child to access such care. [Rule 4(2)(c)]
- Police should also inform the support services such as counselling as Rule 4(2) and help them access such services if so required or desired by the child.
- The report must be recorded in a simple language so that child can understand contents being recorded [Section 19(3)]
- In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same [Section 19(4)]
- Child's statement to be taken at the child's residence or at a place where the child is comfortable in presence of someone child trust usu. Parents or guardian (Section 24).
- Where the child is mentally and physically disabled the Magistrate or the police officer shall provide 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 [Section 26(3)]
- The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence [Section 26(1)]
- Duty to arrange Medical Examination, under Section 27(1) of POCSO Act and see section 164 A of CrPC, it has been provided that the SJPU/POLICE are duty-bound to take victim for medical examination within 24 hours of receiving the report –Medical examination must be conducted irrespective of the FIR or Complaint of the offence.

- Take the child to the hospital for the medical examination in accordance with Section 27 of the Act [Rule 4(2)(c)]and should also ensure that the samples collected for the purposes of the forensic tests are sent to the forensic laboratory at the earliest [Rule 4(2)(d)]

It was highlighted that Section 22 of the Act uses the word ‘solely’ which means that punishment for false compliant or false information under Sections 3, 5, 7 and 9, would only apply to the cases when there is intention to humiliate, extort or threaten or defame the accused and would not apply to any other cases.

Session-7

Child Pornography & POCSO Law

Speaker: Adv. Vakul Sharma, Ms. Vidya Reddy

Chair: M.C. Rao

Ms. Vidya Reddy commenced the session by saying that there is huge connection between child sexual abuse and digital technology as every foreigner who has been arrested for sexual violence always had some link with technology. Further, around 750 million Indian have access to mobile and 83% of them have access to internet, which unfortunately works as an enabler for the child trafficker to make a child pornography. The negative impact on pornography such as it will amount to distress and trauma to a child and also give the child a very distorted view of reality. Therefore, there is a need to make people aware of the negative impact of pornography. It was deliberated that here is an Australian web-site called as '*it's time we talk*', which is a project at the leading edge of international community-based efforts to address the harms associated with children's and young people's exposure to and consumption of pornography. In UK under the 'Personal safety and Health Education Act' it has been recently made mandatory to educate children on pornography.

While discussing the reasons behind the triggering of interest in child pornography it was learned that amongst others the following are the reasons:

- it increase accessibility
- easy to have possession
- non-commercial
- decreases the cost of production
- revolutionizes the distribution, sale and sexual abuse of children

Discussing the [ab]use and effects of child pornography when it joins hand with the menace posed by the internet, it was explained that it not only fuels abuse against the child, but is used to entice other children. Moreover, it was shown to help in rationalization of the illegal act, and extends to increase network of offenders.

- Pushes the boundaries such as 'operation Orgo' sting operation led the investigators who infiltrated the website running by the Richard Huckle on child sexual abuse, the unique feature of this website that in order to have access to the next level of website the consumer itself has to post an image of abusing a child.

The question raised by a participants was, as to why people are interested in child pornography, the RP replied by explaining that there are two types of people who promote the offence, they are: first are 'Pedospheres' means people who have sexual interest in pre-puberty children and second are 'opportunistic molester' mean people who have routine life but if they gets a opportunity molest the child. However, not all Pedospheres abuse the kids but all opportunistic abuse the children.

She added that there is strong connection between the people 'viewing child abuse images' and 'people who contacted child sexual abuse', a study done by 'US Postal Inspection Services' in

2001, wherein the study says that 35% who sexually abuse child also have indecent image of children and around 65% though watch pornography do not actually abuse children. Another study by the US government agency says that 79.6% of convicted child abuse offender had admitted that they had collection of child abuse images and videos before they started abusing the child. The concern the child pornography is a trans-national crime therefore very difficult to prosecute.

Attempt to establish a connection between child pornography, young people and internet which is encouraging de-sensitization among the people on issues regarding child pornography were discussed such as:

- online sexual conversation,
- games like ‘Rapelay’
- not understanding the acronyms used as internet language by the young generation (not understandable by the parents).
- Interest of young people being common all over the world pornographic image or such material get easily circulated on internet within no time.
- Leads to cyber bullying and suicide.
- Programme called ‘internet of things’ where somebody can easily access to your home through online therefore it raises a new dimension of security concern.

These were some of the things discussed. The exposure of child sexual abusive materials can have negative effect on the professionals. It was offered by the RP that judges and others can visit the website called ‘shiftwellness.net’ it provides psycho-education programmes to help expose professionals (including judges), to learn how to recognize and cope up with problems before they become severe or permanent.

Under the POCSO Act provision on child pornography are referred under Section 13, Section 14, and Section 15, and it can be correlated with the Section 67B of the Information and Technology Act, 2000 (hereinafter IT Act) especially while dealing with online or involves electronically enabled medium for the offence of child pornography. It was brought to the notice of the participants that, India has also acceded the UNCRC Optional Protocol on Child Pornography.

