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NATIONAL JUDICIAL ACADEMY



WORKSHOP TO ASSESS NATURE OF DIFFICULTIES FACED BY POCSO COURTS

24TH – 27TH SEPTEMBER, 2015

VERBATIM REPORT

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Programme Schedule

Programme Coordinator: Sumit Bhattacharya, Research Fellow
National Judicial Academy, Bhopal; Version: 24-09-2015, 06:30 AM

<p>DAY 1 24th Sept, 2015 (Thursd ay)</p>	<p>9:00 AM – 10:30 AM Session 1 <i>POCSO Act and its Implementation</i> status Speaker ✓ Mr. Asheem Srivastava</p>	<p>TEA BREAK</p>	<p>11:00 AM – 12:30 AM Session 2 <i>Forensic Science in absence of testimonial evidence</i> Speaker ✓ Ms. Nisha Menon</p>	<p>LUNCH BREAK</p>	<p>1:30PM – 2:30 PM Session 3 “Switching over” to deal with “Specific Jurisdiction” from “General Jurisdiction” Speaker ✓ Mr. Asheem Srivastava</p>	<p>TEA BREAK</p>	<p>3:00 PM – 4:30 PM PM Session 4 <i>Role of circumstantial evidence when victim is dead</i> Speaker ✓ Mr. Asheem Srivastava</p>	<p>4:30 PM – 5:00 PM <i>Library Reading & Computer Skills Training</i></p>	
<p>DAY 2 25th Sept, 2015 (Friday)</p>	<p>9:00 AM – 10:00 AM Session 5 <i>Contest on age of victim</i> Speaker ✓ Justice Indira Banerjee ✓ Prof. S.P.Shrivastava</p>	<p>TEA BREAK</p>	<p>10:30 AM – 11:30 AM Session 6 <i>Contest on age of accused</i> Speaker ✓ Justice Indira Banerjee ✓ Prof. S.P.Shrivastava</p>	<p>TEA BREAK</p>	<p>12:00PM – 1:00 PM Session 7 <i>Challenges when both victim & accused are child</i> Speaker ✓ Dr. Aruna Broota ✓ Justice Indira Banerjee</p>	<p>LUNCH BREAK</p>	<p>2:00 PM – 3:00 PM PM Session 8 <i>Dealing with Child Pornography Cases</i> Speaker ✓ Dr. Aruna Broota ✓ Justice Indira Banerjee</p>	<p>3:00 PM – 4:00 PM PM <i>Library Reading</i></p>	<p>4:00 PM – 5:00 PM <i>Computer Skills Training</i></p>

**WORKSHOP TO ASSESS NATURE OF DIFFICULTIES FACED BY POCSO COURTS [P-945]
24 – 27 SEPTEMBER, 2015**

Programme Schedule

Programme Coordinator: Sumit Bhattacharya, Research Fellow
National Judicial Academy, Bhopal; Version: 24-09-2015, 06:30 AM

<p>DAY 3 26th Sept, 2015 (Saturd ay)</p>	<p align="center">9:00 AM – 10:00 AM Session 9 <i>Media’s influence/ Pressure/Over reach v. Right to know for citizens</i> Speaker ✓ Justice Hema K ✓ Justice Gita Mittal</p>	<p align="center">10:30 AM –11:30 AM Session 10 <i>Obligation for reporting of cases of child abuse</i> Speaker ✓ Justice Gita Mittal ✓ Justice Hema K</p>	<p align="center">12:00PM – 1:00 PM Session 11 <i>Identifying the nature of challenges faced by POCSO Courts: Discussion</i> Speaker ✓ Justice Hema K. ✓ Justice Gita Mittal</p>	<p align="center">2:00 PM – 3:00 PM Session 12 <i>Presumption of “Culpable Mental State” & “Burden of Proof”</i> Speaker ✓ Justice Gita Mittal ✓ Justice Hema K.</p>	<p align="center">3:00 PM – 4:00 PM PM Library Reading</p>	<p align="center">4:00 PM – 5:00 PM <i>Computer Skills Training</i></p>
<p>DAY 4 27th Sept, 2015 (Sund ay)</p>	<p align="center">9:00 AM – 10:00 AM Session 13 <i>Recording of evidence of child</i> Speaker ✓ Justice Roshan Dalvi ✓ Justice Hema K. ✓ Dr. Manju Mehta</p>	<p align="center">10:30 AM –11:30 AM Session 14 <i>Bail in cases involving several accused</i> Speaker ✓ Justice Roshan Dalvi ✓ Justice Hema K.</p>	<p align="center">12:00PM – 1:00 PM Session 15 <i>Evaluation & Feedback</i> The National Judicial Academy</p>			

Session: 01: POCSO Act and its Implementation Status

Speaker: Mr. Asheem Srivastava

Day : 1

Prof. (Dr.) Geeta Oberoi:

Before even we start this program, I think the first important thing is that we all introduce ourselves to each other. So we start with you and then we all will introduce. So, Sir can we start with you, a a no no, please be seated you don't have to stand up at all, second thing is that, apart from telling us about your name, and from which district you are, which High Court jurisdiction, kindly also tell us that are you POCSO designated Court, are you working as POCSO designated Court, if yes, then from which year, which month and about how many cases are pending in your Court? This is like this kind of information, this kind of introduction we want. And also are you dealing exclusively with POCSO Court, or you have other general jurisdiction also? Thank you so much, yes!

Participant(s):

Thank you Ma'm, myself D.K. Garg, from Hamirpur, Uttar Pradesh, Allahabad High Court, I am the I ADJ in Hamirpur, so I am presiding over the Court of POSCO, being the I ADJ, in Allahabad High Court, the VIII ADJ, if there is the VIII ADJ, the presiding judge shall be the VIII ADJ, but where the VII ADJ is not there, the I ADJ is the presiding judge, I am having around 400 POSCO case, I am presiding this Courts from April, 2015 and I am having several...I can say several hundred Session trials, civil appeal, civil revisions and also Human Rights case and also others types of case so I am having round one and five....thousands case in my courts...thank you.

I am A.K. Singh, A.K. Singh, District Barsi, Allahabad High Court, I am senior most ADJ of that district and being senior most DJ I am trying the cases under POSCO Act, around May, 2000..., In my Court there are 100 cases are lying with....only 100 cases (Dr. Oberoi: 100 cases, and you are dealing exclusively or....) no no general court I am dealing in Sessions trials, accident appeals, do you deal in some specified day for hearing these POCSO cases or some specific time or any time?) no, no, Ma'm, all times, all days and all times. Madam we are running chiefly, the POSCO Courts at every time, bails are pending, aa 4 to 5 bails per day in

POSCO Court (Prof. S.P. Shrivastava: achacha what about remand?) Remand by us, (by only...) first, all the works of POSCO Act is done by the I Judge (post arrest all proceedings are done by you). Yes Sir, from the arrest of the accused to the conclusion of the trials and the chare sheets are also filed in our courts. (Dr. Oberoi: Okay!).

I am Malashree Mohanty, I am dealing with under the Guwahati High Court, and 29 POCSO cases are pending in my court and I am also deal with the district judge ummm POCSO court...and right now 29 cases are pending there in POCSO court..POCSO cases.

I am C. Sumalatha, working as I Additional Dist. & Sessions judge, Anathapur, Andhra Pradesh State, and my court is specially designated as a POCSO Court. So, on the file of my court there are 207 POCSO cases pending as on this day, so apart from being designated as a special court to deal with POCSO cases, my court is also designated to deal with electricity matters , NDPS cases and also Human Rights Court.

Dr. Oberoi: kindly switch-off your mobile phones please.

Yeah, I am Rajani from Andhra Pradesh, I am working as Metropolitan Sessions Judge, in Hyderabad, and I am holding a ...fist... court in charge, so I did not get into the statistics yet, I started disposing off the cases as soon as I got incharge of it, but approximately there will be around 200 cases, POCSO cases, and these two courts of which I am sitting as a presiding officer are burdened with several special enactments like NDPS, uh that...I mean this aa...this aa....Electricity Act...that....thats...this thing...that wa ...Act...several such special enactments, both the courts are designated for several special enactments. So, inspite of that I am trying my best to dispose off the cases...special, special, special, special...One thing that I am doing is that I am taking POCSO cases in the earliest possible hour. At 10:30 I commence trial so as not to make these victims wait for long in the Court or ...(Prof. Shrivastatva: What about the remand work?). Rmand work as per convenience, I don't deny, I don't refuse to take remands, but they are taking these remand prisoners to Magistrates also. So, what ever procedure is convenient we are adopting that not to send back the remand prisoners.

Good morning to all, my name is Moolchand Tyagi, Additional Dist. & Sessions Judge Baroda, and I am dealing with POSCO matters, ACV matters, Motor Accident claim matters, misc. appeals, regular first appeal, and Human Right Court and RTI Court, all these business with me, but as far as the other work is concerned, as on today there is 283 POSCO matters are pending in my court, and for other work, I have no time. I exclusively dealing with POSCO

matters as on today. And remands, bails etc. are dealt with me only..as far as the statement of the victim under Section 164 is concerned, that has to be recorded by the magistrate.

Myself K.J. Dasondi, Additional Dist. Judge, Godhra in Gujarat, I am working under the Gujarat High Court, I am nominated as the executive Court of the POSCO as well as the special court of the ECB and others civil matters also I'll dealing, I have also with the charge of aaa...administrative work as well as RTI work also I have to done. Moreover, I have to visited to the children's courts for the observations on and I have as a as a special court as a ECB cases I have in my court to, 150 cases for the POSCO cases, and in 85 cases as under trial.

I am Vandana Tendulkar from the State of Goa, my aa..., in our States position is little different I am a District Judge by designation but presently I am appointed as a president of the children's court for the State of Goa. There's a children's court in the State of Goa, which is functioning under the Goa Children's Act, 2003, from the year 2004. But there was no regular judge appointed for that court till the year 2014. I took charge of that court on 8th Sept, 2014 as a full time judge. Before that the district judge, the principal district judge of North Goa district used to go and sit in that court once a week on every Monday and all matters under Goa Children's' Act was dealt with. Now, the children's court is also deemed to be a special court of POCSO, so POCSO matters are also now coming to my court. I have 129n matters, which are under POCSO, but that is read with Children's' Act. I don't have pure POCSO matters...I have POCSO read with Children's' Act. Goa Children's Act. So, out of that 129 now, I think around aa, 43 to 44 matters are I find that those are of elopement, love affairs, that age group of victim in the age group of 16 to 18 and the...the accused in a age gap of around 3 to 4 years. Around those are 43 cases, remaining cases are genuine cases like, but under Goa Children's' Act the age of victim for rape matters is 16 years, whereas under POCSO it is 18, so that's why now Goa police are bringing those cases of sixt...earlier they used to bring only 16 years old victims he used to bring before the court, now because of POCSO, 16-18 those matters also started coming to me. So, now I completed one year in that court.and since I am exclusively I'm working as a special court under the Children's Act, I maintain all those guidelines all those things which are prescribed by the POCSO as well as Children's Act. So I don't deal with any other matters from last one year, from 8th September, 2014, exclusively these cases, yeah matters would be there pending for childrens total (Dr. Oberoi: Children's Act)...so total because total ...total I have pendency of around 448 cases, (Dr. Oberoi: okay) that is because there was no regular judge functioning for till I was appointed in the last year. There are 448 total cases out of which 129 are POCSO. (Dr. Oberoi: okay)!

(In Hindi) “Main Smt. Girija Devi Meravi, District Court Durg, aur Jila evam Satra Nyayadhesh ke pad par karyarat hoon, special board; court POCSO ki hai meri, aur rape cases ke liye bhi FTC ke antargat mera karya hai, total mila ke kul 500 cases mere paas hain jisme se 280 case POCSO se related hain aur remand vagairah ka kary main swayam dekhti hoon.”

Good morning, I myself Yogesh Pareek Additional Dist and Sessions Judge, Raigarh, Chattisgarh High Court 90 cases POCSO pending in my court, my court not exclusively POCSO court but all civil matters, other matters are pending.

Wannakkam!, I am Selva Sundari from Tamil Nadu, I have been posted as Mahila Court judge of Nagapattinam for the past 4 months back, so I have little experience...the mahila court is dealing with the offences against women, out of them 30 cases of POCSO Act are pending, out of them I aaa, disposed 5 cases..thank you.

I am Rajni Chadha, I am working as Junior Technical Expert with NCPCR.

Good Morning, I am Nidhi Sharma, I am Legal consultant with the NCPCR.

Good Morning, my name is J.B. Oli, I am Senior Technical Expert, National Commission for Protection of Child Rights.

Madam, I am from Karnataka, Mysore District, I am Vijay Kumar Pawale, aa I am having aaa, two charges VI Additional Dist. Judge, it is a special court for POCSO cases, as well as SC ST POA Act, and also I am having a general cases, Session cases, regular appeals, and also misc. appeals and I myself is receiving FIRs of both POCSO as well as SC/ST cases, remanding work every thing is doing, myself is doing I am having totally 700 cases all cases, out of them, 140 cases POCSO cases, charge sheeted cases, and other about 80 cases are in FIR stage. So long I have disposed off 3 POCSO cases, I am giving preference to dispose off the.. and recording the evidence of victims within 30 days as far as possible. I have disposed off 3 cases so long.

My name is Nirvan Khesong, I am working as ADJ Second Court Bankura West Bengal, so in my court there are almost 50 cases are pending, aaa 50% of that is under trial and I am the designated POCSO Court of that particular Dist., and in West Bengal all the Second Court, II ADJ Courts has been designated as POCSO Court in, West Bengal, so I am holding that. In addition to that I have to do all other Session Trial cases MACC cases and it's a regular ADJ

Court actually. So, in addition to that I have been designated as POCSO Court....so almost 50 , 52 cases are pending in my court, thank you.[15:34]

Good Morning!, myself Robin Phukan, Dist. and Sessions Judge Golaghat, a district under Guwahati High Court. Apart from dealing with regular cases I am dealing with POCSO cases, till date I have 88 cases, I am dealing with remand matters and also bail matters. Thank you.

Good Morning!, I am R.K. Patnaik, Dist. & Sessions Judge Bargarh, from the State of Orissa. Presently I donot have the statistics but the pendency position is approximately 200. Also, dealing with other regular cases, cases of Sessions aaa, ST, NDPS, etc. (Dr. Oberoi, How many POCSO cases are there with you at present?). 200. (Dr. Oberoi, 200!).

Good Morning! I am Pranita Mohanty, Principal Dist. & Sessions Judge, District Judge, Dhenkanal, under the HC of Orissa, apart from my other responsibility dealing with I am also dealing with POCSO cases since January 2013, in the capacity of Dist. & Sessions Judge of other Districts also, aaa presently I have a pendency of 230 cases which include cases ready for trial and which are awaited for charge-sheet or final form what ever may be. My court is a trial court as well as remand court. In Orissa, aaa no special designated courts for POCSO are there. All the 30 Principal Dist & Sessions judges has been designated to deal with POCSO cases only, only Dist. Judges. Approximately we dispose off 4 to 5 cases a month under the POCSO.

(In Hindi) Namaskaar!, Main Suresh Chandra Jaiswal, Hazaribagh, Jharkhand high Court ADJ- I ke roop me kaam karta hoon. Main POCSO ke alawa, NDPS, electricity, SC/ST, General Sessions cases deal karta hoon. Right to Information ki 1st appealate Court bhi hai, bail petition, anticipatory bail petitions bhi deal karta hoon. Aur remand jo hai ham hee karte hain, POCSO me hamare yahan, kareeb 43 cases pending hain abhi.

Good Moring everybody, I am Sanil Kumar, first Addl. District Judge, Kasargod, in Kerala, under the jurisdiction of Kerala High Court. I got appointment only on 16-07-2015. I took that on the Court from 16-07 onwards. There aaaaa is aaa designated POCSO Court, in addition to there are other works I had to do, aaa motor accident claims, tribunals, civil appeals and criminal appeals and other sessions, there are total of 550 cases apart from 400 and plus cases are related to POCSO, I used to do the remand work and I have to visit and aaaa observation homes and juvenile homes in addition to that I am the Chairman of the Legal Services Committee of Taluk. That's all.

Good Morning I am Nissar Ahammed,only Special Court for women and children established in our country, first established in January, 2013, in Cochin Kerala, I took charge in last April. It is the Special court for woman and children. Then dealing with POCSO cases, and children....and general and other all 302 and other matters where the victims are women and children. The total pendency is 400, the last months statics, out of which 126 are coming in POCSO case, and the first remand is being done by the local Magistrates. That's all thank you!

Good Morning, I am S.C. Pandey, ADJ – I Patna City, I you see dealing the cases POCSO and aaaaaaaaa SC/ST case, but now I am dealing only IPC case, and civil matters. But jurisdiction has been changed ...that is main. (Dr. Oberoi: So, you are not dealing with POCSO cases?unh....).

Good Morning! This is Vinod Yadav, I am from North-West district of Delhi, under Delhi High Court jurisdiction, I have exclusive Court, dealing exclusively with POCSO matters as well as the cases where the aaaa witnesses are children. Even if it is a case of murder, or what ever, if there is a child witness that case will be in my court. I have pendency of around 430 cases, and aaa there are about 80 cases which are pending investigation, remand work is being done by me only, and I normally dispose around 15 to 20 cases per month. (Dr. Oberoi: 430 cases are under POCSO Act...?). Haan, exclusively under POCSO barring aside aaaaaaaaa 10 or 11 cases are of murder where child victims aaaaaaaaa or child witnesses are there.

Very Good Morning! Myself Virender Singh, Dist. & Sessions Judge, Shimala, I am special judge under this POCSO Act, SC/ST Act, NDPS Act, and apart from these three Special Act, I am having the regular work, so far as the pendency under the POCSO Act is concerned I am having only 15 cases with me, the pending adjudication. Yes! Pendency is not a problem in our State. (Dr. Oberoi: It is not actually pendency, what I am looking into a broader picture, as to how many POCSO complaints are there in different jurisdictions they are pending?, So, in your Courts only 13?). 15....(Dr. Oberoi: 15....and then Guwahati its only 29?, see same....it seems like these two States are much more safer for children). We can say so....(Dr. Oberoi: Yeah haa..).

Not audible.....

Dr. Oberoi: A ahaaa...Please rember we are Indians and no Andhra, Karnataka, Goa over here, please...this is National Judicial Academy, please, .. I am seeing from different Courtwise like

aa, filing of FIRs, so don't say all these....yes, yes safety in the State we are saying, STATE, so you can't say like...yeah so don't, don't do all these ...please..in National Judicial Academy, don't, do all these yeah please, yeah....don't do all these things....

Participant: No, madam pardon me actually the pendency in my Court, as on today 283 as I told you, but it depends upon the custom. In Barroda district there is one Taluka Chota-Udaipur, where the custom is that the boy has to elope the girl for marriage. And if after elopement, the marriage is not settled then, POSCO case has to be registered and that custom has not been recognized under the Act. This is the hard fact. (Dr. Oberoi: Okay, okay, okay, okay!! Please don't become so sensitive, we are just discussing, thinking about the broader picture, yeah?).

Good Morning, myself Raghbir Singh from Delhi. I am presently posted there at Karkaduma Court, Delhi, East District. And though mine is a designated Court yet I am also dealing with general jurisdiction as well. Total pendency of the POCSO cases is about more than 150 or so. Thank you.

(In Hindi), *Main Prabha Sharma, District & Sessions Judge, Pali, Rajasthan High Court se belong karti hoon, aur mere yahan, 150 cases POCSO ke hain. Rajasthan me saare Principal District judges ke paas POCSO designated Court bhi hai. Aur regular work hai he, civil appeals hai, criminal aur revision hai, Session cases hain, civil cases hain, succession hain, probate hai, family dispute hai, ye additional hai he. To POCSO ke liye time bahut kam mil pata hai.*

Myself, Ramesh Meena, Principal district Judge Churu, Rajasthan, (In Hindi): meri court me 45 POCSO cases *hain, iske alawa*, Special Act me Electricity, SC/ST, NDPS, *aur* general case work, regular session cases, pending hain. POCSO ke liye week me ham 2 din kaaa... 2 din tay kiya hua hai. Mangal war aur Budwaar ko thankyou.

Dr.Oberoi: Is it following this practice of making days exclusively for POCSO, hearing POCSO cases? No?...Sorry??....Yes!.... earmark a day... a special day.

Not audible...

Good Mornig everybody, my name is Jyoti Kharka, I am from Sikkim, aaaa, under Sikkim High Court, aaaa, apart from my own work I am dealing POCSO cases in my Court, now aaaaa appx. 10 cases pending.

Good Morning, I am Lingeswaran from Tamil Nadu, under the High Court of Madras, my court is designated as a Special Court to for.aa.... exclusively to deal with that offences against

women...aaaa. I was appointed as a Sessions judge for that particular Court in the month of May, 2015. When I came to that Court, it was around 29 cases, POCSO cases were pending...I have disposed off 16 cases, 13 are pending as on date. I do all the remand work except, for recording 164 statements I do all the works regarding POCSO cases. Out of 16 cases which I disposed in 5 months, 10 cases have ended in acquittal 6 cases have been ended in aaaa. Convicted...conviction. (Dr. Oberoi: and in those 10 cases,if you don't mind....which has ended in acquittal, what was the nature? All the marriage.... The way they are telling....customary issues..) it is all you can think that...age group of the girls will be between 16 to 18...that is the reason, main reason, they turn hostile when they come to Court. (Dr. Oberoi: okay!...hostile!!)...that is the only reason!!!...(interaction between the participantsnot audible.....) And they cause much trouble also. When, when aaa, when, in one case I dealt with that case...aaaa that is still pending...aaaa. A girl of age 17 eloped with the boy, the mother gave a complaint, the boy, the boy and the girl was secured...the case was pending for trial I fixed next date for trial and one day prior to tha date of trial, thee complainant writes a letter to me aaaa making an allegation, that the boy...the girl has again eloped with thee..that boy, and she was actually kept in some other place for security by the parents and she escaped from there...again a girl missing complaint was registered here and thereafter, she writes a letter to me saying that the complainant threatens her...I mean the mother..her own mother threatens her, and she needs security and all these things she makes so many allegations and she comes to depose and she came before me and she gave evidence and thereafter what happened after I giving evidence after 2-3 days after when the case was adjourned again this girl got eloped, again a second case was filed against the boy. Again and again repeatedly this is happening, even during the pendency of the case before...that's right. (Dr. beroi: yes!!) (Prof. S.P. Shrivastava; complex situations.)

Good Morning! I am Sanjeeb Kumar Majumdar, under this aaaaa. Additional District and Sessions Judge, under High Court of Tripura, I am...my court is not a designated court, I am dealing with regular Sessions, with regular cases, aa, civil appeal, motor accident cases..aaaa....compensation cases,LA cases... but in our State only the District & Sessions Judge dealing with the POCSO cases. [29:24]So, there, I know the information there are aaaaa, in our Dist. In ...pur district, is a big district, only the big district.., aaaaa, around 70 to 75 cases under the POCSO aaaaa Act. In other....aaaa...there are three other judicial districts there only 5 to 10 cases pending aaaa our State the very small State. Thank you.

Good Morning, Dinesh, myself Dinesh Kumar, aaaaa presently posted at Ludhiana, under the jurisdiction of Punjab & Haryana High Court. My court is regular court, I am not holding the POCSO trial, aaa, right now. I am dealing with the civil matters, criminal matters, NDPS, MACT, but I am not holding the POCSO trial. (Dr. Oberoi: But there are in your Punjab and Haryana, there must be designated....) There are the designated courts and exclusively designated courts (Dr. Oberoi: okay!) in each district...(Dr. Oberoi: okay!!...may be they are thinking of giving you additional work, so they sent you...)...I think that this will help me in future (giggles) (Dr. Oberoi: yes, yes!) definitely...thankyou (Dr. Oberoi: yes, yes! It seems so, yeah!).

Good Morning! I am Satish D. Jagtap, from Jaisingpur, Taluka Jaisingpur, District Kolhapur, Maharashtra, Bombay High Court. In my Court it have only 4 cases pending now. I am dealing with all other cases...thankyou.

Good Morning Ma'm, everybody, I am D P S Gour, from 2nd Additional Dist. Judge Shivpuri, M.P. High Court, I am I am my court is not designated as POCSO, my DJ transfers cases on ...I aaaaa, what?.....which are pending 2 or 3 cases only...I think, I have not exactly totals that...ennn, basically I..aaaaa, my court is special specially empowered under rape, gang rape cases, that's all, thankyou.

(In Hindi) Namaskar! Main Thakurdas, 2nd ADJ, Shivpur M.P. Mere paas POSCO, special court, NDPS, aaaaa, aur claim, civil appeal, criminal appeal, special electricity board, ko milakar 2000 se upar cases hain mere paas, NDPS me 12 aur POSCO me lagbhag 10 cases hain, thank you.

(In Hindi, D P S Gour): Ek cheez main kehna chahunga Ma'm, Main Shivpuri me hun main 2nd ADJ, 3500 cases are pending in my court. My Court is mixed Court, in which, civil appeals, suits claims, ST and other Electricity Acts, rape cases, sab kuch hai every thing.

I am Additional District judge, Keshari Nandan Gupta, from Gopalganj, Bihar, under Patna High Court, I dealing with the special court as POCSO along with the other general Session, civil, and others MACT, and NDPS matters also, 29 courts, 29 cases of the POSCO in my court pending. I have disposed about 15 case and 5 case resulting into conviction and every thing acquit.

(Dr. Oberoi: Thank you so much for all this introduction, its beenreally helpful to understand the ground realities, of course, I am Geeta Oberoi, Professor, National Judicial Academy and

at present also, holding charge of Director. Aaaa...Now I would like you ... my other panelist to introduce them self.)

Aaaa. Good Morning everybody, I am Asheem Shrivastav, and I am the Member Secretary of National Commission for Protection of Child Rights. This the eeehhh Commissions that is mandated with the responsibility of ensuring all rights of the children and monitoring the response... monitoring the implementation of the POCSO Act aaa, is one of those responsibilities.

Good Morning!, I am Nisha Menon, I am a forensic expert, and have been practicing since last 15 years. And apart from the forensic designation, I also Masters in Psychology, and have been ...dealing with these type of cases with the psychological aspect, wherein a rapport building and interview techniques we apply and these child victims, and we get hold of the evidences and take detail history and the abuses which had been taking place with these child victims and we also work in tandem with the police officials, for training these police officials in taking the samples, collecting the samples. How it needs to be preserved and taken care of forensic analysis and sent to the Govt. Forensic Laboratories, further for sample analysis.

Good Morning! I am S.P. Shrivastava, working here as Professor. Earlier I was aaaa in Judicial Services, I was District judge at Allahabad, and posted at...I have come here and working here as Professor.

Good Morning! I am Sumit Bhattacharya. I am a Research Fellow with the National Judicial Academy and I am also very fortunate to hold this conference as a program coordinator. As this is a workshop, we are really going to work out a lot of things out over here. To the pleasant surprise, while briefing I could aaa, make a rough calculation that within this group of 35 odd people around, it seems that there are 3800+ cases which are pending ...of POCSO....aaa from their data what we could collect....so, lets expect these 4 days to be really herculean and gathering lot of knowledge. Thank you very much.

Dr. Oberoi: Now I will ask...a.aaa. Mr. Asheem Shrivastav, you will make presentation...also, you have Prof. S.P. Shrivastava, and Sumit Bhattacharya, who is program coordinator for this conference, all these 4 days with you. Any issues there that you have, with respect to your stay or anything that you require for your additional reading, any research work that you would like to make, jointly with....you can do that work with the Sumit, and any aaa, all difficulties, that all can be presented, in fact each one you have is a aaaa huge aaa, repository of knowledge

which you can exchange with each other and also with our aaaa faculty Prof. Shrivastava and Sumit Bhattacharya. [37:15]

Asheem Shrivastava: Okay, aaaa, once again Good Morning, Wanakkam, Sasriakaal, Namastey every thing together,...aaa. You know two things which I could understand from the initial round of introduction, is that there is aaaa...that the courts are not the special courts. That's my understanding, I am not a lawyer. And the purpose, of this Act, which says protection of children, you know, the Act was not given the title of... "Dealing with the cases of children", it means protection means, we have to take some proactive measures, to ensure that the sexual abuse of children or sexual assaults on the children, is is, proactively controlled, in other words. Aaaaam.. most of you have mentioned that you are holding additional charge additional responsibility, the Act also says that, where ever the children's court exists, the same should be designated as special court. I get the impression that the same is the fate, of the children's court also. Age, yes aaaa some body mentioned about the problem of age between 16 and 18, aaa I think that is one issue aaaaa, which is a concern for each one of us not only as judges, but as human beings and citizens of this country, and this this needs to be dealt with very very carefully. Many of you mentioned about the elopement cases. And in particular Delhi, a large number of cases are of elopement and there is a general impression that the aaa, POCSO Act, is not very effective, and the accused is being let off because of the elopement issues. However, not taking into consideration that it is not about elopement, its about sexual assault, its about pornography, I haven't heard anything about pornography! I also, did not notice, anything about sexual assault on male child. Does it mean, does it mean that the male children are not being abused? (murmuring sound: from participants) may be ...okay ..good..and lastly, what I could understand was that, aaa there is very little aaaaaa, weight age given to the medical and forensic evidence. Possibly because these are all elopement cases and the oral evidence is given more weightage *viz a viz* medical and forensic examination. I will....in my presentation, I would like to highlight certain things about the Act, you are all luminaries, you know the law, and there will be many other speakers who will be discussing the nitty-gritty's of the Acts, and I am not the right person to do that in fact. But I would like to again reiterate a few things as to why, and this law was enacted, because the existing law was not enough to address sexual offences committed against the children, that was one reason. The second and more important was that there was no specific provision, for laws dealing with for the sexual abuse of male children. And we have another international obligation, and that obligation is that all the State parties (and India is one of the signatories to the UNCRC) and

according to that the nation the signatory state, is duty bound, to take to appropriate national, bilateral and multilateral measures to prevent, inducement or coercion of a child to engage in any unlawful sexual activity. The exploitative use of children in prostitution. The exploitative use of children in pornographic materials and performances. So, its not ... the Act is not only limited to the cases of elopement or rape cases or allegations. Some of the salient features, there are new offences, aggravated assaults, penetrative aggravated assaults and all these terms have been defined. So, it's a very aaaa detailed definition of or aaa conceptualization of various aaammm acts which are being committed by the society, these all considered as heinous crimes. Special Procedures have been laid down, for recording of complaint, statements & evidence. There is for "Mandatory Reporting" every individual most of the organizations, hospitals, police officials, every body is supposed to report not only the commission of offence but also the anticipation in case there is , you feel that there ...an offence is going to be committed. And that must be reported and it's a it's a very serious matter, we we have never come across such a situation where the offence has been reported aaaa before the commission. Monitoring by NCPCR (The National Commission for Protection of Child Rights) and the State commissions and the provision for "Compensation". New offences, I think you are all aware of this, I will skip this slide. "Special Courts", I would like to highlight a few things here. The purpose of having a Special Court is to go for "Speedy trial", if the ...we have ...still have pendency, it means that the purpose of having the Special Court is getting defeated. It also means, increasing the trauma of the victim. And not only the victim, the parents and others aswell. Special Court may take cognizance of any offence, without the accused (its not only that the police officer, aaaa when ever they, they aaa inform the court then only the court will take cognizance it can be otherwise also.) without the accused being committed to it for trial, upon receiving aaaaa complaint of facts which constitute such offence or upon a police report of such facts. Are there any cases, where the court has taken cognizance without the police reporting the matter? The SJPU or the Juvenile Welfare Officer of the Police Officer is the key here, who can make or mar the case...I'll show you in the next slide...is a very very crucial person, and our understanding is that the SJPU only exists on paper. Is that right? (assertive murmur from the participants)... good, so that's the fifth preferably the assessment that we get, and that's the purpose of the exercise you know it says the workshop to assess the nature of difficulties faced by the POCSO Courts, we want to understand from you all, and therefore I would request you to be very open, transparent, honest, in giving your comments so that, we understand what is going wrong and if there is something is going wrong, let us propose for the necessary amendments in the law. Coming back as I said, SJPU holds the key. Evidence of the child has

to be recorded within a period of thirty days of the Special Court taking cognizance of the offence. That is the purpose of having speedy trial. The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence. There are cases, thousands of cases which were registered in 2013 after the enactment of this Act, are still pending. Lets see I am sure, you cant see all these things, so I will read it out for you. As I said the SJPU or the police officer, the “IO” is the...is holds th key.. to the whole case. FIR or no FIR the primary responsibility is (in the case of a genuine sexual assault) the IO is supposed to take the victim to the hospital for medical examination and medical treatment. FIR will come subsequently, its not necessary. But that does not happen I’ll show you later on. Aaaaa theeee the IO is also responsible to produce a victim before the “Child Welfare Committee”, in 24 hrs. he is also responsible to provide support person. CWC, once you take up the trial it is the responsibility of the “Child Welfare Committee” to ensure that a support person is provided and the the support person is to inform the victim and update him on the process of investigation, judicial procedure, case proceedings and potential outcome. I think the intention of introducing all these provisions was to ensure that the poor people and majority of the cases we will find that there the people who are really poor who come for support to the police or to the CWC are the otherwise rich people can always hire the good lawyers and take up their cases. But, this is meant to provide relief and succour and advice to the poor people, and that’s why there is a provision of support in the Act itself. So, SJPU going to CWC and CWC providing the support person. Secondly, SJPU is supposed to inform, the Special Court and update the Court on all developments, to inform the victim about counselling services, case development and progress of investigation. It is not the support person it is the SJPU the IO is responsible for informing about the legalities about the court, about the proceedings about the investigation. SJPU to inform parent/guardian: and their Right to be represented by a lawyer; and also about the Victim compensation scheme. We receive lot many complaint were the victims are not being prayed the compensation, though the compensation may not be really important, but sometimes for the poor people it does means a lot, where you have to treat the child and for other purposes. SJPU to facilitate “Emergency Medical Care”, and the words used is emergency medical. Consent of Victim and Parent/Guardian or Trustee person is a must. Doctor to collect Forensic Evidence simultaneously. Most of the doctors they are not resorting to this practice of collecting the forensic examination aaa evidence, delaying the whole process, and because of the delay the evidence is lost or destroyed. If required, provide for counseling. So, that’s why I say SJPU, police officer needs to be highly highly trained professional and sensitive to deal with the issues and as soon as the complaint comes,

the moment the officer comes to know that this is a genuine case he or she is supposed to assist in all possible ways. "Failure to Report", okay we can skip this slide, it's about the punitive action in case the person who knows about the case. "False Complaints" again to protect unnecessary allegations. I will now highlight something very important very crucial, see the National crime Record Bureau, has prepared the list of rape cases against children from 2001 to 2011, and there are 48, 500 roughly cases, which were registered in all these ten years, though, statistically if you look at it , it looks that yes, it is increasing, I am not very sure, whether it is increasing? In this country today, 1000-s of cases are not being registered. All child marriage cases are offence under the POCSO Act. All child marriage cases. and I am not sure which court has taken cognizance *suo moto* or by the complaint generated by the society, by the individual? Again there is a reason, you mentioned that there is tribal culture...its an issue which needs to be aaaa debated. Whether we want the child marriage or we want the healthy individual? If the practice of child marriage continues...what will be impact on the child, [52:45] how are you treating the child? I'll show you one slide about that also. But, we have the data we collected from the States recently, and barring one or two States, I mean they are major ones, Madhya Pradesh is one amongst them, we don't have the data from Madhya Pradesh and Tamil Nadu, also. Between 2013 and March 2015, you see 40,000 cases have been registered under POCSO. Ten years and these two years what does it indicate? Yes certainly yes, there is more awareness, more sensitivity, no doubt about it....but, aaaa does it mean that the earlier rape cases, or sexual assault cases were not happening? Or pornography, the children were.....they were not reported earlier!....but do you think that they are being honestly reported today? No... that's our impression also. Sorry, say it again....there is a provision of punitive action against those people. Aaahm..yeah!, Some of the States which show very high number of cases, 9182 Uttar Pradesh, Rajasthan 4959, Odisha 2790Maharashtra 6861 , Kerala 2818 Karnataka1522, Haryana 2096 aaaahm, Punjab of-course is pretty low, but let's not draw any conclusion on the basis of number today as we all know most often the cases are not being registered. Aahhhhm lets see the status of Special Courts. We have 665 Districts, 604 Special Courts, on paper. You all know that you are all overburdened, its not your fault. There's one aspect of sensitivity, the other aspect is that Special Court means that it is dedicated Court. Theoretically on paper, things are under control. Disposal of cases: This is of-course, aaa, ammmh empirical data and we don't have the recent statistics, but, whatever we have received from the State Govts, it aaaaaa doesn't give us a very healthy picture, as far as conviction is concerned. The conviction is very very poor. And, I think next, next four days we need to discuss as to why conviction is so low? What are...what is it which is impeding the aaahh..

decision making process. Alarming rise in child abuse 236% jumping child rape cases, this is basically based on aaaahhm.... The NCRB figure. We will come out with our document once we analyze, the cases that we have received aaaahhh from the State Governments. One in four cases....but these are some of the things that we need to highlight here we need to understand and appreciate also, 1 in 4 cases of child rape involve girl younger than 16 years; 25%. 90 % victims under 12 years are raped by family member and close relatives and friends. This, I don't know, because our assessment and I have also another assessment of Maharashtra, were one organization called "Raahat" has analyzed around 400 odd cases and their assessment and our assessment, we have recently, we are analyzing the complaints that we have received which are registered and on the basis of the documents, our assessment is somewhat different from the assessment which is made here where 90% of the victims are under, they are they are raped by the family members. 87 % children were repeatedly abused. Is it the child marriage?.... which is one of the important factors and if yes do we need to do something about it?.....yes! Madam there is a child Marriage, we have so many Acts in this country, what about the implementation? And not only the implementation, part, ummmhhhhh as my friend over there pointed out it's a socio-cultural issue. There are certain things which people believe, See in early, 1990 the accepted age for the girl for marriage was 10 years, it was enhanced to 12 years and when the Angrez came they enhanced it to 14 years, (Hindi) hamne usko 18 to 21 kiyaa. However, the ...I'll show you the statistics, the child marriage is rampant, rampant, rampant in this country. We need to change this, I don't think the judiciary alone or police alone or registration of cases alone will solve this issues, but, you can definitely contribute while writing the judgement. So that the message goes across the society, and there your role will be very crucial. There are many you know in Haryana what happened? There was...Yes! Khap panchayat....the point is that we'll have to change the mind-set of the society. You cannot use the girl child...ahh..... to satisfy the male ego. The world is changing and where are we....i mean we are still bogged down with the 19th century issues. People, US is thinking of going to aahhhh.....moon and sun & aaaahhhh Uranus & Pluto, and we are still 200 years behind , our thinking is still the same.How do you expect these girl children to come up and come out in the society and become good citizen, good scientist, good sports persons, if you are getting them married at the age of 12 years or 14 years? [1:00:10] (In Hindi) *Sahab main aapse ye keh raha hoon ki ye aapki aur meri responsibility hey*, we're all guilty of neglect, we're all guilty of being insensitive. You are in a position to influence the society, I am in a position to influence the society every one of us. Why don't we do that? (not audible) ... (participant: what process is to be adopted later on after receiving the) you have to register this as a

complaint.... (not audible)...(that's we are trying to understand)... I have I have quoted this, the yellow highlighted portion from National Geographic. There is a beautiful article, I don't remember which one, I can I can share that, let me take it out, but this is this is maybe one of the year that means that...(not audible!) (Participant: how the person will come to the court for divorce? This is not a case of legal marriage...) I don't know, we need to go to the details of the case where my but this has been quoted and if a magazine like National Geographic, they must not have quoted this out of blue, they must have taken this reference from some judgement or somewhere else...(not audible) Yes! this is very common, they say that the marriage is not what it is void ...murmuring its void yeah! Right! So there is being ... (noise & cross talks)...you cannot take divorce, divorce will not be granted. (cross talks by participants). Do they? Do they grant? (..Participant: they can!)...no but has the court granted?...How many in how many such cases the divorce has been granted..(Prof. Shrivastava: See Decree of annulment will be there...there will be decree of annulment. there will be decree of annulment but not the divorce. I think, there will be decree of annulment...right, there will)

(In Hindi) *Achcha, main aapko yeh.....* I'll (3) readout something else also for you. Aaaahh, in rural Karnataka in January 2013 a young girl on her way back from school on bicycle, (though its not directly related with marriage) but then she aaaaa was gang-raped and thrown into a well she was saved by passerby and who noticed her struggling for live there after the entire village, has stop sending girls to school outside the village, these girls will soon be married off despite a law in place which stipulates the minimum age of marriage as 18. This is something very very common. Parents feel, (in Hindi) *ladki ko 8th class tak pada do, uske baad shaadi kar do*. Where shall the villagers find across the country (in Hindi) *uskebaad door nahi bhejna door bhejengey, to kisi ladke ke saath affair ho gaya, chali gayee outside the caste marriage kar lee*, (Participants amongst themselves: yah! Its changed) *abhi nahi hai?* Okay!!, but this has been quoted January 2013 case (cross talks amongst the participants! Not clearly audible) *karaa rahen hain* , I think I think that's a very very positive sign and I hope the other villages also adopt such practices, the sooner they adopted the better it will be, for the society. This is a figure which is quoted by registrar general of census 2011. (In Hindi) 10 to 14 years age group *may yeh saare States may jo log married hain*, this is a statistics. Lakhs of people, U.P. five hundred thousand. (In Hindi) *Paanch laak log Uttar Pradesh me hain, Maharashtra may 3.5 lakhs*. What happens to these people?, I mean, just imagine, they start bearing children at the age of 14. Health, look at their health, I mean gentlemen our health statistics are very poor. (Participant: Sir, I just want to ask one question, if this data is available with the

government, then why government is not taking the action for implementation of Act, why the burden lies over the Courts?) No no, it has nothing to do with the Court, I am just trying to sensitize you, it has nothing to do with the court and yes it is definitely the responsibility of the government and the officials who are dealing with it, but there is no denying this fact but it is not an aspersion on the court and it is only for the sake of understanding that we must be sensitive about it. (In Hindi) *mera purpose yahan pe usko is liye nahi that ke aap usko nahi le rahan hain to isliye yahan par ye ho raha hai*...not at all. I will now share with you, the analysis that we have done, we have registered around 500`odd complaints after the enactment of POCSO Act, and we analyse this 200 odd cases after that, aaahh, majority of the cases were from U.P. 162, from other regions, mainly U.P. because we received being...because of the aaaaa... yes! large State and proximity to Delhi, we receive large number of complaints from the State of U P, but that doesn't mean that it is not happening in other States and, we receive 28 complaints in 2012; 100 – 2013 [1:06:24] which were being analyzed and I'll show you some of the analysis results. Location of the offence, victims home and offenders home: 48 & 51; farmland 50 percent; the purpose of this analysis is, to prepare some sort of dossier, which will help the parents and the children. So, I am thinking if you can come out with some analysis which can help in devising some protective, sort of safe hand book for the parents, teachers and other well-wishers. So, first understanding is that most of the sexual assault cases are happening, either in the home of the accused and the farm land. Age of the victim and here the Maharashtra, analysis also agrees with this age of victim is 12 to 17 years. The susceptible or vulnerable age-group is between 11 to (in Hindi) *yeh dekhiye aap* 74 to 72 cases are 74 cases are between 12 to 14 years age-group and 15 to 17years, 72 cases. So,(in Hindi) *uske niche jo hain,cases hain*, but they are aaaa still not I won't say serious, but these are some of the issues which need to be taken into consideration. Relationship between the offender and the victim, acquaintances they stand on top. 53 % cases the accused were not very well known but known. If you club acquaintances with neighborhood, 57 ...53 % + 17 % that come to nearly 70 % + So, one has to be, (in Hindi) *aur abhi jo maine aap ko bataya, jo NCRB ke report me maine kaha tha* it is the parents this analysis which is based on the evidence and the data which is available with us, and aaa similarly the report of "Rahat" I was reading it yesterday and this also says so. I'll leave a copy and you can distribute it to every body and this is a very good analysis and infact and each one of you can go through that. It'll tell you a lot about what is happening in Maharashtra. Aaaaaa, if you club these two together, so we need to be cautious with the acquaintances. People you know approached us, who register their complaints, most of them were sorry, ... the immediate family members and complaints and some *suo moto*

complaints self...10 complaints are self-generated and public spirited persons 5, so all across but the majority of them are family members, so family members are taking I mean they are now getting more and more conscious about these issues, and many of these complaints are against the police officials and their inactions.