Advocate Vakul Sharma continued the session by raising the issue as to whether child pornography can be blocked? He said Section 67B of Information Technology Act 2000 (the first law that expressly prohibits online child pornography) provides various details or instances wherein IT can be misused for child pornography. The IT Act must be considered as an augmentation with the POCSO Act especially in those cases which fall under Section 11, 13 and 14 of POSCO Act. There are five instances where a person can be punished for child pornography:

- Publishing and transmission in any electronic form which depicts children engaged in sexually explicit acts or conduct [Section 67B(a)].
- Creating text or digital images, collecting, seeking, browsing, downloading, advertising, promoting [Section 67B(b)] e.g. exchange of child sexual images on *wats app* or *facebook*, looking at child pornographic material or site. The term ‘material’

used in the act would also include ‘pseudo-photographs i.e. image in cartoon or video, caricature etc.

- Cultivating, enticing, inducing children to online relationship i.e. grooming the children from the point of view of sexual harassment, sexual stalking, taking sexual harassment to a physical level. [Section 67B(c)]
- Facilitating abusing children online e.g. Rape game. [Section 67B(d)]
- Recording in any electronic form or abuse others pertaining to sexually explicit act. [Section 67B(e)]

Therefore the entire range of child sexual abuse would fall under the purview of clause (a) to (e) of Section 67B. Explaining the nature of the provision of Section 67B of the IT Act, it was highlighted that Section 67B(a) and 67B(e) are ‘generic’ in nature whereas Section 67B(b), 67B(c), and 67B(d) are ‘specific’ in nature. In other words it was shared by the RP that where direct application of the POCSO Act in child pornography cases cannot be made, IT Act must be referred with special reference to Sections 67B clauses (a) to (e). Moreover, it was highlighted that except Section 11 of the POCSO Act the punishment under the POCSO Act is more than 5 years. In the issues where jurisdiction may not be determinative by the POCSO Act help of Section 75 of the IT Act must be resorted to. Particularly when the origin or cause of action lies outside India. For the purposes of determination of the intermediary liability in the cases of child pornography under the POCSO Act, help may be taken from Section 2(1)(w) of the IT Act from where the definition of intermediary may be imported which is a vast and inclusive definition.

Discussing over the issue of limitations to regulate the child pornographic contents available on the internet through the intermediaries, it was argued that under Section 79 of the IT Act, liability of an intermediary cannot be fixed if they are a mere passive pipe line through which the information and the child pornographic material passes. The “Information Technology Intermediary Guidelines Rules 2011” was referred as an available mechanism due diligence and to fix privacy policies with the grievance officer assigned for the intermediaries. However, the immunity under Section 79(1) & (2) shall be lost by the intermediary under Sub Section (3) under two broad conditions:

- If even after a Court order the intermediary fails or refuses to remove or block such contents as ordered.
- The intermediary conspires, abets, induces or aids using threats or promise (under contract) commits such unlawful activity.

It was opined that the contents of child pornography cannot be blocked in its strict and technical sense, but can be temporarily or partially removed or disabled.

Bottlenecks:

- A simple step wherein the appropriate government or its agency such as Police should approach the department of telecommunication insisting it to direct its ISPs to block the illegal contents. But, till date neither Ministry of Home Affairs nor Ministry of

Women and Child has issued any list of website, to intermediaries for blocking the contents, which results in further delay.

- There are around 284 Internet service provider licensees in India and not all ISPs have competence to block the website.
- Often the Court's request to Computer Emergency Response Team (hereinafter CERT) to block the contents of a particular website etc. It must be known to them that although CERT used to have such powers from 2003-2010, but the current status is that these powers no longer exists with CERT.

Suggestions:

- Big Internet Service Providers (hereinafter ISP) such as telecom giants namely, Airtel, Videophone, Videocon, RPG group, BSNL & MTNL etc. have their "cable landing stations" which are the entry/exit gateway of contents to India. These are approximately 6 to 8 such big ISP players in India, the Govt. must put a check to these ISPs to stop/filter the entry at the threshold level itself. This could be one of the most effective way to block such child pornography related contents.
- Court should give order for blocking the entire website rather than just blocking the URLs because if one orders the blocking of one URL, within no time there will be hundreds of alternative URLs under different name and numbers generated to by-pass the block and carry the illegal content ready for access.
- A comparative between Section 67B of the IT Act and Section(s) 11, 13 & 15 of the POCSO Act reveals that Section 67B offers wider scope to deal with child pornography cases as compared to the relevant aforementioned Sections of the POCSO Act, hence the same must be considered as a good option.
- Ministry of Home Affairs or Ministry of Women and Child must immediately workout to issue a list of websites, to intermediaries for blocking the contents, without any further delay. Moreover, a continuous monitoring and updated list must be provided to control the menace.
- POCSO Act is silent on jurisdiction issues. Hence, invoking the Section 75 of IT Act appropriately (which provides for extra-territorial jurisdiction of crime committed i.e. publication, transmission or distribution of images and sending a material to computer network located in India by the accused irrespective of his nationality will be liable under the Act), the POCSO Court may, by applying the 'legal mutual assistance root' to ascertain jurisdiction over the outsider, (if he distributes or publishes any material using computer network located in India) order prompt and effective actions.

The Conference concluded with a program audit done by the participating judges.