Offenders Age: majority of them are adult 200 (In Hindi) *Saat sirf offenders inme minor the majority were adults, obviously.*

Problems faced by the victim during investigation: This is again something interesting.

Insistence by Police: That the victim should be brought to police station for FIR where is it written that the victim has to come to aaaa? But (In Hindi) *main aapki complaint register nahi karoonga*, and that's why people approach us. People approach State Commissions, people approach higher authorities, they start sending complaints to President of India, Prime Minister, Home Secretary, (In Hindi) *Falaan falaan*, because, (and most of these complaints are against the police) Police take the victim to the site of offence before registering FIR or in medical examination, where is it written in the law that the victim has to be taken to the site of offence? The first thing that the police is supposed to do, in case of genuine offence, they have to go for the medical treatment, FIR will come subsequently; or if you can do these two things simultaneously. But where is the need for taking the victim child to the site of an offence? and increasing the trauma of the child. Victim needs to repeat the details incident several times.

Delayed filing of charge-sheet by Police result in bail to accused. Does that happen? You all agree to that. Good!

Delayed filing of charge sheet sorry! Victim and accused are taken for medical examination in the same vehicle : Police may say that they don't have the vehicle, if you ask the aammm the IO, he'll say (In Hindi) *Saahab mere paas gadi he nahi hai, main kya karoon, Sarkar ne mujhe dee nahee to main isi me le kay jaungaa?* But, is that the right approach? Imagine the child of 10 years who has been raped, brutalized, beaten, and he is sitting in from or together with the accused, who is a known criminal. (In Hindi) *Woa kahaan jayega?* And who comes from the poor strata of the society. Imagine that situation!

Delay in serving summons to victim for deposition in court: (In Hindi) *victim ko batayenge nahi last day me bataayenge, victim aayega nahi...aayega to confused rahega...*The victim doesn't know what is court, the moment you step inside the court room you imagine the situation of a child!

Police fails to inform CWC:

Medical Examination Issues:

Victim is made to wait for a long time. If we have hundred two degree temperature and we are going to doctor for medical assistance; if we have a toothache we want to attend this as soon as possible, in here; the doctor is making the child victim to stand and wait.

Doctors are rude and impatient with victim and family.

Victim is not explained about the medical procedure or consent

Some doctors fail to report the matter to police in case victim directly approaches the medical for medical support: Again the doctor is at fault; he can be taken action under the Act.

Medical Examination is conducted in the Labour Ward open (In Hindi) *ek chote se bachche ka*, you know how the labor wards are!

Forensic evidence not collected at the time of medical examination: I have mentioned earlier and the impact of it. So, there is, if these are the issues, there is probably in every attempt to protect the accused, and not help the victim.

Some of the comments made by the Judges:

- In the absence of victim's statement, the case could not be proved beyond reasonable doubt.
- Case not proved in the absence of documentary evidence of victim's age. This is one of the major issues not only for the cases of sexual assaults, but also for trafficking, for education and everything.
- The IO did not collect the evidence properly. If he has, he or she had not collected the evidence properly, why was he or she not charge-sheeted? At least, by the department, there should be departmental enquiry against that IO.
- In several cases Judges did not comment on the failure to conduct medical examination. Medical examination and forensic examination in case of child victim is extremely crucial and is the best evidence. What happens, if the child is deaf & dumb? Will you still go for the oral examination? If 100% victims are dumb, what happens? Or they are especially abled, imagine a situation, what is the evidence you would rely upon? Medical and forensic? My my humble humble request to all of you is that, when you go back, please start relying on the evidence the forensic and medical examination.

That's my ...if you can do that, then this will be the greatest contribution that you can do to the children of this nation. (in Hindi) *aapko, sabko, hamko pata hai kaise, evidence liya jaata hai, oral evidence, kaise jo victim se...*they change their evidence, everybody knows that. Why not rely upon the forensic examination and the medical examinations, solely? (Participant: Sir then the Evidence Act has to be changed). Please suggest that.... Please suggest that... if if that is...see, otherwise if the Act is getting defeated, it is not serving...(In Hindi) *Hum usko 15 saal ke baad we will change the Act then.* (Participant: As judges we have to see the Evidence Act only, and our precedents). Let us, debate it here, but at least start giving weightage [1:16:51] (In Hindi) *poocheeye to sahi police se, medical report kahaan hai?*, call the doctor, ask him, why the examinations were not done, why the forensic evidences were not collected? Let them appear in the court and say, (In Hindi) *humne kyon nahi collect kiya ya galat khyun??* There is a laid down procedure for collecting the forensic evidence. And most of them are now police officers...(Participant asks something...not audible)...I think my friend over there she will..(Participant: not clearly audible....in many cases they want to settle the cases in the village committee, village meeting and all that, in the process they take two three days, after two three days when the victim is produced before the medical officer, obviously the forensic evidence will not be there, that is a very...and another difficulty is if the FIR comes within the 24 hours only, and not the accused is produced, in that case it is very difficult on the part of the court to insist that whether the medical examination is done or not. If the accused is produced in the court along with the FIR in that case we insist that where is the medical report of the victim and the accused? If the accused is absconding then we send the) that's really nice on your part (Participant: apart from this let me tell you, in cases where medical evidence is not referred also they are subject to the victims to medical examination...audio not clear) there is a element of consent also, that's a different....my understanding is (correct me if I am wrong) that the science has advanced today, and I don't think that an accused can go scot free if the evidence is collected properly by the IO, by the doctor. Even if it is delayed, by a week or so, (am I right) the science is so much advanced today (In Hindi) *kahee pen ahi ja sakta, koi bhi nahi ja sakta* you always leave your signature; every person leaves his or her signature (In Hindi) *kahin naa kahin pe ham log karte hain* . Okay! (Participant: cross talks...actually the victim herself is not decisive, they decide in many cases) In all cases? (Professor Shrivastava: But even then if there are circumstances coupled with

forensic evidences, we can put out these evidences....) Okay!, my question in that case will be, if somebody pays the victim, and they turn hostile, and you know very well, I mean you are all experienced people, you are all luminaries, before the case comes to you, whether it is a genuine case or it is a falsification, in case the victim turns hostile under the pressure of his or her society, parents, family members, many other things, will it be appropriate still to give an adverse judgment? Even if the victim is hostile, what is the worst that is going to happen, based on the evidence, I am saying if the basic evidence is the forensic as well as the medical evidence, clearly proves that this is a case of assault, it's a clear a case of assault, however, the victim turns hostile, and you know very well, on the basis of the forensic and the medical report would you take the decision? [1:22:00] against the accused, what is... the accused, that is what I am saying that the accused, there is a irrefutable evidence (Prof. Shrivastava: *Nahi*, where is that evidence, the question is where is that evidence, irrefutable evidence you are referring to, where is that...forensic will prove that some incidence has taken place, but the question is that who has done it?) ok ok let me put it, ok (If DNA is there then it can be proved) okay which which means which means,(Prof. Shrivastava: but I think he is fine we can we can just try to understand that sensitivity has to be shown) yes! which means if the accused is dead, aaa sorry victim is dead, accused will 99.9 % go scot free, no?? How?(Participant: there is provision Evidence Act, circumstances leading to the death....) I am coming I am trying to link these two cases, circumstantial evidence, forensic report, medical examination, believe for the time being that though the victim is standing in front of you, and he is, she or he has turned hostile (In Hindi) *tab aap prove nahi kar sakte?*(Participant:*Kar sakte hain*)*Karsakte hain na*,good thank you! this is what I wanted to know and I would like to learn form you, that we can the point is,when such cases come to us, we have to revert back and I would like to know how we can do that, and if there are some case study some good judgment, they will become Landmark judgments under this Act and this is what we would like you to do (In Hindi) *nahi who aap kariye, mera kehne ka matlab ye hai ke do minit ke liye imagine kar lijiye ke...*(Prof. Shrivastava: possibilities are there, at least, possibilities are there) possibilities are there, may be you have to assert a bit more, okay! (participants cross talks not audible) ...(In Hindi) *main kuch kuch achi Judgements dekh raha hoon*, these are noteworthy remarks by the judges, and I will read it out for you, please have a look at this:

- Prosecutrix's sole testimony is sufficient to convict, corroboration not required.

- Insisting on corroboration will add insult to injury.
- Delay in filing FIR in cases of father raping daughter is understandable.(They have gone ahead and taken these decisions).
- When the victim is of tender age and the case is reported after a long gap, there are bound. to be inconsistencies which must be overlooked.
- Gesture of a child who does not understand sex are important and must be taken into account. (these are some of the landmark, noticeable, praiseworthy judgements, people have taken).

So, I want to motivate you. (participants: Lot of noise and cross talks which is not clearly distinguishable); (Prof. Shrivastava: we are supposed to work in an unbiased manner, we cannot treat each and every case that it has necessary to be result into conviction only. That is what is the aim of the judicial officer. At least some empathy for the victim, that, ...while evaluating the evidence or while appreciating the evidence , empathy with the child should be there, and only very much tactical approach should not be there, some kind of adjustment if possible within the law, and if conviction can be appraised then conviction should be done in this type of cases. If there is no evidence at all certainly, nobody can say that you to convict the person). Actually, aaaa... just to, Shrivastava Sir has come to my rescue.... This is exactly what I wanted to say, that a child and especially coming from a poor family, who cannot afford to have a lawyer, and in those cases where you know for sure, and most of the cases based on the evidence you know. If you know for sure that Yes!, there is a person, who has actually committed the crime, however in the absence of the evidence, I cannot do anything. I think this is the point which is debatable, where it is a point of empathy or sympathy, there probably you have to weigh your heart and mind to , in how to help in delivering a judgment, in favor...though I mean, it's a court of law not a court of justice, fine....that in the interest of the child. see in other cases, in case of theft, in case of any other thing if something happens its okay!, but if this message goes...(In Hindi) *Aapka ek jo judgement hota hai woa gaon me spread hota hai, woa criminals ko encourage karega yaa criminals ko demotivate karega...* the judgement demotivates the criminal. People, see you are these people, manage (In Hindi) *10 saal se aap bachche ko uthakar le jaaenge aurhe'll start raping the child.* The message that the judgment sent to the masses is more important, aaaaa! I have few questions, which I have written, on the base of some of the cases which came up in the news paper:

- Are the existing laws and provisions effective deterrent in prevention of sexual assault ?? (If not if there are any flaws, then let us discuss in the next 3-4 days and highlight them. Because you see the advantage of these Commissions is, that when our report goes, [and this will form a part of our report] it goes to the Parliament, may be today, tomorrow or after 2 years 5 years, if the Parliament picks that up, and makes those changes, it will be something good for the society, and this will be the hardcore evidence).
- Are we failing in IMPLEMENTATION? (Yes or No)
- To what extent and satisfaction (of victim) the laws and judicial pronouncements have punished the perpetrators?
- Can police and judiciary solve the problem of sexual assault? If not, what else is required to be done by individuals, families and communities? (I'm not saying that you are supposed to take the decision when the case comes up, but is it the society, the parents and everybody else who is responsible? Or Not?)
- What impact sexual assault had on the lives and psyche of past perpetrators and victims? (Nobody has analyzed, I have not come across any such study, people who are growing up, who have been sexually....there is a one very good book "Bitter Chocolate" you must read that, *Pinki Virani Ki, kya uske experience kya the*)
- What percentage of perpetrators, both juveniles and adults have reformed? (They have come back to normal life?)
- What encourages sexual assault?
 - Is it lack of parental care, inadequate attention or neglect in schools;
 - Changing social values;
 - Easy access to porn films,
 - Media reporting particularly page 3 reporting and so on and so forth.
- Do the parents or society have high level of tolerance or apathy for sexual assault and its reporting for fear of social stigma?
- Is it that the children, particularly boys, witness sexual and physical violence and debauchery within the family, friends and society going unpunished which encourages them in committing these acts with impunity?

Okay! Now I this is my last slide, this is the impression of children, but this is with reference to the child labour and the stress these children who run away from home. I think we will have

a response of such children, though it is not very appropriate to ask them to do anything and re-live those moments, but this was done by the street children, so how they have reflected themselves their own agony and in these paintings. Thank you very much, and if you have any questions or suggestions not question but suggestions, I am not a legal person so please don't ask me questions. (Prof. Shrivastava; as you said I think we can avoid legal questions, but general questions) if you have any, if not thank you very much, thank you. (Prof. Shrivastava: so I think we can break for a cup of tea and by 11 we will be here).

Session: 02: Forensic Science in Absence of Testimonial Evidence

Speaker: Ms. Nisha Menon

Day: 1

Before I even I started with the presentation, I would like to have a small question with all the members present out here. How often do you come across, with forensic evidences, in child sexual abuse cases? 90% ...90%; 90%is a on the same for everybody? 50%; somebody else with a different percentage here? Yes sir, Fifty Percent, so I was take on an average of 50% of you all come across with forensic evidences and one more question, question added to that what sort of forensic evidences do you all come across? (Participants: crosstalk's, not audible) DNA testing, DNA testing? DNA No, (Prof. Shrivastava: actually this may be true for the Delhi only). That is mainly the biological fluids which are collected from the victim, and serum articles, fine! that is the only type of evidences and that possibly is like the evidences which is being collected from by the medical examiner, which is subjected for forensic analysis, for grouping of blood and all these things, fine! (Participant: even in age determination, age determination) Age determination! Age determination of the victim and the accused both, (participant: radiological examination) yeah!, like basically whatever, whatever forensic evidences aaahhh you'll have been stating is a part of the medical examination which is conducted by the doctors and the samples which are collected by the medical examiner is sent for forensic analysis and subsequently those fluids and tested and a report is submitted. Now, anything apart from these biological fluids, biological fluids or DNA, you'll have come across? (Participants: hair, not clear and audible....from scene of offence) scene of offence, okay! (Sumit: There is a request, anybody who is making a remark, could you please put on the mike and then speak, so that it is audible more clearly, please pull the mic towards you, put it on and then respond, please!)fine! So, I have a fair idea in terms of like what type of forensic evidence is have been used by different officers and also of what sort of evidence are like more prominent in as a part of forensic evidence in this particular child sexual abuse cases. I will start with simple definition of forensic science, I know that many of you'll might be aware about the definition of forensic science, it is not a subject, it is basically an application of science for legal purpose and the application of basic Sciences; like when you are talking about the biological fluid, forensic science biology when it is being used for legal purpose, it is forensic

biology, when physics is used is forensic physics, so herein and so forth we go for forensic science. Now, everything the entire forensic sciences is based on one simple principle of “**Locard’s Principle of Exchange**”, “Whenever two objects come into contact, they always leave a trace on the other.” Every criminal can be connected to his or her crime by contact traces carried from the scene of crime or left by him or her at the scene of crime so this is a simple principle of Locard, aaaaa Principle of Exchange by Locard.

I will not go deeply into the Act, what the Act says, just a brief about, what exactly is POCSO Act? The Protection of Child...aaaa...Children from Sexual Offences Act, (POCSO Act) which is formulated in 2012 in order to effectively address sexual abuse and sexual exploitation of children.[4:40] It is any sexual activity between between adults and minors or even two minors when one forces it on the other. This includes sexual touching and non-touching activities like exhibitionism, exposure to pornography, photography of a child for sexual gratification, solicitation of a child for prostitution, communication in a sexual way by phone, emails, and even face-to-face. I would not Go Mandal details of this particular Act, rather I would take it to the forensic aspect of how these how this particular Act can be corroborated with forensic evidences and what are the other forensic evidences apart from what you'll have stated. Child sexual abuse or CSA is often referred as a very silent crime, because it is the victims here is a child. The age is definitely a very important factor because many times even the children doesn't know what exactly is happening to his to him or her what it and they have difficulty in disclosing what exactly to disclose to? to whom to disclose this? Disclose to whom to trust? and how, what would be the reaction of the parents, their neighbours, their relatives, once they start the disclosure. Disclosure, tends to be a process, rather than a single episode. Single episode of disclosure only occurs when there is a forced rape or something very abnormal have happened to the child and the child is; the pain and all these things that the trauma is really unbearable and the child reports that.

Signs of genital trauma are seen in cases of gradual and multiple episodes of sexual abuse. Because these types of sexual episodes, which like we have already seen the statistics, which happens inside the home which in their near neighbourhood. This is a gradual course, which is taking place in like months; years together, so if it is a sign, but a genital trauma signal signs of their genital trauma definitely seen.[7:00]

Definitive signs of physical and genital trauma is seen if there is an involvement of physical force, and when we say physical force, it is definitely the rape and which has been brought into

notice immediately. The valuation of the children require special skills and techniques in the history taking, forensic interviewing and examination. Now aaa the major problem during the last session what, I have come across, is like, the victim turn hostile, they are not able to address their problem, they cannot exactly, once they even we have come across with so many children, they speak about one thing at one time, somebody else ask question they say something else, they are not able to identify they are not able to explain what exactly had happened to them. Now for about that aspect it is child forensic interview. Now this is a very specialized terminology which is used. It's a formal structured interview technique, when you are interviewing a child it is not simply like an investigation officer sitting in front of an excuse or other victims of other crimes, simply asking what exactly have happened. It is mainly done by an experienced specialized interviewer, mainly a psychologist or a person who has a similar education; wherein the session starts from a rapport building with the child. A special rapport is built with the child by asking the daily routine their name and all these things, and if the child is really traumatized, the first child is sent for a psychological treatment and possibly slowly and gradually after that the same psychologist who is treating the child, would be interviewing the child. Now the goal of child forensic interview is to get maximum information while causing minimal stress and contamination. Repeated question and answer in front of different people right from the IO, to the doctor to their other members or even in the court deposing the court really leaves the victim in a more traumatized stage. So, a child forensic interview now exactly is conducted and what is the goal assisting the child in providing detail information on the nature and extent of abuse, including those responsible. Sufficient details of the event to take appropriate action. Now, [9:13] whenever these type of interviews are conducted, which maybe even extend it to a day or two, these type of interviews are video recorded. Video recorded by the trained people so that the child and that particular statement can be used as a statement of the victim, for further investigation for face also and can be used as an evidence also, because repeatedly the child might, may or may not remember what exactly had happened and might not be in the sequential state, or might not be if like if a person, in general is asked to enter the court and asked to depose in front of the court and normal adult person is so petrified, so you can just think about the child who's a very small child and would not be able to utter a single word in front of... like maybe a stranger or two different person or a set of people who are already there in the court. So, a specialized technique which is known as the "child forensic interview", wherein all the, the entire interview is video recorded and can be used for further investigative purposes.

Now, followed by the simultaneous (I would definitely not say followed by, because this is a simultaneous process which needs to be addressed) like physical examination has to be conducted within 72 hours of the assault; but should not, definitely should not result into additional emotional trauma. The examination should be performed immediately, when the alleged sexual abuse has occurred within 72 hours or there is bleeding or acute injury. In even conditions where there is acute injury, bleeding, pain, in that condition Doctors of the medical practitioners are prescribed to give sedatives for physical examination to the child. Even after 72 hours of a physical examination conducted, should be conducted as soon. If the case is reported late, say even after 72 hours also, the physical examination with proper procedure has to be followed to be conducted we cannot see that there is a delay in reporting the case, hence, the physical examination should not be conducted.

Biological trace evidences are secured such as epithelial cells, cells are which dead cells or live cells which are there on the skin, semen and blood to maintain the chain of evidences. (some enquiry from the participant: not audible). I've already touched upon the point wherein is the child is really traumatized or in pain sedatives are used.

Now a medical practitioner should use instruments to magnify and eliminate the genital and rectal areas signs of trauma should be properly documented. The foremost thing it is just not examination is not sufficient it should be properly photographed document or if not photography illustrations [12:14] should be drawn, what exactly the physical examination, examiner has find out, found out.

Specific attention should be given to the areas involved in sexual activity— like the mouth, breasts, genitals, perineal region, buttocks, and anus.

Thorough genital examination is conducted as per the gender of the child victim, if its a male child a different type of examination and if its a female child a different type of genital examination is conducted.

Now, once we have the... ones we have the physical examinations, swabs and smears are collected from the victims body clothing and in many of the cases, even from the scene of crime also. The purpose of making smears is to allow microscopic forensic analysis of the specimen to test for the presence of body fluids like blood, semen, depending upon the type of sexual offence, semen may be detected in the mouth, vagina or even in the rectum.

Samples are collected from the Clothing, Perineum, Anus, Thighs, Pubic areas, Bite injuries, Finger nails, any part of the victim's body (appropriately), where one feels a biological fluid, some swabs some marks, some biological fluids would be present. [13:30]

Now a special event, like physically with the help of the naked eye the swabs and smears are collected, but special techniques, special tools are used, like a UV light may be helpful to scan the body and clothing to locate the signs of semen because with fluorescent lights give a florist color, of greenish color so with that if traces of these biological fluids are present tools can be used for collection of these swabs and smears.

Now, what are the types of samples which are collected,

- Seminal stains
- Blood stains
- Loose Pubic hair
- Loose scalp hair
- Saliva from the bite marks
- Nail scrapings
- Foreign material (like Mud, Weeds)
- Blood for alcohol or drugs
- Few plucked pubic hair & scalp hair
- Now, why few plucked pubic hair & scalp hairs are collected? I will come in future slides and basically that is for DNA purpose. Trace material from genital areas
- Trace material from genital areas.

Now, what are the types of test conducted with biological samples retrieved from the site and collected samples: first of all the first and foremost thing what needs to be done for any type of biological fluid analysis or forensic analysis of a biological Fluids is to eliminate the victims biological fluids. So, if the blood, if the swabs are collected from the aaahhh... clothing, first of all elimination of the victims blood is done. Blood group analysis of the accused sample other than the victim.

- Blood can be tested for substance abuse also
- Other samples can be collected for DNA Analysis
- Hair Strands, hair strands which are present in the clothing's or on the victims body are matched with the victim's and the suspect's hair strands also
- Nail scraping are tested for presence of skin traces which can be further taken up for DNA analysis
- Urine and Blood samples are collected within 96 hours of ingestion of drug. (this is the time, this is the maximum time duration, if the victim and the accused is intoxicated with drug, so this is the maximum limit or the time limit in which the biological and urine sample need to be collected) and
- Samples collected are analysed for drugs
- Pregnancy tests are conducted from the samples simultaneously. So, these are the various types of tests, which are conducted from the biological Fluids which have been received.

Now, followed by, followed during the physical examination the major part or the major evidence part lies with the injury marks. Physical examination of child with injury mark is very important. Specially in cases where Injury pattern is inconsistent (there is a specific injury which is inflicted on the child victim, and there is a altogether different story, which the relatives of the accused come and say. So, specifically in those cases that has to be checked) with the history provided. The child is examined for:

- Incised wounds
- Laceration
- (these are specifically inflicted wounds with the help of some objects) Bruises(or contusions)
- Abrasions and
- Bite Marks.

So, the child is examine for this type of wounds. Now, how these wounds prove as a forensic evidence, or a corroborative evidence, for these type of sexual abuse cases.

What is a bruise? Bruise basically is a hemorrhage, when there is a force which, when then there is a heavy force on the body, the capillaries and the blood vessels, the blood oozes from theses capillaries, but doesn't comes out of the skin. So, I gets collected in the body tissues and form a bruise. The main part of the bruise is that, immediately when the force is inflicted, on the body the bruises doen't appear. It takes 12 to 24 hours for the Bruce to appear on the body therefore it is always suggested that a medical practitioner or a forensic examiner should have a second set of examination, physical examination after 24 hours. Bruises over bony areas are common in childhood but, specific pattern of bruising that raise the concern of abuse include: Bruises Bruising of multiple areas of the body beyond bony areas:

- Like ears, facial cheeks, buttocks, palms, soles, neck, genitals
- Bruises at many stages of healing (might be if the case is reported after 2-3 days and there is a bruise in the body, we can actually figure out, that the assault has taken place on the which day, is it a 2nd or a 3rd day? I will come with the age of the bruises)
- Patterned markings resembling objects, grab marks, slap marks, human bites and loop marks.

The shape of the bruise line is most likely to reflect the shape of the causative object. When the objective is small, delayed I've already informed that there is a delayed appearance of the bruise that once the there is a deep bruising, it may appear after 12 to 24 hour, therefore a medical practitioner is always suggested to have a 2nd set of examinations, after 24 hours. [19:00]

Now, what is the medico-legal aspect of the evidentiary value of Bruise in these type of cases. This is the age determination of the bruise. The colors result from the break break-down of the hemoglobin which is present in the blood from the tissues into a different enzyme which is known as bilirubin, so when it, when the bruise is dark blue or purple in colour, it is, it gives an indicator of age of 1 to 18 hours like the assault has taken place within an hour to 18 hours, if it is blue or brown in colour it is approximately 1 to 2 days. If it is green in colour 2 to 3 days and if its yellow in colour if it is it is approximately 3 to 7 days. This is approximate indication of the ages. This acts as corroborative evidence with other forensic and other circumstantial evidences. [20:00]

This is, ...yes!...any questions? (some query from the participant: not clear and not audible) Yeah!...if it's a superficial bruise. See if it's a superficial bruise like the last slide, sorry....see, deep bruises may take as long as 12 to 24 hours, if it's a superficial bruise, so even, it may appear even after an hour also because from deep bruises the, when blood oozes out, it has to come to the surface of it takes time to come to the surface of the skin. But when it is superficial and the injury is not very deep the blood will immediately come to the surface of the skin within an hour Standard is the minimum time which normally a bruise take.

Similarly, after bruise this is a abrasion, friction injury, removing skin or tissue. An abrasion is "a portion of body surface from which the skin or mucous membrane has been removed by rubbing." I have given images of what exactly abrasions are. Now, abrasions again are of different types, it has of scratches, brazes, pressure abrasion and impact abrasions. Now what is scratches? Scratch - Caused by sharp instruments Eg. - pin, thorn, finger- nail . The head is very clean that is the beginning portion is very clean and leaves it to a very tapering end. Head- clean seen at beginning and Tail- tagging of skin at end. So, this is a scratch type of abrasion.

Graze-(the second image I have shown you is the graze), when there is a friction between an object and the skin surface and the Pressure abrasion / Impact abrasion is force, when forcefully a object, a person is hit by a object, or rubs off very...more of a friction a pressure abrasion or impact abrasion occurs. Skin crushed and the surrounding area is contused. Now, these type of pressure abrasion is always, has bruise also, the abrasion is substance...aaaa..is surrounding ..aa..area has a contusion or a bruise.

Now what are the Medico-legal points of evidence, the nature with the...of abrasions, it gives us the • Nature of injury •the Site of the impact • Direction of the force • Patterned abrasion- identifies object a) eg.) elliptical/circular, 2-4 teeth bite with bruised intervening spaces. Now, nature of crime from the site of abrasion it can be exposed like, if it is a) Breast, genitalia & thighs-sexual assaults marks. If it is the bruise, the abrasion or the bruise is towards the neck, it gives you an impression, some throttling has been done. Around mouth &the nose-smothering of the victim has been done and Site of Crime-Abrasion if it is like the incidence is somewhere outside, in the outdoors, the abrasion is accompanied with this mud and grasses, which gives us some indications about the crime scene.[23:10]

Indicative Age Determination of Abrasions:

1. Fresh – it is bright red in color, that is immediate

2. If it is 12-24 hours -scab formation like, light blue, in the first image you can see light brown, formation surrounding the abrasion formed that is known as scab,
3. After 2 days -scab reddish brown scab, that is the second image, the scab turns slightly reddish brown in color.
4. 4-7 days- the epithelium cells, the last image is the epithelial cell is formed and the scab starts falling off and the abrasions are healing.

So, with this, with this type of images and with the medical practitioner, or the forensic practitioner note down the type of abrasion and the color of the abraded tissue the indicative age determination or the time when the abuse had taken place, or the assault has taken place, aaaa can be determined.

Bite-marks:

This is again one of the important evidences in Child Sexual Abuses. Bite-marks, are like fingerprints, and are unique. Bite marks can also provide saliva of the biter which possibly can be used for DNA samples. A forensic dentist or an orthodontist can tell a lot about the teeth of the biter based on the bite mark For e.g. If there's a gap in the bite, the biter is probably missing tooth. Crooked teeth leave crooked impressions, and chipped teeth leave jagged looking impressions of varying depth. Braces and partials leave distinctive impressions.

Now, how these bite marks are analyzed? First of all these bite marks are Measured. The first step in analyzing the bite marks is measuring and then possibly, identify whether its a human bite mark or it is inflicted by a animal.

The bite is swabbed for DNA, which may have been left in the saliva. The investigators take mould of the suspect's teeth as well as photos of the mouth in various stages of opening and biting. Then compare transparencies of the mould with those of the bite-mark cast, and photos of both the bite mark and the suspect's teeth are compared to look for similarities. The bite-mark and exemplar castings are compared for the features like:

- Gaps
- Rotation (angle)
- Size of the teeth (e.g.width at tip)

- Width from tooth to tooth and specific measurements from tooth to tooth then sizes to incisures, what are the gaps in between, everything is measured and noted and then compared with the suspects bite mark which has been collected with the help of moulds. [26:02]

Now, everyone knows about DNA analysis and this is the last part which I would like to cover as a forensic evidence for the child abuse cases is a DNA analysis. The other parts what we have discussed will you, will have proof as an evidence with definitely would require a corroborative set of evidence and a through medical practitioner or specific experts of this field, like an orthodontist for bite mark analysis Has, need to be there and this DNA analysis is one of the most crucial part of forensic evidences, which can be collected. DNA evidence has become a crucial tool in achieving justice for survivors, because tourism increases likelihood of identifying the accused and second is increases likelihood of holding the accused accountable for the offence what he has committed.

What is DNA? simple question? we have been talking about DNA profiling, DNA, any clue? any idea? (Participants: murmuring sounds, somebody said mitochondria, mitochondria) Sir, mitochondria, mitochondria is partially correct. Every cell, the body is made up of cell. Cell has different verticals different components inside, which is known as the nucleus, a Mitochondria, chromosome all these substances and DNA is basically the genetic material which is carried forward by the cell; and basically the genetic material come from the father and the mother together and genetically, genetic material is responsible for the characteristic feature within the human body. DNA profiles created for evidence contain a set of identifiers. Now Adenine, guanine, cytosine, thymine, these are the identifiers which are present in DNA and these are present in different quantity, different length, different sizes within the DNA that special identifiers group this particular DNA into a specific group and then with that it can be identified. Now, that is, how it is done I'll come in forthcoming slide. This information constitutes a DNA profile and is like a fingerprint. The features of DNA profile can be compared with other DNA profile for genetic matches or exclusions. The chances of 2 people having exactly the same DNA profile is 300 million: one. So, if somebody comes up with and argument saying that DNA can be common, so, that is nearly impossible, only identical twins have same DNA because they are carrying the genes or the genetic material from same parents. [29:08] DNA evidences can be collected from blood, saliva sweat, urine, tissue, semen, anything else one can think of? Apart from these biological fluids? Hair strand!... not hair strand, root of the hair. Because hair strand does not have a cell, the root of the hair has cell,

therefore, even while collecting a sample, if I hair, the hair has to be plucked. The hair should not be cut, it has to be plugged so that root is accompanied with strand and that particular material is tested for DNA. Any any other (Participant: bones) bones right, (Participant: nails) nails right, (Participant: tooth) yes! Tooth, semen already have been mentioned, (participant: tears) tears no no no not tears, ear wax, wax which is present inside the ear, also has a DNA. DNA can be tested from your ear waxes also. [30:21] So, all these biological Fluids or biological substances contribute for extraction of DNA. The biological material should be collected for use as soon as possible, due to environmental conditions. like whenever biological Fluids are collected, I forgot to mention that, a specialized paper bags should be used for collection of biological Fluids because, whenever polythene of plastic bags are used the moisture is retained which contaminates the entire sample. So, whenever an investigating officer or a medical practitioner or forensic expert are collecting sample specially biological samples, like a swab, smears or fluids, all these things it has to be in the paper bags. Even if it is dried testing can be done, but if the moisture is retain and sample is contaminated notice things can be done but in case of DNA the material should be collected as soon as possible, due to environmental condition. Although if a proper collection and a storage process of DNA is done, the testing for analysis of the DNA can be done even after 5 years. But it has to be stored properly, it has to be collected properly. I receive the sample for DNA after 15 years, wherein a father had collected the blood sample of all the children and kept in the bank locker for 15 years and after a certain amount of , he was somewhere about the age of 60 – 65, he came up with a dispute, saying that my children are fighting for my property, I want to just check whether they are my children or not, and for paternity testing, this guy had stored the blood samples in the bank lockers and to the surprise, we could extract DNA from those blood sample which was completely dried; but there was no contamination and we could do the paternity testing for that particular person. (Participant: What was the outcome then?), (In Hindi) *NahiNahi, waousika he thaa...hah haha. Bachcheusikeheethe.....Yes! (not audible) ...I don't know, (In Hindi) hotehainaisekuchsuspisious log keunkokuchnakuch, kuch activities, se doubt lagtahi, kabhi, bachchonke activities se kabhi wife ke activities se...Soooo, he had done that. In sexual assault cases, it is important to obtain evidence samples from the victim as soon as possible after the incident, preferably within 12-24 hours and max within 72 hours and even with the advancement of technology of DNA the maximum permitted time limit for collection of samples for DNA is 96 hours. Beyond this, samples normally present nahihotahi, because bathing takes place washing hojatahaiyaphir contaminate ho jatahai due to environmental conditions.*

With appropriate storage, DNA evidence collected properly can be analysed after the passage of any amount of time. *yanek hum logagar bahut he achcheta rike se sample collect karke, store karke, forensic analysis* if a foren... due to the lack of staffing *jo normally forensic laboratories bolte hain...* they collect samples and do an analysis after 5 years outcome should be accurate and they cannot get away with an excuse saying that samples *contaminate Ho Gaya* because they know how to collect samples and I know how to preserve it. The DNA profiles acquired from the samples collected from the victim's body or crime scene is compared with a Reference Sample i.e. the DNA profile of the victim itself to elimination Suspect's Sample i.e. the DNA profile of the suspect always the collection of DNA from the victim is also done so as to eliminate the present out here for a reference sample of the victim is collected and is definitely the suspect sample is collected and the DNA profile of the suspects match with DNA profile sample which is collected at the Crime Scene drawn for the body, clothing of the victim. Now exactly, in a very simple layman language I have tried to explain how DNA profiling is done. Now, the cells are broken down to release the DNA.

The fluids which have been collected, the DNAs are broken down, I would definitely not name the process enzymes which is being used, but in a simple layman language, I've tried to explain how it is done. Release DNA. The DNA strands which are there, it is cut into small fragments using different types of enzymes are known as restriction enzymes and these fragments are collected and these fragments are known as restriction fragments. Now, with the help of electric current that is the electrophoresis, this particular DNA is separated on the basis of the sizes and if you could see the picture which is towards the right hand side, this and these separated strands, a fluorescent material is added to that particular DNA strands so that the photographic image can be prepared of DNA strands. Now, these plane lines linear line which are present if you can see there are thick blocks there are thin blocks....[35:42] So, the DNA have separated on the basis of their sizes, the pattern of the fragment distribution is then analysed. This particular standards is then compared with the profile of DNA. The profile or the DNA profile of the victim and the suspects. Simple example: I would like to further explain the profiling of the parents the mother and the father D1 D2 two daughter S1 Son and S 2. This is basically I am showing you an example of paternity testing. I would would say, I will come towards that side, [36:15] I think I should be audible enough, am I audible? Now, if you see daughter 1- this strand has passed from father, this strand has passed on from the father, this strand has again passed on from the father, this strand has passed on from the mother. So, daughter-1 is the biological daughter of this mother and father. Now, let's come to daughter -2: this particular

strand is not there, this comes from the mother, again this is not there, this again comes from the mother, and then this again comes from the mother. So, this daughter is the biological daughter of this mother, but not this father. So, this is a daughter from the previous marriage. Fine, now, next lets come to the this strand has comes from the father, this strand is common with mother, this strand is common with father, this strand is common with mother, this strand is common with mother. So, this son is the biological son of this father and mother. Now here we will see that nothing matches, so just to show as an example, this their adopted son. So, this is how the DNA profiling or DNA matching is done. [37:47]

Now, lets come (Participants query, not audible) Yeah, yeah, they might be inheriting from their parents. (Participants query, not audible) yes, if we start, if we take the mothers' DNA profile and compare it with the parents of the mother, then we can identify like this is the daughter of these parents. It comes from, partially it comes from the father and partially it comes from the mother; and one more thing I would like to add-on that there are basically, yeah..., basically it's a transition of DNA, its every time you may not get the profile or the samples from the parents, (Participants query, not audible) yes, yes, yes, yes, and that is how, hereditary and all these things are evaluated. Ancestors, (In Hindi) *yeh is raajgharanekehain*, all these ancestral things, this is how it is evaluated from the grand parents, *bone se jo samples miltahai* (Participants query, not audible) hunhun...I dint understand your question.... yeah!(Participants query, not audible) hunhun...yeah!...they yes paternal grandmother also, but will also have, aaa common thing of mother, because *mother kabhirahegana common!* (Participants query, not audible) yes, yes, yes.... Yes, yes, yes, yes, *mother's DNA bhiaayega, abhi, jahanpe mother's DNA missing rehtahai, grand parentske DNA se relate karletehai*, (Participants query, not audible), hun, hun, *nahi*, how can mother's DNA, grandmother's DNA be same?, mother's DNA will have grandfather's DNA also no? (Participants query, not audible) yes....*Wao combination hotahai*. It is simply, ma'm, it is simply not on the basis, I am giving you a classic example of the strands. They are basically statistical values assigned to each DNA profiling, it is the numbers ...a coding is done, once the DNA is analysed on the basis of the presence of enzymes and nucleotides, coding is done on each strand, those numbers are then compared with the profiles, it is strand to strand comparison is definitely there, but for the database preservation and everything a coding is done. And that codes are then matched. (Participants query, not audible) yes! [40:46] yes! (Participants query: Madam I have a doubt, aaa..ma'm we have the DNA of his father, so if any dispute is there as to whether the child is the, he is the biological father is that man or his father?) A man will have DNA of his father

and mother both, (Participant: So, whether the paternity of the child is in dispute?, and if the grandfather and the father, claims that he is the biological father of that child, both of them) both of them are the biological father..? (Whether there is dispute that whether that child is from the grandfather, or his son?) [41:41] then (In Hindi) *grandfather ka DNA or uske mother, biological mother ke DNA ka combination hoga*, if that person is the biological child of the father, then *father ka DNA aur mother ka DNA ka combination me hoga* (participant: if the grandson, if the grandson is claimed to be the son of the grandfather and also the father)..how is it possible ma'm? (Participants murmuring sound, not clearly audible)...(Participant: Ma'm I think, the question is ..aaaa in theson son alleges that its not my son , it is his father's son, that's the question I think...) in that case, the DNA of the grandfather and the DNA of the mother would be there, instead of the DNA of the father and the mother. (Participants murmuring sound, not clearly audible) yes!, ...*matlab*, like my wife had an affair with my father, *apnesasurkesaath...haan*, So in that case the DNA profile of the grandfather and the mother will be there. *Theekhai, aur agar aisana hai to father aur mother ka hai. Samajh me aaya? ...nahi?....*(Participants murmuring sound, not clearly audible), haan, grandfather will have *unke father mother kaa*, son will have his father and mother's. (Prof. Shrivastava: *grandfather ka father me bhi to aayega?*) *is strands me se kooch strands ither aa gaye....genetics kyaahotahi Sir, mother father kekuch...mother ketarah mil gaye, ankhe father kitaraf mil gaye*, so its genetic combination (Participant: Madam, madam, madam, madam, *grandfather ka jo biological system hai DNA kaa, wo hi to uske son me bhiaayeganaa?*) *lekinuskesaath me grandmother kaabhi to hai....grandmother kabhi to aayanaa sir!!Son me grandfather aur grandmother donokahi, aurbete me, jo illicit beta batarahen ho usmesirf grandfather karahegaaur biological mother karahega, ye combination hai.*(Sumit: See, see if I may try, this thing, that the confusion lies, like there is a grandfather, there is a father, there is a child, and there is a child of that child, lets take 4 generation, its not a true copy of the no. 1 to no. 6, its generation , its not like that) *grandfather kekuch profiles melengeaapko, father kekuch profiles melenge* (Participant: some profiles)*kuch profiles milenge* (Sumit: there are so many permutations, because at the grandfather level grandmother is a different female so the combination that flows down to the next generation is definitely distinct, to the combination which is next, so there is a third combination with the next marriage which happens, so it is not like one copy passing on to the other.).

(AheemShrivastava: I will, I will make it a bit simpler you know, let me let me explain, in the larger perspective. You know, have you heard of the word chromosome? Males have X & Y

and Females have XX, okay!, between the child the first child, if that is a male child it will have the some part coming from the father, some part coming from the mother, a female child will have X from the father and X from the mother, now part of this is transferred, some part is transferred, okay!, this will go on reducing, next generation, the XY if the child is, daughter is there then it will have the X from the father and X from the wife whom he has married. In simple terms there is a dilution, it goes on diluting over a period of generations, but the traces are not lost. You will have less number of strands matching with great grandfather and more no. of strands matching with the immediate father. Somewhere you will always find some strands matching. They will be yes...)...yes! I just wanted to simplify the entire processes of matching of DNA profiles, one more thing...[47:18].

(Participant: Madam one thing...aaaa.... that is how do you compare the DNA of two full blood brother?) full-blood brothers?...See sir, two brothers, like for example a younger brother and an elder brother, fine; the strands which are from the parents, like there are specific amount of strands from the father, there are specific amount of strands, or the chromosomes or the genetic materials have been transferred from the mother. The quantity in these strands differ, like you will see that the elder son is more of father and less of mother and the younger is more of mother and less of father. So, it is basically, the transfer of genetic material, chromosome or the DNA from the father, the amount what has transferred to their respective sons or their respective generation. So, it depends! So, therefore the DNA of two full blood brothers, would be totally different, identical twins, it is not different because they are being brought up in the same womb seed genetic material is the same, being carried forward. Now, one important, (Participant asked some question, not audible) (In Hindi) *nahi identical, ekhotahai Sir, identical bilkul exact replica hotahai*(Participant asked some question, not audible) *nahi identical twins kabilkul exact DNA hotahai, bilkul exactly same rehtahai, (participant: twins aur identical twins me kyaafarakhai?).....basically Twins ek, identical twins kyahotehain Sir,you know...jo Sir ne bataya, ek X yahan se aa rahahai Y father se aa rahahai, wo egg kesaath me fuse hotahai, wo egg kesaath me fuse hotahai to wo hi egg do bachchoon me differentiate hotahai to wo identical twins ho jaatahai.*(Participant asked some question, not audible) *Aap DNA profiling karaiyeaapkopatachaljaayega (waise wo)....No noits not that, I'll tell you, normally it is like always fusing of one egg with one sperm, when one egg fuses with one sperm, and the *jo blastosisya jo embryo bantahai*it seperates into two different child, *to wo identical twins ho jaatenhain.* No nonono, you cannot claim them as identical twins, now there is the second instance wherein, an egg is fused by two sperms, by coincidently, *do sperms enter**

hoke fuse hoke, dono embryo me convert ho jaatehain , they are twins, *wo same surroundings me paltehain, lekin they are not identical twins.*[50:17] because the sperm, one which is fusing with the egg will have a different DNA profile, and sperm two which is fusing with the egg will have a different DNA profile. So, this is how it is, and *identical twins chorke twins ka common nahihoga, kyonki, do sperms fuse ho rahenhain, and* one more very important factor *jo DNA profile ke bare me*, which possibly I wanted to give like, if I start explaining the cell...(not audible)... whenever there are fresh biological samples, always nuclear DNA is checked, but what happens in cases like *Sheena Bohra's case*, where it has been already two years, and when the extracts, bones teeth are exuviated, then there is a mitochondria, this is the structure which is known as mitochondria which is there inside the cell, there is a mitochondrial DNA; the mitochondrial DNA does not go away with time. So, the bones which might have been recovered, might not had the nuclear DNA because of the time, contamination and everything, but the mitochondrial DNA is always intact. The mitochondrial DNA always comes from the mother's side only. It is only the nuclear DNA which has both the paternal and the maternal side DNA , the mitochondrial DNA, which is extracted, only has the DNA from the mother's, from the mother's side. So, therefore, it can be only tested with the mother's ancestral, ancestors, or the mothers' relatives. ...*Mitochondrial DNA me father kanahimilega DNA aapko, mother kamilega, mother ki mother, grandmotherunkamiljayega, lekin, strands me nuclear DNA (jo fresh DNA hotahai) usi me aapko paternal melega, maternal mitochondria me milega. (Participant: affirms) Yes, yes, yes, yes...sister's relatives jo female side se jo bhiaatehainunke.....(participant: not audible) nahi mitochondrial DNA milana Ma'm bone se, mother se, mother ke samples.....(participant: not audible) no*, but the other DNA strand is from Siddharth Dasgupta, *(participant: not audible)no,no,no,no, paternity, paternity cannot be only decided by the mitochondrial DNA We can not say that Sheena Bohra's case me sirf mitochondrial DNA milahoga*, this is one of the instances of detailing about DNA I am telling you. In cases nuclear DNA *bhimilahoga*, but mitochondrial DNA and nuclear DNA there two kinds of DNAs, which is normally taken care by forensics, aaa...DNA experts for testing, I just wanted to give you information about that, and this last set of example, victim, DNA strand, sample which is collected from the crime scene, suspect 1 DNA strand, suspect 2 DNA strand, suspect 3 DNA strand, Now, I am avoiding one more click, I want any one of you all to come up and tell me like, the sample which has been collected from the crime scene, matches with which suspect? S1, S2 or S3? Very clear, very simple, any other answer, other than S1? See the blue lines, so the sample which has been collected from the crime scene, matches with the suspect S1, and the number of matchings, there are approximately about 15-20 strands which

are matching, this also, plays a major role, how many strands are actually matching? This also, come up in analysis like how many strands are matching. So, with this I would like to conclude the presentation and, I think so questions have been already taken up, any any other questions, apart from what has been asked? I beg a pardon? Ma'm to be very honest I have not gone through the statistics of identical twins percentage.

(Participant: there was a case before me, [55:38] the allegation was that, aaa there are two brothers, full brothers. One is having mental some illness, the other is okay, he is having good job and everything. There is a neighbour lady, pregnant and delivered, she has a child. Now, is a case is, she alleges that, the brother who is having the job is the person responsible, but she has given another statement also that the other man was responsible, so there is some contradiction regarding that aswell.) okay! (the DNA test was conducted, taking the blood samples of the mother, child and..and aswell as that of this...aa) both the brothers (no not both, only the brother who is having this....good job) okay (this DNA test is tallying and it is found that he is his biological father, that is the result) okay (my doubt is that DNA is a 100% proof, it is conclusive, but in the case of identical twins, there is some...my doubt is...) are these brothers identical twins (no not twins, full brothers, two brothers, same parents) okay, okay (is there any possibility,...see there are other circumstances in the case, that mentally sick person is always available in the house. This lady was always visiting the house. But this man was fully employed and away with the job, not always available in the house, that's some other allegations also. My doubt is that, is there any possibility, of any confusion regarding this DNA possible,...full brothers) possibility of what, Sir? (Any type of confusion?) Sir, confusion, can be eliminated....the confusion can be eliminated a) only if you can collect the samples from the brother who is not mentally stable, (Yeah!, but he is not, he is, he is, absconding from ...after this incidence, that is another aspect, he is missing, that is another aspect in the case) okay, so if you want a concrete proof Sir, [57:44] then you have you need, you need to have DNA of (the DNA says he is the biological father, that result is there, expert persons, forensic opinion, expert has come and given that, yes he is the biological father, of course there are other aspects in this case, but he is the biological father as per DNA) okay! (a lot of cross talking and heckling of voices, not clearly distinguishable and audible) but there must be other evidences which opposes this (except in the case of identical twins, he is given opinion....is conclusive that he is the person) Yes! (and one thing, when there is two suspect, and one DNA test...is in one suspect, if it is conclusive, there is no reason to conduct, necessity to conduct the DNA test of the other person, is it...) but why do you suspect the other person, who is

absconding? (there is statement from the victim) *achchaa*, statement from the victim (at that time she has given a statement that he is responsible) yeah! (but now that's he is missing) but, but, no, but once you have compared the DNA and it has been proved that, the child, that this particular, man is the biological father of this child, I think it leaves no more clue for collection of the sample of the other (is there any chance of confusion?) no I don't think so...(of course it's a identical twins of course) if it is like definite conclusive (we can accept that DNA results are conclusive....a lot of noisy over talks which is not clearly audible..) It might be like after effects of conviction, that statements might have changed, victims turn...yeah (there is some other aspect also is there, I don't want to disclose it here,) yeah! But when the DNA profile has actually matched and it is proved that, this particular person who is the brother is the biological father, it leaves no room for any confusion further. [59:25] (there aaa there is the another question also, that when you are taking the blood sample for the DNA test, I think as per rule it is to be refrigerated. Usually when it is collected from the, from the ,aaaa.. concerned doctor, it is being passed through the court, several procedure, it will take time, so it will not be properly stored, whether that will effect the result of DNA?) I'll tell you, blood samples which are collected for DNA are refrigerated, for the safer purpose, but it, if the temperature, the room temperature is also maintained, the contamination, would not, would be really less. Not happen I will never say, because biological fluids have a tendency of get contaminated. So, it will get contaminated, but it is not that the entire DNA is worn off and we wont get anything from the sample, it doesn't happen that way. (Participant: Is there a chance of effecting the results, especially in the case of full brothers?) no no, results no, its either you get the DNA or you don't get the DNA, that's it. It is not that you get a impaired DNA, (in Hindi) *Aisa nahi hota hai*. Thankyou!

Any other question? (Sumit Bhattacharya: I wanted to know one thing?) yeah! (you talked about mitochondrial DNA which is there, on the other hand in the earlier part of the session we were discussing the best time frame, in which we need to extract this is 96 hours) Yes! (So, does that extrapolates that even beyond 96 hours, the mitochondrial DNA at least can be the indicator?) No, even beyond, even beyond the 96 hours, we will have the nuclear DNA also. (Okay!). It is not that 96 hours, is the time limit of testing of DNA (collection of DNA) sorry! Collection of the samples of DNA, this is the best time to collect, you will get more of DNA strands, and you will get a fresh detailing of the DNA profile. See, I told you the number of strands also matter, when we are matching. When we have a fresh sample, which has been freshly collected, or we have a sample which has been collected after 96 hours, there might be

some differences in the number of DNA strands which are there. Like you will get 20 DNA strands which is fresh, you might get 10-15 in something which is collected after a reasonable amount of time. (So, in that case, yeah!, I was just trying to understand that, like what Ma'm was telling, 96 hours is the best time for collection purposes...) collection, right from collection, storage (storage). Both collection and storage are important, it is not that you collect the blood and keep it in open which is heat and humid, mud and everything, all these things really matter (okay Ma'm, taking it from there, I just wanted to know like, since you are handling these cases quite often and the august gathering also relies upon the FSL reports, I just wanted to through a question from academic point of view, that, how often the FSL report comes within time frame keeping in view the POCSO aspect? And what is the, like how accurate, even the scientific, this thing, we have the signatures, we call it DNA signatures, they are as good as matching and getting the things, like does it really, in practical situation also works out that that theoretically as we are talking). During my presentation I talked about the theoretical aspect only. Practical aspect, there are huge cases that are pending, in terms of DNA profiling....(Participant: Madam if you allow, I want one thing, in case of victim survives occurrence are always she take baths and, clothes are washed off, in that circumstances DNA test is possible?) I am really not getting it? Sir, can you come again I was figuring out...(I said, after a sexual assault, always it is seen that victim is always taken bath, or her cloths are changed or washed off, in that circumstances, DNA collection is possible? What will be result? Can we effective or not?) sir, normally it is said that, DNA has to be collected , (in Hindi)*isi liye hum log ek time limit dete hain ke* DNA has to be collected within a time limit and all (after taking bath or washing cloths) If it is washed off nobody on earth can do anything, if it is washed off no samples can be collected, it is like simply, (In Hindi) *jo cheezhai hi nahi us me se aap kyaa nikalenge* ,its like that. Therefore it is like, awareness has been already spread like, during the earlier presentation also, it is the first thing that the victim should undergo the medical examination. It is only after that, reporting of FIR, everything should be taken, and all the other things are like step-2. Step-1 is first the medical examination, and not only medical examination, collection of the biological fluids is absolutely as important for all these kinds of cases. (Sumit: and Sir just to add to that, as you said that washing off happens after there is a gram panchayat which decides, days are lost, then it comes to a Court level, or that too a Magistrate level, and then it passes on, so there is a time lag. Now, I just wanted to bring in one point, DNA is only one part of the forensic examination, there are other things which serves as indicators). There are like the other things, I had already talked of, like about the bruises, the abrasions the injury marks, using that you can determine an indicative time limit, *kikitna*,

kis time pe assault huahoga, by the indications by the injury marks, by the mild marks, there are other set of evidences also, which can, it is not only the DNA which can. (Participant: But that will only prove the sexual assault on the accused or not, that do not prove the environment of the accused) (Prof. Shrivastava: but environment can be proved by other evidences also) but, yeah!, in that case an awareness has to be created amongst different sets of people who right from reporting of the case, to taking of samples and everything, that there is a set procedure, there is a set time line for all these set of things and it has to be taken in that sequence. [1:06:03] (Sumit: Ma'm with this I just wanted to yeah!...please anybody's phone if it is buzzing could you please keep it in the silent mode. Ma'm one thing I was contemplating, as you said it speaks more on the accused, who might not be very much available or traceable, how about the study we just got in the first session, wherein we see most of the POCSO cases which happen normally, we see a great involvement, if we take the neighbours together 90% as high as 90% within the family. So, I am just throwing an open question to your mind, because you are the people who handle these cases really, so don't you think that there is a chance, quite a, I mean an even chance for you to look for the accused within the family which is reachable, I mean I'm just throwing an open question, might be it doesn't works out, 90% is not 100%, but then in POCSO cases particularly, even if the accused signs up there, with the presumption that definitely accused is always not available, and all those things, but that is only 10%; 90% of the accused could be traced, could be traced, so that's a very, fairly very high percentile of this thing...) (Prof. Shrivastava: Actually during the trial, a person is accused and we are seeing whether the person is guilty or not? Nothing else, at that stage we cannot include some new persons) [1:08:00] (Participant: will we people decide the cases based on the evidence collected by the investigating officers. We apply the evidence, we cannot collect the evidence). (Sumit: My idea just to extrapolate if we can take a leverage out of the 90% group, it is not possible it seems). (Prof. Shrivastava: that will work only with the investigator, he can do that). (Participant: Madam, is there any chance of manipulating a research, forensic result, manipulation?) Manipulation of DNA result? I should not actually comment on this, see manipulation of any result and any point of time can be done. But, technically, no manipulation ...cannot be done, fine. There have been studies, there have been researches, wherein different countries are working out "fake DNA", that is also a concept, slowly and gradually coming up, but its actually people are creating fake DNAs fine, but still long years to come to our country, but technically, during the analysis or while noting down the conclusions, no manipulations cannot, no manipulations can be done. But if the inferences can be twisted, tweaked, managed, that is again manmade thing that can be done. So, I really, technically no it cannot be done.

[1:09:17] Can we dictate it? No. (Participant: No what he was pointing out, if police immediately reports the matter to CWC, and the of CWC are having the power of Magistrate first class, they can direct the matter in a particular way, for a particular investigation, we cannot). I think that Sir, was asking about tweaking the DNA results, right? Technically it is not possible. It is not possible that you come out with a false result. It is not that. You come out with an appropriate result only, with a very true result, but if somebody want to manage with that, show something else, apart from what has been analyzed, its again manmade thing and can be done, must have been done. So, I really don't want to comment on that. (Participant: If it is done, can it be detected by a judge? Through some methods). No you cannot detect it, you have to, again the sample has to be resent to a separate laboratory altogether a neutral person or laboratory, then the conclusions or the inferences you can compare and at that level you can definitely detect some (foul play is done) yeah! Some foul play is there. (participant: asks something which is not audible). (In Hindi) *maine kaha na Sir ki technically nahi hota hai*, but a man can manage any thing, *kuch bhi kar sakte hain, manage kar sakte hain, manipulate kar sakte hain*. (Participant: But I think that can be detected by a successful lawyer, by cross examining the expert. Upto a certain extent it can be). Technical things like a DNA profile, a DNA profile can be read by a DNA expert only. Now, if a DNA profile is shown to a second set of DNA expert, *thikhai* you can read some traces of the result. But entirely, definitely, a person who is managing, might be DNA expert only *wo usihi sab se tweak karega ki wo doosra usko pata nahi lagaye*. All these things happen and we should not, actually this should not be the topic and lets not go into all that. (Participant: if two DNA reports conflict with each other, what will be the opinion?) Sir, if two DNA reports? (conflicts each other, two let from two laboratories, what will be the third opinion?) like, if there are two different opinions about the DNAs right? (yes) [1:11:56] It should be resent for testing, re-sent for testing, (In Hindi) *ek third opinion hona chahie* (Prof. Shrivastava: Does that happens?)(What will happen after that? In that case, if two reports conflicts each other? What will be happen?) Sir, two things can happen in that case, you cross-examine the expert who has conducted the analysis, fine. So, you all are at a better position to understand, analyses and experienced people to know that cross-examination *me kya hai*, or you can re-send the sample for third opinion. (Has there any laboratory, authentic, who's report will considered the best report?) I beg your pardon! (has there any laboratory in India, who's report will considered best report?) Sir, *Aisa kuch nahi hai* there is no such, it is, it is, basically how we come(cross talks in between not audible) How we term the laboratories the best, we say, it depends upon the equipments, the advancement of the technology what is present. And the experts should have that value that experience in

handling the samples. That is the level of expertise from the laboratory point of view I would say, whether it's the best or the mediocre, it is the tools which are there. It is the experts, (In Hindi) *kitneachcheexpertshain, experienced hain*, extraction and how they put that all these details into report. All these things matters, when we consider what a best laboratory is. (Participant: There are cases of intentional spoiling of forensic evidences) Yeah! (So, to prevent that, some penal provisions should be incorporated in the Act.). (Prof. Shrivastava: I think the IPC has so many provisions, from section 205 to I think 250, so many provisions are there. Somebody giving false evidence, false evidence, manipulating false evidence, creating false evidence, everything is punishable.) (Participant: if it is incorporated in the POCSO Act, it will have more impact). (Prof. Shrivastava: But, I don't think, so many POCSO judges are here, in one or two cases only DNA report will be there. In India police functioning we all know, DNA reports available in the POCSO cases it is impossible!). (Cross-talks by the participants.) (Prof. Shrivastava: So, very few cases are there in which DNA report is placed. (Participant: There was a case sample was collected and when tested in the laboratory, only salt was detected. It is nothing but intentional spoiling of the sample.)(Prof. Shrivastava: Have any, have any person, encountered any such situation, DNA report in the POCSO case?) And mostly in practice we have seen that forensic experts are called the last. SO, we conclude this session, any other questions? (Sumit: Okay! Presuming no questions are stupid, I wanted to ask a question, there is a there is this AADHAR Card, in which we take we take this biometric impressions and the retinal images, which happens to be a forensic evidence. Now, this AADHAR business is done by some private agencies, your details are going to the public domain. Though they say that its secured, but I don't know to what extent? To what level and to how many years. So, do you see that, some manipulations, of so vital signatures being out in the public domain?) huge! manipulations, huge manipulations!! AADHAR, I would not name AADHAR, because I have not done that particular domain, I have done huge amount of cases for BPL Cards, "Below Poverty Line Cards" like there was a sample which was collected, I would definitely not name the party, I would definitely not name the insurance company nothing. There was a sample of five lakh, which was given for analysis, which had this finger print "biometric" and out of which 75% finger prints were same. 75 is the figure I am saying, finger prints were exactly the same. The samples were not even collected. It is the hand in glove job of the insurance company, the third party and one more person who is into this field, go collect few 100's of samples, few 1000's of samples, cut-paste, cut-paste, cut-paste into every card. And we were asked to stop that investigation from all the IO, in fact it was into the media also, and the media was thrown away with money and everything, and the second set of articles

didn't even come. I was the, I was one of the core member team to analyse all the biometric equipments for this AADHAR thing, whether some manipulations at that level, so I had given a huge report to all the people, all the set of people who were checking these biometric devices, like what are the loops, lacunas in their biometric devices and what sort of manipulations they are doing for the certification of these biometric devices also. So, I have conducted this test very personally, BPL cards I have found 60% of the biometric thumb impressions being manipulated. You will see family member of five people here, same family in the second card, (In Hindi) *uskaekbanda, 3rd card me, ekbandachauthe card me like, its like very common.* (Participant: talks amongst themselves, which is not audible). Ha, ha, ha, ha, (Prof. Shrivastava: It is always a opinion). (Participant: Ma'm, can you say a few words about collection of samples?) Collection of samples? (Participant: What are the precautions?) (Another Participant: In every case, in our courts, IO is moving the application that kindly permit me, to get sample of the blood of the accused , who is in the prison. I asked him how will you collect the sample? He said that the jail doctor will collect the sample. Can it be possible?) The jail doctor or a medical practitioner can collect the sample (what observation we should give in our orders?) What precautions? (precautions ma'm) the precautions definitely will be like, first precaution is in the presence of the authorities it has to be taken and possibly rather than a jail doctor taking the samples, I would say, a forensic practitioner, a forensic expert should come and take the (forensic labs are not there at all.) Not available? (Not available!) In that case (forensic experts are not there) because there are specialized, why I am actually insisting upon this point is that, there are specialized kits available, wherein if the biological sample need to be collected, how they need to be collected? With what device? Those are sterilized properly? How it has to be? What is the quantity of the collection of the biological fluid? Where, How, it has to be sealed? What if it, ah ehhh... what material is to be inserted in it to restrict the coagulation? Or even if coagulation is done, how it is to be stored? In a test tube in a paper bag? What is the time duration it should be handed over refrigerated or stored? All these directions are there and a forensic practitioner is much more, like he is more experienced in collecting these samples that is why I was insisting. Or if not certain directions and directives can be given to the medical practitioner, who is collecting the samples. Those, guidelines can be laid down. Cross-talks. That is why, if you, see manipulations are that you have, it has to be done in front of, like not a single authority, a neutral authority, you can designate somebody, yeah! You can designate somebody to collect the sample. All these things can be done from your end. [1:20:56] (Participant: Ma'm, now it is just for the IO, just, if he tries to collect the DNA samples, but he is no concern. He is having no concern. Actually, he is having no concern

with the matching of the DNA). Or like a panel, a panel of medical experts or a (What can we do? What can we do? He moves application that kindly permit me...I permit, and there is no, in any case there is no report of the DNA. Then what is the use of the) I think Sir, you should also insist that a report needs to be submitted as soon as possible for the collection of permission of what he has taken, like how soon he has collected? Had the reports been channelized to the designated place for analysis or not? (IO is moving the application in compliance of the honorable court's orders. Hon'ble court has passed the order that every, in each and every case the DNA sample should be collected. Just it is a formality on behalf of the IO to move the application, get permission, get DNA sample and just, he never sends the sample to the forensic science laboratory. This is the actual position. So, I have round 400 cases of, in none of the cases, DNA report is submitted in any of the cases. This is the ground level reality). This means there is a lacuna in the entire system. (This is the ground level reality). There is a lacuna in the entire system, which needs to be addressed. (All this is only the theoretical work). (Prof. Shrivastava: No scientifically this is very good, but since the police persons they are not cooperating not following the procedure, we are not getting the benefit of this.) See, Sir the major part lies, all these evidences, all these things put together will be of only benefit, when the implementation is also there.[1:22:58] the implementation is done, that the authorities, the designated people needs to address in terms of proper implementation, where we experts can help in terms of implementation but cannot anything, or formulate any law or Act, or any Rules, policies for this. We can lay down steps. In fact a DNA expert or a medical practitioner, know how to collect the sample, know how to preserve. There are kits available, there are samples available, need to implement. They also know the time, because police is giving training, all the officials, everybody on and off they undergo these type of trainings, so it is the only thing left over is proper implementation. So, that needs to be really addressed by the entire (concern, concern!!) law fraternity. (As far as my knowledge is concerned, there is no need to moving the application before the Court. Section 53 A is very clear, if IO is moving the application he is burdening the Court. You can reject the application and you can say this power is vested in you. Why he is moving the application when Section 53 is there?) (Prof. Shrivastava: Infact to impress his superiors, and to show his superiors*ki* I am doing these things. they are moving the applications, they are not interested at all.) (Other participants acknowledges "Yes" this is the actual problem. He is not interested. He is just shifting the burden to Court). (The first participant: Yes! you reject the application with cost and quoting the Section 53A. next time will not move any such application. Not only this not only this the apex Court in many cases has given the direction to the IO). Okay this the point of discussion which can be taken up

during the tea-break also, so with this I would like to conclude the presentation! (Participant: just clear one thing, he is moving the application where the accused is in custody, only in that case). Sir, let me thank the entire audience, then possibly you can continue the dissuasion. I would like to thank the audience, all the members present out here for your patience and specially the questions which have come forward, possibly there might be many questions which I in future I would address in different presentations, Thanks for the... THANKS!! (Prof. Shrivastava: thankyou Ma'm). (Sumit: Thankyou Ma'm, aaah, before breaking for the, I am actually standing between lunch and you so that's a dangerous proposition, I don't want to do that, but a small two liner may be like, if you can make it 2-3 minutes before lunch, what we will do is , in the next, Sir, Sir, *ek instruction haithodasa bear karlen Sir, lunch se aap agar 2-3 mins pehele aa jaye*, since this is a workshop, we are going to break-up into groups and I will be telling you like who all are in which group, and then we will be escorting you to separate rooms, conference halls. There you are required to do a brain storming and take out the challenges that you are facing while shifting....because in the inaugural session we found out that most of the Courts are not the Specialized POCSO courts barring some. Like a MCOCA case, followed by an electricity case, third case POCSO; requirements are completely different. So, the kind of challenges in the jurisdiction which you are finding, and other challenges which could be one of you may be jotting down in the bullet heads. Taking a transparency or taking a soft copy of it, and one of the group members amongst you, while we come back after half an hour makes a presentation, these are the challenges faced and then may be like we will take it forward from there. So, am I clear like, after lunch (the next Session) I am just taking it because after we'll not spend much time in explanation, because its only 1 hour Session. So, half an hour is allotted for group discussions, break-off groups, identify the problems come back to this hall after half an hour, we'll take up the problems and then we'll see how the group feels like to what extent we overlap and with that I will be also distributing a 10 question questionnaire, objective type (it'll take 5 mins, and this will also give leads). So, this is the exercise all about, so I'm breaking off between you and the lunch, have a nice lunch and lets gather together 2-3 mins ahead of time. Thank you very much!)

Session: 03: “Switching over” to deal with “Specific Jurisdiction” from “General Jurisdiction”

Speaker: Mr. Asheem Srivastava

Day: 1

In this Session the participants evenly broke out into 4 groups. After completing the exercise they reassembled at the main conference hall for presentation.

Participant: This is **Group No. 2**. In group no. 2 we are the judicial officers from the State of Assam, Bihar, Tamil Nadu, West Bengal, Sikkim, Karnataka, Kerala, Himachal Pradesh and Chhattisgarh. After the deliberation, due deliberations it has been consented by all members, that the problems which are being faced by the judicial officers while dealing the POCSO cases is, first problem is:

1. There should be exclusive Special Court to deal with POCSO Cases. Its original work brother its not copy, its original work. The advantage of being first.
2. The second problem that we are facing and the suggestion is that the IO should be sensitized about the peculiar features of the POCSO Act. How to investigate the matter, precaution should be taken by the IO at the time of registration of the FIR and taking the victim to the hospital for medical examination.
3. Third suggestion to the problem, is the lack of trained and exclusive “Public Prosecutor”. (My brother from Delhi, is pointing that this is also a violation of copyright Act. Its copy-paste. Sister it is copy-paste). (Sumit: I think it is the saying that the early bird catches the worm, that’s the issue over here, So let’s find out that the belated birds how innovative they are in preparing some new things.) So, it’s an open challenge for all of you.
4. The third is, creation or non-creation of Special Police for investigation of offences under the POCSO Act. Average police is investigating the matters, which is against the mandate of the Act. That is the problem/suggestion.
5. Next one is, lack of basic infrastructure with the juvenile homes. We are sending the victims of the offences to the juvenile homes but those juvenile homes are not having

the basic infrastructure there. We are coming back to the lack of basic infrastructure of the Courts, no special wards for the victim or his or her parents who are accompanying their child to the Court. Actually, ideally we all have noticed, victim and accused sitting in the same verandah in the same corridor. Our poor PPs that is guiding the witnesses about the depositions in the Court.

6. Next is luke warm response from the forensic laboratories, while sending the DNA reports. The legal hurdle in the disposal of the cases under the POCSO Act, because it is the mandate of the Act to decide the matter within a period of one year from the date of taking of cognizance, but we are little bit handicapped to decide these cases due to the poor response from the forensic science laboratories. [04:00]
7. Another suggestion which has been given by one of the senior members of our group. Non-availability of expert regarding recording the statement of deaf and dumb witnesses. We have to wait for them, in some cases the victim is little bit handicapped, deaf and dumb, that's why we are facing this problem.
8. Another very important suggestion which has been given by the our group members, the numbers of the cases should be fixed in a Special Court. For example, for example, aaaa, (sister I am coming to that, Ma'm I am coming to that, o that's why...no its my original ideas, therefore please, its wi-fi connection), for example,for example, in a particular Court let us suggest, there should be 100 cases or 150 cases. So, the mandate of the Act, that should be, out-put be complied with. To decide the matter within a period of one year from the date of taking the cognizance. It has been suggested that if the number exceeds, for example it has been given that, in Karnataka, in Bengaluru there are total 4 Special Courts under POCSO Act, Special Courts keeping in view the numbers of pendency in a particular Court.
9. A very stein suggestion but a bitter truth, aaa non-cooperative attitude of the Bar. I don't think *ki* how many of you are with me on this point, but are facing problems day-in & day-out, because if the advocate is a little bit apprehensive about the judges is innovative, then they will resort to strike culture, which is prevailing all over India. Some of the new entrants in the judiciary, they have criticized the Principal District Judges, I am also one of them, ha,ha,ha..
10. Insufficient staff of the POCSO Courts, I was not inclined to add this being Principal District Judge, but it has been objected to by the new, by the young members, you being the Principal district Judge, you will not write down this, but it is the decision of the group, I am bound to mention this.

11. And another point which has been pointed out is non-experienced staff. These are the general grievance of the group members. There may be Principal District Judges are recruiting the fresh-hands, newly, recruited person to the POCSO Court with un-experienced staff. Problem is there.
12. Lack of proper medical evidence. That has been already taken care of. It is I think it could be that, general consensus that for POCSO Court there should be no disposal norm for judges. (All participants laugh). (Prof. Shrivastava: they should be judges friendly only. Not litigant friendly!) Kindly, ha haha Sir, these are the suggestions. I think here we are, keen to say something, otherwise we are always under the constant vigil of the Hon'ble High Court. This was been suggested keeping in view the mandate, because if there is no disposal norm for the judges he will likely, expeditiously decide the matter.
13. Last but not the least, it has been pointed out by the members of our group, *ki*, the judicial magistrates who are recording the statements of the victims under the Section 164 of Cr.P.C. they are not trained enough, they are simply completing the formality, I think they should be sensitized or trained especially for recording the statements under Section 164 of Cr. P.C. in POCSO Cases. With these words I will give mic to the next group, so the.... Thankyou Sir, Thankyou Sir for patient hearing. [9:15]

Participant: Good afternoon everybody, on behalf of **Group 4** I am PranitaMohanty. After deliberation, all the members of group 4 we have come to a conclusion that all the difficulties faced by the trial judges, and at the cost of repetition I'll say (Prof. Shrivastava: I think repetition we can avoid if there is something new)..hahaha, No, no no I'll repeat otherwise my number will be less.

1. Mandatory establishment of providing adequate infrastructure as contemplated under the POCSO, Act & Rules; and
2. One thing that we all agreed, that the PO of the POCSO Court should preferably be woman judge, because the women judge are more sensitive towards the children who are the victims of the POCSO cases.
3. One major problem that the trial judges are facing is non-availability of interpreter. Most of the cases either the victims of the POCSO are truck drivers, or they belong to labour class people. So, the migrant labour, they have commutated to the industrial town and all that, they all belong to tribal and or a group of, a section of the society which, who do not use the common language of the State. So, in that case neither the

judge, nor the advocates, nor the Courts clerk are able to understand the language and we face lots of difficulty in interpreting. Suppose the victim belongs to a particular community, if the judge uses somebody from that community as the interpreter, then the criticism starts that he is not a neutral person. So, in that case Govt. has to find out ways and means of preparing a panel of interpreter, after making a survey of the language used in a particular district or so. So, that it will make the trial procedure easy.

4. Another point is appointment of “Special Public Prosecutor” properly trained.
5. And other point decided by our group is a suggestion, at least one forensic medicine specialist should be appointed, posted in each District Head Quarter Hospital so that forensic evidence can be effectively collected.
6. And my friend suggested, I think it is a very important thing, one of my friends in the group, that Govt. should provide a mobile forensic van with para-medicos, for each District, so that the collection of forensic evidence could be easier.
7. And another point, and my friend told that (It is repetition) provision for separate “waiting rooms” for the victim and her parents, companions, away from the site of the accused.
8. One more difficulty is when the case is transferred to the “JJ Board” Courts, when the victim and accused both are below 18 years of age. So, the accused very “easily gets bail and escapes the rigor of the trial” and all that. So, in that case, and more so, the JJ Board judges, who are senior civil judges, they are not well trained or experienced like the District judges, about trial of POCSO cases. In that case the trial becomes a farce we can say. Recently, under the SC/ST Act, Govt. has introduced a provision, a mandatory provision, that a member of the victim, representative of the victim or the victim himself/herself shall remain present during bail hearing, and our group suggests that a parallel provision should be introduced under the POCSO Act. So, that whenever a bail application is heard, at least the victims representative should be there, to resist the bail application regarding the age of the accused and all other aspects. This our suggestions on behalf of Group 4, thank you! [13:38]

(Prof. Shrivastava: Yeah! Please!) Good afternoon every one, except to add few points nothing more to add from our Group, that is from **Group 1**. We the members of Group 1 totally concur with the observations made by the Group 2 & 4. The things which we want to add & I on behalf of the Group 1 wants to add are;

1. We the judges, who are designated as judges for trial cases under the POCSO Act are unable to create a “Child Friendly Atmosphere” in our Court rooms, because we are being entrusted with multifarious duties and we are dealing with so many cases attracting different provisions of the Acts, so different kinds of people are attending the Court and we are unable to create a child friendly atmosphere as such, which reach the object and the mandate of the Act as to why it is created. So, it is the 1st constraint rendering substantial justice to the victim as such.
2. The second one is, we the judges, we (our group members) feel that we are “unable to switch on the mind set from one atmosphere to another atmosphere”. In like Juvenile Justice Board, the judge will be only under one mind set. He will not wait that, aaa, in robes, and he will be in formal dress, he will create the child friendly atmosphere, deal with the case. Have a leisure talk with the victim, before recording the evidence. But due to pressure of work we being, present on the dias, we cannot have a direct talk, and create such confidence that she will get justice, if he speaks whole heartedly, and what the things had happened without any fear. So, the victim enters into the Court Room with some kind of fear and apprehensions. Therefore, she cannot speak what she wants to speak, and in which mode she wants to speak. What, particularly, these children as such. So, the opinion, unanimous opinion of our group is, the Special Court should be Special Court as such.
3. The third thing is in continuation to the first point, inability to create ato “Conduct in-camera Proceedings” in trite time. Because every time we want to record the evidence of the victim or any of the witnesses, who attend the any of these cases, we have to request the members, the advocates to leave the Court hall. They take at least 5-10 mins to leave the Court hall. And one of our members pointed out that we are being burdened with unique system as such, they leisurely leave the Court hall. Then they wont come to conduct the cases áfter the case is over and the doors are open, then we have to ask our one of the attendants , call the advocate where he has gone, he has to come the witnesses are waiting. So, these are creating problems. Our mind will be Oh! the time is over we have to clear the arguments otherwise next month we won’t be getting the required units and we will be pointed out by our High Courts. These apprehensions we are working, so our minds are also not on the object of the Act as such. So, when the Special judge is designated to conduct the cases under a Special Court, he should be entrusted with those cases only. This is the opinion of our group and other things are

4. Untrained Police Officers, untrained Public Prosecutors, like this.
5. The another thing our group observed is that, due to this, every case, everything is top priority, under trial prisoners, give top priority, senior citizens give top priority, POCSO cases, recording of evidence of the victim girl within one month, give disposal within one month, everything top priority. How can we give top priority to everything and dispose off, this is one of the cases we have. [18:20]
6. The last but not the least thing is that though there is a specific provision under the Section 33 of, for giving victim compensation, even when raped cases are run. Every State has provided the victim compensation fund, but, the, in reality State Govts. Are not giving compensation to the victims though there are judgments and orders of the Special Court for granting of compensation to the victim. If these things are rectified and efficient system is created, then the purpose of passing the Act will be rectified. Thankyou! thankyou one and all.

Group No. 3: Good afternoon to all, I am Lingeswaran from Tamil Nadu. My group members are there: Mr. Thakurdas, Mr. R.K. Pattnaik, Mr. S. B. Pandey, Mr. S.D. Jagtap [19:24], Mr. Robin Phukan, Mr. Moolchand Tyagi and Mr. A.K. Singh. We had a nice discussion, I think my paper got mixed up with all this group leaders. (All participants laughed). (Sumit: I would actually like to put in Sir, this is in another way to look at it is, the more number of repetition comes, that actually hammers the point even more, so I am actually putting a tick every time there is a repetition, so don't shy away over it, its only an insistence on the point.) In a lighter way, yes that's correct.

1. Now, when we talk about infrastructure, a “special design” for every Special Court is necessary. So, that I want to add to the infrastructure point.
2. You know apart from concentrating on the other aspects, the judge has to concentrate on him first, because “switching over” from a general jurisdiction to specific jurisdiction. For which we have to inquire ourselves, aaaa, this, we need “proper counseling” to change our behavior, mindset, pre-determined mind all these things we need a “special kind of training” for that. And that I want to emphasize, that my members, my group members are very particular about it. Sometimes when we deal with the general cases we are mind pre tuned mindset up. Then we switchover to normally adversarial system we follow, and when we come to POCSO we need to mix-up things, both inquisitorial as well as adversarial. Then in

that case sometimes it gives some difficulties. Both for judges as well as for counsels.

3. And sometimes when we put questions and under Section 165 we put questions to the witnesses in order to find out the truth, and more particularly in POCSO cases because in every question is routed through judge only, so what the defense counsel thinks, that this man is trying to destroy the defense case and all types of cross-examining is going on, like that they think and they try to complain this thing, that puts the officers in problems. Definitely, I have faced the problem like that, but my High Court supported me very well and it is... But that is one kind of problem.
4. Another kind of problem is that norms and all we have norms, attitude, of the defense counsel as well as the public prosecutor, has to be changed and they have also to be properly trained and properly... and
5. The “change of attire”. We need to change our attire, robes that takes some time, when we try this particular case and along with other cases then changing this and that, that takes some time. Practically it is impossible for the judges. And that is one of the difficulties.
6. And procedural aspect-wise questioning, all the questions have to be routed through, through the judge. That is quite time consuming matter and furthermore the witness will be here, the child will be here, the counsel will be there and we will be there. The object of routing the question through the judge is that, this witness the child should not hear the words which she is not supposed to hear. Or some deliberately questions which we will curtail in fact. Suppose if it is asked, we will stop the counsel not to ask such questions and we will not repeat the question to the witness that again comes to the infrastructure. So, she will hear the, those words, even though it is routed through the judge, the child always there and she hears the question that makes some difficulties for the child. So, that again comes to the infrastructure only. Some kind of mic arrangement, should be (Prof. Shrivastava: the 1st point was this only, it has to be special designed court.) yes, yes! So with that I thank you all. Thank you! [23:55]

Prof. Shrivastava: Okay thank you very much, so what next is? (Participant: Sir I would like to...) Ha, please, please! (my sister judge incorporate that suggestion, I said that as Section 24 mandates, that investigation has to be conducted by a lady police officer,

not below the rank of Sub-inspector. It so happens your case gets matured, case is now lying pending only for recording of the evidence of the inspector and she goes to CCL, maternity leave, long maternity leave 6 months, how are we going to fulfill the mandate, Section 34 or whatever, that it has to be completed within one year from the date of taking cognizance. So, the suggestion which is, which I had put forward was that along with the lady Sub-inspector we can include a male officer also, which my Sister judge objected to by saying it will frustrate the very purpose. But I said at least he can identify, he can depose on behalf of that lady Sub-inspector by identifying her signatures on the documents. So, this was one small problem which I am actually facing in a ...[some participant speaks not audible] yeah! This could be another solution or, those who were promoted from constable and became Sub-inspector both ways. This was number 1.

Number 2. I said about the operational aspect of the Act.

Three from the evidence which was recorded, the case sounds 51:49, it is really the discretion of the judge to take it either way. But, we lean towards acquitting the person, because the punishment is very stringent. If let's say it's a case of a child, a sexual assault with a child less than 12 years old. It is covered in Section 10, the allegations against him are inappropriate touch, touch, but the moment child is less than 12 years you have no other option but to send him behind bars for 5 long years. Which is totally disproportionate, that's why we lean towards acquitting. [26:27]). (Other participant joins the discussion but not audible). Prof. Shrivastava: He is explaining why people lean for the acquittal.

(Participant: Sir, may I be permitted to just say one thing, just one line). Prof. Shrivastava: Ha, very quickly, we have a very short time. (the officers aaaa always under pressure for gaining the units, and Sir, you see Section 33 refers some, though I am not dealing with the POCSO matter, POCSO matter, that is Section 33, aaaa the special procedure to be observed, that is the question cannot be put directly. Then there it should be frequent break, for examining the child. This is the lot of time is required. So, it cannot be equated with the normal cases time required for, aaaa for examination of aaaaa for completion of the trial. So, there is a, most of the officers I heard in the morning, for the functioning as an efficient judge. So, for the, for proper implementation I think, there should be exclusive Court). Prof. Shrivastava: I think that all the participants are unanimous, that there should be dedicated Courts for this. If the

dedicated Court is not there the scheme is frustrated. I think we will incorporate this in our report. (Participant: Court is designated, but other business is also there.) Prof. Shrivastava: not designated, “Dedicated”. Only for the purpose of POCSO Act cases. (In Hindi) *designated to hai hi hai, hum dedicated Court chahatenhain*. We should be dedicated for the POCSO cases only.

Sumit: So, thank you very much for having this interactive....Yes! *han*.

Mr. Asheem Shrivastava: You to discuss and deliberate on the issues relating to sexual assault, as defined in Section, explained in the Act itself. I think let’s go through that once again, because the whole, Act is around is around sexual assault. The term “assault” has not been defined in the Act, but sexual assault has been explained in Section 7. So, at any given point whenever you have this opportunity, please go through that and see if the definition is or the explanation of sexual assault is appropriate or not. Whether it is implementable or not, and if not then what should be done. The second, point about segregating the witness, and the sorry, the victim and the accused, there is a provision that there should be separation so that the victim can be heard or the other way round. But they should not be seen, but now, I mean it didn’t ever occurred to me, and thanks for pointing out it to me, this issue that, any anything which is uttered by the accused, aaaaa during the cross-examination is being heard by the witness, aaaaa, the victim and the witnesses also, how to deal with this situation, I means its complete segregation which means the two are in separate rooms, effectively they are in separate rooms and there is a judge sitting over hear who can see and talk to each one of them separately. This is what it means effectively. So, you need to have 3 different rooms or, aaaaa, (cross-talks in the house) it amounts to the same thing. Basically the victim should not come into picture anywhere. Victim should not be...no sentences should be used or uttered, where the victim feels disturbed. So, its both, the acoustics and the visibility. Just think about, think about it, how to resolve this point.(Prof. Shrivastava: ha, may be video conferencing.....advocates..ormay be earphones can be used). May be! Let’s come out with some really innovative ideas, because this is something very crucial.

Sumit: so really very very interesting points coming up, I mean, most of it we might be thinking like, oh! This point I knew but somebody else wrote it down but, for me it’s a group, diversity, but definitely, eye opening points being jotted down. Throughout the

conference we are going to definitely address all these things, though this Session was specifically on changing over, switching over, but yes, indirectly or directly it effects on the switching over anyway. Whether it is infrastructural, or this thing, it all helps the judge to have an atmosphere to decide. Having said that we all will break for tea. Beyond tea we will come back at 3 O'clock wherein Sir and Madam we are going to have a similar exercise, we'll have break-off groups. This time I have been clever by not using 1,2,3, because you can use the earlier number to be in a particular group. It is A,B,C,D this time so, we are going to have a post tea service of the A,B,C,D we are again going to break off groups come back and this time the exercise will be aaaaa there will be hypothetical case studies, couple of them, you need to come up as a group on that, and let's have a debate on that. So, we break and come back at 3 O'clock. Thank you very much!

Session: 04: Role of Circumstantial Evidence When Victim is Dead

Speaker: Mr. Asheem Srivastava

Day: 1

Mr. Asheem Shrivastava: Before we go for the next round of group discussion where there will be cases which will be thrown open for discussion within the group and then, you can take a decision and then the group leader will make the presentation. As to if such a situation comes, how will you examine those cases and deliver the judgement. After that you have the library and computer Session. Now, this is a, what we thought is that we will make something interesting and it will test your ability and interest in computer. How many of you are conversant with excel sheets? Please raise your hand. Though there will be people to assist you with this. How many of you are conversant with computer? Hands on with computer? Okay good. And excel? MS excel? A few. Okay, doesn't matter, don't get scared with this. I am just projecting this on the screen. This is one excel, and you will find, please have a look at this, (In Hindi) *ye neecheek word aa rahaa hai final* okay, can you see this word final? Okay, now there are so many computer terminals in the lab, what you have to do is when you go on, when you visit this sheet, click on final. There is a, on computer, aaa, the right side of the mouse if you click it, it'll ask you to rename it. You can rename when you click rename, after clicking the right mouse add your name to that. Okay, otherwise also there is a provision for registering your name on the sheet and there will be someone to help you. Now, coming to the question part, there is something very simple, the 1st question, "Has the State Government designated "SPECIAL COURT" in your district for speedy trial of offences registered under POCSO Act?" only two options which are given below (a) or (b) you have to select either of this. So, you can simply write, when you say yes, it will get printed here. If you want to write something in response to any of the questions given below, there are around 50 questions here, in response to this if you want to write something, please add in the remarks cell. The remarks cell is the third one and there may be some questions (long pause) yes! For like say question number 18 "If yes, which of the following may be seen as a threat by the Child Witness? It is written in the bracket (You may select one or more options)"; so, you can, if you are selecting say (a)

court ambiance, you can select court ambiance, you can select the other one. You can select either one or all of them. Sorry, there is a dropdown menu here. Can you see that? (In Hindi) *dropdown menu me aapisko click karenge*^{2nd}*pejaaiye* in the dropdown menu again you select the “Examination”, you have various options there. And in the 3rd column if you want to write anything additional, you can write it. *Aap*, in case you do not want to disclose your name, please it, yeah! (let us make it optional, why unnecessarily, it doesn’t serve any purpose. If you want to disclose your name it is fine, if you don’t want to do that, please don’t do that.) because then you know you can probably, you can give more ideas, better ideas also. Sometimes people have inhibitions and so, if you, its your choice, whether you want to or you can simply say XYZ instead of writing your name. In place of writing your name you can use ABCD, XYZ so that we can know that you don’t intend to disclose your name. If you feel that you want to disclose your name, good, very good. Alright, thank you! [4:36]

Sumit: so, with this we again break-off. Group –A, Group-B, Group-C and Group-D. Group-A goes to room no.1. Group-B to no.2.; no. 3 and no. 4 like that. We do our exercises there and come back after half an hour, i.e. 3:30 we will be here and then a small, this is a hypothetical case, a couple of cases would be distributed, just give us brief answer to that and we will collect and let’s exchange like how it takes shape. We can just break-off to the places and there we will distribute the hypotheticals. Thank you! [5:19]

(At 3:30 the Groups re-assembles at the main conference hall)

Now, what we will do is Group-wise the group decision of the case that you did 2nd, one of you would come down and just tell [5:38] what were the facts and why you arrived at a certain decision. That’s what, that’s what, then then say that also. There is a delivery of the bench wherein the yeah! the majority was this and the dissenting one are these. So, yeah! please do that so that see all the 4 groups have 4 different cases. so, the cases wont be known to the other groups that’s why please brief, are we together? yeah! please brief the case, briefly and then say this is the reason and this is the consent or desent. so, which group A, B,C,D? okay welcome! First and fast will come first. welcome Sir.

This time I am representing **Group no. B**, last time 2 this time B. (gigles! numerically aaa) Facts of the case which has been assigned to this group that is the role of circumstantial evidence when the victim is dead. I think this was the case? Facts yeah!, the facts and brief of the case is that, victims mother, (responds to some query from the audience:

individually, but till the time we received the information we had already discussed and give the reasons collectively.) (Sumit: So, sir, this one is not the group one, this is individual one, and this one you please deliberate on, okay Sir?) Okay! this is the individual one? (haa the individual one. I'll collect it, this is there), haan reasons are there.

So, for this case which has been given to our group, (In Hindi) *karliyamaine de doonga*, I have already done. Sir, your kind attention please, the facts of the case are as under:

the victim "A" aged about 13 years, on 20-02-2015 at about 8 PM went to the field near her house to attend the natures call. It was then the B, C, and D committed rape upon the "A". When she returned home she informed her parents F & M about the same. A's father F next day went to the police station to register the FIR in the matter. But the police refused to register the case. This was the incidence of 21st of Feb. thereafter on 26th Feb 2015, she went to school, but when she didn't return till afternoon, her parents started searching for her. The dead body of the girl was found hanging on a tree near fields. police was informed and a case was registered for suicide. The dead body of girl A was sent for postmortem, which revealed that the cause of death was ischemia due to hanging. Subsequently her parents informed the Court about the sexual assault subjected to A by B, C, & D and disclosed of their suspicion that B,C& D had killed her to cover-up their crime. They also disclosed that they were threatened not to report the matter to anyone. During investigation B, C & D were initially found absconding but at later stage C was caught, arrested by the police, and during investigation, interrogation, he disclosed that he along with B & D committed rape upon A on 20-06-2015. [10:45]Sir, I think date is not correct here and 26-02-2015 thereafter hanged her on a tree.

The charges, after FIR investigation the charge-sheet was filed before the Court. B, C & D were charged before the trial court for the commission of offence punishable under Section 302, 376 D read with Section 34 of IPC read with Section 5 & 6 of POCSO Act.

Prosecution witness: the prosecution led with examined 5 witnesses in all including the doctor who conducted the postmortem and the investigating officer PW-1, PW-2, PW-3, PW-4, PW-5, were F the father of deceased, M the mother of deceased, the doctor, the accused C accomplice and the IO respectively. PW-3 & PW-1 deposed about the sexual assault attributed to A. the evidence from various sources *interalia* the witnesses were recorded. PW-3 the Doctor who did the postmortem testified the cause of death to be ischemia due to the hanging, but could not mention anything about the sexual abuse subjected to A as the same was not

examined at the time of conducting the postmortem. PW-4 C, the accomplice disclosed about the offence of sexual abuse and the murder of the girl by hanging her on the tree after the commission of the offence. PW-5 the IO testified on the facts of the investigation and was examined. after this

the Defense: after recording the evidence of the prosecution witness and exhibition of the documents an opportunity was given to B, C, & D. Sir again the C has been shown as the accused, whereas he is accomplice and appeared as prosecution witness. again this is some mistake, ha, ha. it should be B & D only. because he is already accomplice declared. To defend themselves statements were recorded under Section 313 of the Cr.P.C. B & D pleaded innocence and refuted all claims of the prosecution and accomplice witness C, who is also include that all the allegations in the matter were untrue and they were being falsely implicated in the matter by the police and C who is doing same on pretext of the police.

Evidence Documentary: as per the medical report the deceased A had external injuries and brazens on her face, arm, leg and neck, that reveals that she was beaten-up/ struggled with someone. So far as the medical evidence is concerned as per the opinion of the doctor the face of the deceased was pale. marks were of the non continence placed high up in the neck between the chin and the larynx, cervical vertebrae are dislocated, the sub-contagious marks on the tissue are white hard.

On the basis of the above facts our group has decided the matter and it is the unanimous decision of the group that no conviction can be based, can be passed and in this case. and accused are (laughter) acquitted! reason for this..(Prof. Shrivastava: because of the leadership only) reason for this is:

First of all in this case, police registered the initial case under section 306 IPC. the incident was of 20-02-2015. she died on 26th, she was found hanging, aaaa, on 26-02-2015. The entire case is based upon the evidence of accomplice C, no eye witness, First of all we have to determine the cause of death. certainly death is suicide. theory of the murder is totally i think unacceptable in this case. Now comes to the evidence of C as per Section 30 the evidence of an accomplice is a confessional statement, sort of confessional statement, can be taken into consideration if proved, and that is only a corroborative piece of evidence not the substantial piece of evidence. Moreover if we see the provisions of Section 133 of Cr.P.C. read with 114B the rule of prudence says such type of evidence should not be accepted. And here in this case the evidence

of accomplice as per the defence taken by him, he has made successful efforts to exculpate himself because he took the plea that, we have been falsely implicated in this case. This is the reason which has been taken by this group. Thank you Sir.

Representation by **Group A.**

Prof. Shrivastava: Madam can you keep it brief/ So, that time lesser.

Participant: Very brief, very brief. In a nutshell the facts of the case are:

that one girl studying in 8th Std. who's age is not mentioned in the problem, has come out from the school to return home, and then she found, this accused waiting on a motorcycle at a little distance. They talked for some time, afterwards she was taken on the motorcycle, and she returned late in the night at 9 PM. When questioned by her mother, she stated that she was raped by this accused.

So, the evidence was adduced the medical evidence which came forth was that there were external injuries all over the genetarea. And the defence evidence which came forth is through 3 witnesses. they said that they had sexual intercourse with this girl, with her consent which was corroborated by this victim in the cross-examination. No, cross-examination no? cross-examination that its a consensual sex that she had with this DW-1,2,3.

And the accused has taken a plea that it is a consensual sexual intercourse, and that she is habituated to it. The medical examination revealed that one finger admission, apart from external injuries on the genetaria. I have a disclaimer here Sir that I am not not the leader of the Group. Not to be stamped with a tag of bad leader, because, there is lot of difference of opinion in our group.

Sumit: Ma'm please mention what is the majoritarian view and what is the dissent view.

Si, it was so hurriedly done, the case that you have had put us in, I think that justice got buried.

Sumit: delivery of fast track (all laugh).

If this is the pace that we have to deliver, then I am sure we are not going to deliver one judgment judiciously. But, anyhow, the majority, aaaa, we didn't even have the time to calculate aaa which of our Group members are in which side? So, I stood for acquittal, apart from 3 of

my Group members luckily for me. So, acquittal was based on these particular facts. I had to support my judgement so I put forward.

Sumit: Could you please for the help of the Group say who all stood for acquittal? Can you please put your hand up please? [19:47]one, two, three, So, 3 acquittals. Anybody else for acquittal? no. therefore 3 acquittals, and how many differed? 5 So, we have a result.

Laughter, result, that's not a result...okay supporting points for my point of view I would like to just put forward. So, one point in favor of acquittal was, she is used to consensual intercourse. Admission of one finger is coming in contrary to that she is, used to habitual sex. the medical opinion is contrary to the very statement of the victim who accept that she had sex with 3 men, which can be conveniently termed as a habitual sex. In my opinion. So, she had sex with 3 men admittedly. that is concluded to be a habitual sex which comes in contrast with the medical opinion, which says only one finger is admitted. So, we reject the medical opinion. It may be erroneous or due to some reasons it might have been recorded erroneously. And the other thing is one witness has testified to the fact that she did not offer any resistance while she was being carried off in the motorcycle. That is one fact which gives a benefit of doubt to the accused, that it might be a consensual intercourse. Age is not there, age is not, she is in 8th Std. but prosecution is not allowed to make any assumptions, she can study 8th standard even if she is 20 or 21 also. So, I don't prefer to make any assumptions. One pertinent question that fell from the Group, that went for conviction is that there are external injuries on the geneteria, but I have my own doubts whether, (some participant asked some thing which is not audible). she accepted, no consent with this particular accused she did not accept but, she had earlier she had consensual sex with 3 other men (some participant asked some thing which is not audible) yes yes I accept all that I accept all that, but the other circumstances are negative in that presumption under 114A. The other circumstances I am trying to explain. It is not mentioned. (Participant: whether the PW-1,2,3, that is the victim and her parents supported the case of the prosecution or they turned hostile is not mentioned in the problem anywhere.) okay even assuming that they have supported the case of prosecution, we ended in awarding with acquittal. So, external injuries in the geneteria, whether they necessarily prove a forcible sex or not is ?? I have my own doubts about that. Because the kind of sex she is habituated to 3 other men provenly, So the kind of sex also can cause external injuries on the genetaria. So, that's how we concluded for acquittal.

Another group member: can I give the reasons for conviction from here? I'll give the reasons. (Other participants: go there, go there). No I'll give the reasons from here. Okay the reason no. 1 is that the accused has not denied of having sexual intercourse with the girl his defense is that there was intercourse, but that was consensual and all, so the burden shifts on the accused to prove that there was consent. First thing he has failed in proving his defense. He has examined 3 witnesses, who said that, they had consensual sexual intercourse with the victim, victim admits that. But, just because victim is having consensual sexual intercourse with 3 persons does not means that these person can rape her. He has no right to rape her. So, first of all his defense is shattered his defense is not proved. What remains is his admissions remains, that he had sexual intercourse with the victim girl. There is the FSL report which matches the blood sample, the semen sample, the blood sample of accused and the vaginal swabs of victim girl matches as per the CFSL report. There is medical evidence on record which says that, aaaa, the hymen was ruptured and there were external injuries on the private part of v. So, that shows that there was some force exerted. There is an independent witness (passerby) who has seen this girl and that man together and then that girl, by sitting on his motorcycle had gone. then she came late in the night. She has told her mother that she returned home very late, and then she, when her mother asked her the reason for returning home late, she broke-down and she told her mother that she this man raped her; and most important is this man has a previous antecedent. He was a convict for raping a 20 year old girl and he had served a sentence of 7 years and prosecution has charged him for 376 E. So, even assuming the prosecution has not produced any birth certificate of the victim girl to show that she was 13 years or 15 years old girl, 376 E stands. So, he has to be convicted atleast under 376 E. (a loud round of applause).

Good evening ladies and gentleman, I represent **Group D**. There is a case of two unfortunate children. girl 16 years, boy 17 years. They eloped on 20-07-15. naturally the parents of the girl complained. FIR lodged and later case was registered 360, 366, 376, (not audible) POCSO Act. the other case also here victim and other witnesses did not support the prosecution but there is medical evidence. In fact we didn't get much time for discussion on this question because there was we were concentrating on the 1st question. Anyway I am answering this question. First of all here both are minors, under 18 years, so normally this case would have been tried by JJ Board not by the POCSO Court. Assuming that the JJ Board is dealing with the case, our considered opinion is that accused is guilty. He has to be found guilty based on the medical evidence, coupled with the presumption available under Section 29 of the POCSO Act.

Regarding the IPC offences that presumption is not available. 366, 376, because the child is minor, the girl did not support the prosecution. Going by section 29 of the POCSO Act, the presumption available regarding the offence under Section 5. The charge also 5 & 6 did not occur because there is no case of repeated, allegation of repeated rape, that also, under the charge of Section 3 & 4 of the POCSO Act. That is all thank you.

Good evening to all! In fact, I'll read the facts first. "R" is about 20 years of age and is a special child. A teacher "T" comes home to teach her on 19-11-2014. Now her teacher, as usual arrived at her home at around 9:30 AM. No body other than "R" and "T" are at home. when R's mother came home in the after noon, around 2:30 PM she found R crying. On inquiring why she was crying? She revealed that T had raped her. She immediately took her daughter to police who conducted her medical examination. T was thereafter apprehended by the police and was sent to judicial remand. After the FIR investigation charge sheet was filed by the police before the competent Court. T was charged for aaa before the trial Court for the commission of offences under Section 376 read with Section 4 of POCSO Act. 376 read with Section 4 of POCSO Act.

Prosecution witnesses: R is is PW-1 and she testified to the fact that teacher came that morning and started caressing her face. When she said that she did not like that the teacher stated to hoax her by hugging her. She tried to push him away, but he then started to take her cloths off assuring that she will be okay. She stated that he didn't raped her. She also testified that even on previous occasions he would touch her thigh while teaching.[30:33]

On cross-examination when she was asked as to why she did not inform her parents about such incidence? R said that she was afraid and therefore, did not tell anyone about it. She was further cross-examined on why she did not shout when he was, she was, he was raping her? To which she replied that she willingly surrendered to T.

defense: The defense vehemently denied the allegation and stated that the sexual intercourse was a consensual one. And that the same was evidenced by the medical examination, negating rape by forcible assault. It is a case of the defense that the victim was over age and that she consented to sexual intercourse. The defense produced an attested, attested copy of R's birth certificate which confirmed the victims age as 20 years.

Evidence: (medical evidence) A medical evaluation by the neuro-surgeon, U she arrived at the conclusion that the IQ of R is about that of a 12 year old child. The gynecologist yes, in her medical examination could not confirm rape by forcible sexual intercourse.

Now, we had a discussion and in fact we are divided. Majority had convicted the accused. Two they are dissenting, one Miss Selvasundari and another judge from Karnataka Mr, Vijay Kumar, both have dissented and they acquitted the accused. the majority view is that for conviction, we found some gray areas in POCSO also, that section 2(b) defines the child as a person who is below the age of 18 years, that's all. They are not taking into consideration the IQ or the mental maturity of a particular person. So, we find that there is a grey area in the definition of, these factors are not considered while the definition was made, drafted. So, we convicted but we convicted only under Section 376. Why because, even if you proceed under POCSO also, section 42 of POCSO Act prescribes alternative punishment. When an act is punishable under two Acts, both under POCSO or any other Act, now whichever is greater has to be awarded. Now, which is greater? for 4 we can definitely award a sentence, and even in 376 a life sentence can be awarded which will be for remainder of his life. Clear indication is there. But, is greater punishment. We'll take it as a greater punishment, that is why we convicted the accused under Section 376 firstly. And another view is that POCSO will not apply, because of the lacuna in the definition. If we go that way we can acquit it, this way we can give greater punishment. that is why we have convicted him under Section 376.

And the reasons for the Defense: though they have produced certificate, birth certificate, showing aaaaa, the age to be 20 years the mental maturity of that particular girl is of a 12 year old girl. That is the finding by a neuro-surgeon. In that case if a person has to give a valid consent, her age should be above 18. Above 18, mental it should be, it is the age is such fixed as such, because the mental maturity will arrive at that stage, that 's the general presumption. In this case, the mental maturity was lacking and she cannot give any consent at all; first thing. And second thing, when she says no consent, we have to presume that no consent 114A applies. So, these are all the reasons and another place she has subjected herself and she did not reveal these all these things. The special instructor they develop the kind of relationship like a trust building. Trust building, so developed a relationship with the child, they trust the instructor fully. So, they are the only person who can teach them, so any deviation or any disobedience that may be adverse to the interest of the child. So, this may be one of the reasons for not disclosing! and such offences are normally not being disclosed. when it must have crossed its

limits, she might have thought it may be a limit or something like that. So, mental maturity, aaa, prevents her from disclosing it. So, these are the reason for finding guilty, yes. and

The reason for acquittal my friend had stated that, neuro-surgeon, right, a neuro-surgeon is not the competent person to say about the age of the person. A fix..(cross-talks)ha IQ, IQ, regarding the IQ he says so. And another reason, yes yes they will explain I think, they can explain better. Thank you!

Second representative fro **Group D** (for acquittal)

Not only for that reason, first of all I agree with our group so far as POCSO offence is concerned, because it will not apply because of that grey area, what my, our group leader discussed, presented. But I, two people differ with under Section 376 IPC the we enter into acquittal, because, first the offence is rape is concerned the rape has to be proved first, then only offence committed by the accused has to be proved. first, what evidence is for rape, proving the rape, is that the medical evidence could not confirm the rape by forceful intercourse. So, the medical evidence itself the rape has not been proved. And another thing is the victim stated that she willingly surrendered herself for sexual intercourse. so, if we have to see the cross and chief together. So, in cross-examination she admitted that she herself surrendered herself for sexual intercourse. So, in this point we enter into acquittal.

Prof. Shrivastava: So what do you feel? Its a case of conviction. This is not I feel is because it has been explained, and number one consent, it must be , actually the person should be in a position to understand ki what for is she consenting.

Nidhi Sharma (NCPCR): For you all this is a original case of one State and original judgment is conviction under POCSO Act.

Participant: POCSO Act?

Mr. Asheem Srivastava: Yes Yes!

Nidhi Sharma (NCPCR): Judge has given his reason his reason stating that the mental age, the lacuna the he was mentioning, mentioning that the girl was 12 years by mental age that is the reason POCSO will be applicable.

Participant: I was of the same view but because of the lacuna in the Act only...(cacophony owing to lots of cross-talks)

Nidhi Sharma (NCPCR): It is a debatable issue definitely, but this is what has happened in the original case.

Prof. Shrivastava: in fact if you read POCSO it is the speaking of the physical age, may be for the consent purposes yes it is right.

Nidhi Sharma (NCPCR): But he has mentioned with respect to the age depending upon the...(a lot of cross talks, not clearly audible).

Participant: we are not concerned about the mental age only physical age matters.

Prof. Shrivastava: Consent yes her mental capacity can be seen.

Another Participant from Shimla: Sir, I am also, not in agreement with my brother with regard to the conviction of the Section 376, instead of POCSO. Conviction should be under Section 4 of POCSO Act.

Nidhi Sharma (NCPCR): What are your reasons?

participant from Shimla: reason being, if we go to the definition of POCSO section 4 minimum punishment is : shall not be less than 7 years. and which may extend to imprisonment for the life. Imprisonment for life is there also in 376 but, so far as the minimum punishment is concerned that may be guide by giving the reasons 3 years. That could be an additional; reason.

Prof. Shrivastava: But the, one thing ki according to school certificate she was major. She was major according to birth certificate. birth certificate and the psychological age was 12 years but, I think that distinction we can not maintain, in the criminal statutes.

Another Participant argues: He may be convicted under 376 but not under POCSO.

Prof. Shrivastava: Not under POCSO. Because date of birth, according to date of birth she was more than 20 years.

Asheem Srivastava: this is a very interesting case its a thought provoking case, you know it compels the judge to really dissect the issue of age. and he has to technically, what everybody thinks that it is the physical age, but here the judge has interpreted this as physical age as well as the mental age. And it is in favour of a specially abled child. So, aaaa, I don't know I mean there may be discussions and debates on that, but one good thing that I have liked about this case is, that it has opened a thought provoking issue. Some times in future people will start discussing and debating on the mental age as well as the physical age, because they.

Participant: But Sir, unless there is some sort of ambiguity in the language of the Act we cannot go beyond the prescribed language.

Asheem Srivastava: but, he has taken this decision.

Participant (In Hindi): Sir, POCSO Act to provide *nahikartaakimentak age aapdekhengeaapko to wahi words kodekhnarega*.

Asheem Srivastava: *main yhi, nahi main el cheezaurbataanacahunga*

Participant: In this particular case from the line of facts revealed during trial the girl cannot be, She disclosed the matter to her mother, testified in the Court, specifically stated that on previous occasion I was subjected to abuse and sexual abuse and all that, again I was raped. From the line of evidences adduced during trial it is difficult to perceive that she is a girl aged about 12 or mentally challenged person. So, once it is proved that her age is 20 and when the law under the POCSO Act never recognizes the mental age of the person, she is presumed to be a girl of 20 years of age and POCSO is not attracted. That is the view taken by our group.

Asheem Srivastava: Actually majority have interpreted the way you have done. However, there is a I think the law makers will also have to start thinking the definition of the child in the POCSO Act says "any person", any person subsumes that it also includes the mentally challenged people and the whole world knows, not from today from 100's of years back that mentally challenged people they don't have that mental age, and there is a there is a clear gap between the mental age and the physical age. Unfortunately, the law does not distinguish and it simply says "any person". It presumes that every person is healthy and every person is equal, which which is ..aaaa, in today's context when the science has advanced so much, when the

human brain has been aaaaa analyzed and assessed to such an extent today aaa a time will come shortly, when this definition will also incorporate the mental age or something like that.

Prof. Shrivastava: Okay! Yes its a debatable point. Right now as the Act exists, it is very clear and age is not only this POCSO specific issue, age is an issue in so many cases for example rape has been an offence, since time immemorial and only physical age has been recognized as the relevant age for the purposes of rape or other things. But, yes we can start thinking because specially challenged people or mentally challenged people, they are like class in itself. So special provisions can be made for them. May be for these kind of person a different age can be provided or prescribed under the Act. We have to think ovber it, because its a valid valid area where some discussion is needed.

Sumit: Sir, the other day one of the conferences I interacted with Professor UpendraBaxi, he was here and what he narrated was like if you talk about the text of law, what he narrated is that there is some, aaa, one Professor at NIMHANS, Banagalore who is working on this thing, even the age defining child which is now in this case 18 years , he says that neurologically he has drawn certain conclusions that even a 20 year old is not in a position to called as a grown-up or an adult. So, those all things are definitely coming up evolving things in law. Maybe like those would come up and as we have seen the divergence in these debates also, Prof. Sir was also debating, may be these will be forth coming things which legislators may have to ponder. US has that Canada has that.

Prof. Shrivastava: May be in India we also start thinking and the legislature will take note of all these things ki some different age can be prescribed for the mentally challenged people but as of now, as far as my understanding is, because its a criminal statute, strict interpretation is needed if somebody is not within the 4 corners of law he should get the benefit of it. And there can be a reverse argument also, suppose there is a boy, 13 years old boy or 16 years old boy and he is extra ordinarily intelligent, his mental age is 21 year, can you deny the benefit of JJ Board Act. (laughs) So, both way we cannot take it. So, physical age is very important. Whether you are going to give the benefit under the JJB or whether you are going to punish the person under POCSO? So, thank you very much for the discussion and the last problem that we distributed, out of 33 persons, 30 persons have convicted. Only 3 persons have acquitted the person. I would like to know the reasons or views, basis, on the basis of which acquittal order has been passed.[46:23]

Anybody, *nahi I no problem*, no problem, there can be very valid reasons. Anybody, the last problem which was given ki 3 witnesses they turned hostile. The person who has acquitted. Ma'm you have acquitted? Please, if you have acquitted, (laughs), no just I want to know the reasons, ki what are the grounds (cross talks for confirmation on which problem). First problem, sure, who has acquitted, anybody? *nahi* 3 persons have acquitted, there is no problem, there is no problem. First case, first case, 3 witnesses turned hostile. I acquitted, haan please Ma'm, no problem, no problem, please. There were daughter's mother, daughter's father and mother they all turned hostile.

Participant who acquitted Ms. Mohanty: I acquitted in that case , the eye witnesses turned hostile from the begining. They testified during examination-in-chief supporting the accused, during the cross-examination also. The only incriminating material available against the accused is leading to discovery and the discovery of the dead body, blood stained cloths, motorcycle etc. DNA test was positive. So, it was a purely case of circumstantial evidence and the principle in a circumstantial evidence is, the chain of circumstance must be complete or pointing towards the guilt of the accused excluding any other hypothesis. That's why the recovery of the dead body, or the motorcycle, in terms of Section 27 of the Indian Evidence Act, the facts discovered only, that much is admissible. If the accused confesses that I committed rape and murder of X and led to the recovery of the dead body, only the recovery of the dead body part is admissible, which proves that there is a death or a rape. That never proves the complicity of the accused as the wrong-doer or the (cross question from the other participants) one minute, one minute (some query and debate which is not audible) knowledge of the place of the dead body, that is true, but it will not point a finger towards him other circumstances lead completing a chain is proved.

Another participant: When incriminating evidence is against you, you are supposed to give an explanation under Section 313 when you are confronted with that, while, he had simply denied, he has not explained as to how the, that body was found and how that blood stained is there and all these explanations are absent in this 313.

Prof. Shrivastava: one thing can be said at least, *ki* the genesis of the incident, because 3 witnesses were there, they turned hostile, if that was taken away (voice heckling amongst the presenter and others)

Participant Ms. Mohanty: The last 3 things theory is in the line of the incriminating circumstances, but that never complete the chain.

Participant: And further that is a case under POCSO Section 29 also comes into effect.

Participant Ms. Mohanty: No, No, so I concluded in acquitting the accused because there were 3 incriminating circumstances, but the circumstances do not complete the chain and the forensic evidence is not a substantive piece of evidence, it only adds corroboration to other substantive evidence, so in this case substantive evidence is lacking that's why acquitted.

Prof. Shrivastava: Thank you very much for the discussions and it was very good and thought provoking also, yes there can be opinions on the same facts, one will come to one conclusion and other will come to other conclusion the only relevant thing is that there should be a reason logic behind your conclusion. Yes he is also right because the genesis sometimes you can see if the 3 witnesses if you simply don't rely on those 3 witnesses who turned hostile then genesis will not be there there will be no evidence about the genesis. but in the examination in chief all the witnesses they supported the prosecution case they turned hostile only after 2 or 3 years, So, this is a very important circumstance. In another case Supreme Court has pointed out *kiif* the witnesses have been run over, even in those cases the examination in chief portion can be used by the Courts. 2G's case Justice aaaa, *Zahira Sheik's case* and so many cases are there. So, I think with that we can conclude the (some participant puts up a question)..han yes!

Participant: Accused was supposed to explain how his semen could be traced from the undergarments of the victim.

Prof. Shrivastava: How the blood of the girl was found on the motorcycle? So, overloading evidences against the accused person. So, next Session I think we have to go to the library, for the computer Session, and there the problem distributed by Mr. Asheem Srivastava I think they will help.

Session: 05: “Contest on Age of Victim”

Speakers: Justice Indira Banerjee & Prof. S.P.Shrivastava

Day: 2

Prof. Shrivastava: opens up an informal discussion with the participants till the time the Chairperson Hon'ble Justice Indira Banerjee from Calcutta High Court arrived to conduct the Session-5 on the Day 2. Participants discussed about the bail related issues etc. prior to the start of the Session.

Sumit Bhattacharya: Good Morning! yet another day the Day 2 of the POCSO workshop. We had lot of working out yesterday today also hopefully we'll have a lot of interactive Sessions. To hold the sessions together, I am really honoured to have two eminent person amongst us. Firstly good morning to both the guest of honour here I would say Hon'ble Justice Indira Banerjee from Calcutta High Court, Born on 24th Sept, 1954; educated in B.A. (Hons.), LL. B. Born on 24th September, 1957. Educated at Loreto House, Calcutta, Presidency College, Calcutta and Calcutta University College of Law. Hon'ble Justice Banerjee enrolled as an Advocate on 5th July, 1985 and practiced both in the Original and Appellate Sides of Calcutta High Court in all branches of law except criminal law. So we are actually dragging her somehow into this also and definitely she would be there. I am very honoured to have her. Appointed permanent Judge of Calcutta High Court on 5th February, 2002. So, very senior Justice, we are honoured to have you ma'm with us today, thank you very much for coming, thank you ma'm.

I would always take this opportunity to also greet Prof. (Dr.) Aruna Broota ma'm, a Psychologist, Hypnotherapist and Alchemist, and she is a trained psychologist, acclaimed mental health expert, revered people-transformation expert and a highly sought after employee engagement expert with world's leading corporate conglomerates, schools, colleges (under scored, schools, colleges, there are kids there) as her clients. Dr Aruna Broota has over 4 decades of work experience and expertise. So, I am really honoured ma'm to have you with us and let's, I would request our own Prof. S.P.Shrivastava Sir, who is there to open the Session Sir, and let us commence it for today, thank you.

Hon'ble Justice Banerjee: As we can see the workshop is to assess nature of difficulties faced by POCSO Courts. So, it is not exactly a lecturing its an assessment, and here your participation is going to be very very important after of course Prof. Shivastava has said whatever he has to. Now, from my experience, I think the biodata has been taken from the High Court net, and I think that now that bit of not having practiced Criminal Law, which was a fact when I was in the bar, that will now have to be changed considering that I have presided over Criminal Bench until 2 months ago for a considerable length of time. Now, of course I am again back to arbitration appeals and motor vehicle appeals. This Act is a relatively new Act. Enacted in the year 2012. We may have some experience of putting this Act into use. There may be cases before you, so far as we are concerned there are hardly any! except for bail cases, where there are allegations of contravention of the provisions of the POCSO. So, it will, it is you who are really going to do the speaking. So, far as the practical aspect is concerned both for Session 5 and Session 6; Session 6 is of course later on there is practically no authority directly on the point. Therefore so far as contest on age of victim is concerned we have to fall back on the judgments which exists under the Indian Penal Code in the case of rape of minors, rape of children which, there were stringent provisions of punishment under the Indian Penal Code as well. So far as the second topic, the Session 6- "Contest on age of accused" now the contest will only be for the purpose of claiming the benefit of juvenility and there you Rule 12 of the Juvenile Justice Rules are there as to how you determine the age. It is now well settled by certain judgments of the Supreme court that no matter how heinous the crime may be you have to determine the age as per 12 of the JJ Rules. What is interesting is that you will be told about this but there are atleast 2 judgments of the Supreme Court, *Jarnail Singh v. State of Haryana, 2013 7 SCC 263; and Mahadeo v. State of Maharashtra, 2013 14 SCC 637*, where the Supreme Court has said that the principle in the Juvenile Justice Act and Rule 12 framed under the Juvenile Justice Rules will apply, but there will be more discussion on this after Prof. Shrivastava and Prof. Broota, the discussion will be thrown open to all of you because all your suggestions are going to be welcome. I for one, I love coming to the Judicial Academy whether as a participant or as a Resource Person because I feel that even when I come back, when I come here as a Resource Person I probably take back more than what I give. Now, over to Prof. Shrivastava. [10:16] because *mohunhe le doobtai*. If anybody understands Hindi. Raise your hand who haven't. There's so much love in parents that they are the beautiful criminals, they'll do anything for their kids because they have so much love. I am a mother I'm saying it. And you take that as authentic?

Prof. Shrivastava: No this is why the Supreme Court is saying that there is tendency and you can explain it.

Participant: Ma'm we follow the law.

Prof. (Dr.) Aruna Broota: A the law you follow is the parent and not the doctor, I am not a doctor, please, I'm, I'm just saying. And the parent is fool proof. The parent will become fool proof only if he creates that birth certificate which will also be not fool proof.

Participant: There are methods to find out whether you are telling truth or not!

Prof. (Dr.) Aruna Broota: So, has Supreme Court gone into that, because they are saying that they are weighing to the authenticity of the school leaving certificate or the college leaving certificate etc. and I have 3 colleagues, who's ages have been tampered with by their own parents. They admit it they tell me. (Cross talks) We are having tea together in the University and they tell me!

Participant: Ma'm in all cases, in doctors report there may be a chance of variation, difference of ages, but in all cases, of the information given by the parents , not ..likely to be incorrect. can I put a question to you ma'm ? When you put your child to school, did you give a false ?

Dr. Broota: No!

Participant: then ma'm, you mam.

Dr. Broota: No!, but when any mother sees her child in trouble then, she will tell a lie to protect the child. All I'm saying is that rule where he says you add two years how you add two years/

Hon'ble Justice Banerjee: That is why emphasis is given to contemporaneous records not something which is inserted post crime. At the time of admission at school

Participant: The mother did not know that he will be the criminal.

(A lot of cross talks, heckling of voices amongst the audience and the Resource persons , not audible)

Hon'ble Justice Banerjee: And there is also a second aspect, just one minute, a judgment is a precedent for the authority of the law, which has raised a decider, and depending on the facts

and circumstances, the Supreme Court or the High Courts or other Courts, may deliver their judgments. Now, sentences in a judgment, are not to be read in the manner, as if it were a statute, you have to look at the judgment as a whole, and then see under what circumstances Supreme Court has said a certain thing.

Participant: we have to ultimately match the question to the facts that we are handling with.

Prof. Shrivastava: Okay! if you permit I think we can have tea here and we can continue, Madam if you permit!

So, in a very, *matlabki* with the help of some cases, I tried to just examine what has been the approach of the Supreme Court, and what is the nature of the problem that we face in determining the age. Parents they are not true, they are giving the incorrect facts, but we don't have any other method to ascertain the truth. Then medical opinion has got its own limitations, they cannot come out with the exact age of the person. No, registration of the birth, no schooling so all these things they make the things very much complicated. To get rid of all these complications, as far as the Juvenile Justice matters are concerned the legislature has come up with a very clear Rules and Guidelines. Rule 12 of the Juvenile Justice Rules. These rules are very clear, and it has set at rest all the controversies and this is very important and as Madam was pointing out, there are at least 2 Supreme Court Judgments, in which the Supreme Court has stated ki whatever procedure we adopt in the juvenile justice matters that can be adopted in criminal cases also. So, now, I think with the help of these 2 cases and the Rules of the Juvenile Justice Rules, I think, our work can become comfortable and easy also. Because Rule 12 as interpreted by Supreme Court in *Ashwini Kumar's Case*; *ASWANI KUMAR SAXENA vs MP*

[(2012)9SCC 750] very important judgment of the Supreme Court, it has clarified the law, as far, as much as possible. I would like to stay here for a few minutes, because the interpretation of the Supreme Court, in this case is very important and it has clarified for the 1st time the legislature has restricted the evidences that you can produce. Number 1. Earlier, under the general law, the position is you can come up with any evidence, horoscope, date of birth, LIC certificate, anything wherever you have disclosed the age, all those documents could be summoned could be produced before the Court and they could be considered by the Court. But in Rule 12 JJ Rules, they have limited the scope, only 4, three documents and no other documents can be produced before the Court or before the Board to fix the age of the person. They have made it clear, matriculation certificate and then, first attended, and then, birth

registration from the *Nagar Palika* or the *Gram Panchayat*. So, except for these three documents.

Hon'ble Justice Banerjee: the difficulty possibly arises, the difficulty arises with the certificate of the Municipal Authority, because it does not specifically say that the certificate should be based on the entry made at the time of birth of the child. So, that is where, you have to play perhaps a proactive role and say that it appears that it is not a...that court has to interpret the municipal certificate will have to be interpreted as a genuine Municipal Certificate.

Prof. Shrivastava: In fact what is happening now a days Ma'mki suppose the birth took place in 1980 they get it registered in 1990, they move an application before the Magistrate, magistrate conducts, some inquiry and order is made in *KULAI IBRAHIM Case in fact this was the fact*. They did not disclose to the magistrate, that there was a matter pending before the Supreme Court. They obtained the order from the magistrate and got the entry made in the *Panchayat*. Supreme Court commented very adversely on this style or procedure. So, in this case JJ Rules, they have linked it their choice of evidence, number 2 the inquiry has become inquisitive and not excusitive adversarial, it is not adversarial. because the Rule says ki the Court will obtain the evidence by and seek the evidence. This not the choice of parties to conceal the documents. This is not the choice of parties to hide the documents. Court can *suo motu* or the Juvenile Justice Board can *suo motu* summon the documents and get it proved. The wordings used in Rule 12 is very important. They are saying the Juvenile Justice Board will conduct the enquiry by seeking and by obtaining the following inferences. So, the elements of adversarial litigation has been taken away, so the Rules are important number one choices have become very limited, number two it is no more adversarial, it is inquisitorial and the Board will take proactive steps to obtain the evidences. Prioritization is also there order has been fixed in which order the evidences will be led. this all has been interpreted by Supreme Court in *Ashwini Kumar's case*. And in this case the Supreme Court has very clearly stated *ki* we are not concerned whether date mentioned in matriculation certificate is correct or not. You see just contrast, earlier approach was ki person must come, he must depose, he was said ki this is the correct age, they said no we are not concerned, because to ensure the simplicity and certainty in the procedure, they are saying ki you produce the evidence in following order. If there is a matriculation Certificate all other evidences are foreclosed. You cannot produce those evidences, even if they are contradictory to the High School certificate. So, priority has been fixed and most important corollary is the exclusionary zone. Evidences are excluded, this is

not the position in the normal law, this is not the position in the ordinary law. If the dispute arises in any other matter, example, election petition *hai*, insolvency petition, of civil matters or family dispute the parties are free to produce any evidence they like concerning the age but this is not possible in the case of Juvenile Justice matters. So, "Exclusionary Rule" if one evidence is accepted is there, which is acceptable under Rule 12 of the Juvenile Justice Rules then all other evidences are excluded. So, this we call "Exclusionary Rule" which has been interpreted by the Supreme Court in *Ashwini Kumar's Case*. On same basis we can say that Rule of Evidence Act is ki best evidence must be produced before the Court. that has also been given a go by. In other matters in other cases that can be be true, ki "law requires the best evidence should be produced " but here they say ki are not concerned with the best evidence, we are concerned with the evidences. ...*haani this will be treated as the best evidence*. In the technical concept we are not concerned, we are concerned with the order in which you can produce the evidences. So, this has been a general approach, now the question arises how to apply all these principles, in the Juvenile *ye* POCSO cases. Because cases are also getting important, here also the age is very important and we have seen Supreme Court Judgments latest judgments in which they are saying ki even if the girl was major by school certificate, parent came and they proved ki no it was incorrect date given by me to the school and it was accepted by the Supreme Court. So, question arises how to apply all these principles in the POCSO cases and one another question is ki at which stage we can consider the age of the prosecutrix? Because if we are the Courts of Sessions only at the time of judgment we will pronounce a final finding ki this is the age of the prosecutrix. But suppose there is an application at the preliminary stages ki Sir return the finding of the age because she is and here is the High School Certificate, what can be the approach in this regard? Ma'm if you can enlighten on this please? these are the issues which are coming up, coming up probably in the POCSO courts.

Hon"ble Justice Banerjee: Possibly as I had stated at the inception, that there's no authority of the Supreme Court, no authority of the High Courts either because the Act is very new, but in such a case. In ...this is a case of absence of any Rules, so far as the victim is concerned. So, far as the accused is concerned he gets the benefit of the Juvenile Justice Act and there we have no option but to apply the Rule 12 of the Juvenile Justice Rules. But at other times in a situation where there is better evidence forthcoming, let us say, medical opinion which clearly says, that the age was between 14 & 17 perhaps that may be taken into account. Secondly, Matric Certificate but later on if some entry in a Birth Certificate emerges and it is found that the Birth Certificate was different. Thirdly, the usual way of proving anything, say for example elders

coming and testifying to the age therefore even oral evidence is good evidence. So, may be a neutral person, say say say, for example somebody it may be able to say that my daughter was born on such and such date she has a birth certificate. I remember I,I,I, knew the family very well his daughter was born 3 months after my daughter, so there you know if my daughter is a minor then 3 months younger she will have to be a minor. The usual principles of evidence, going through the judgments I don't think any Supreme Court Judgment has really ruled out or given a very definite finding as to how? ultimately evidence has to be analysed depending on the facts of the case and what is available. It is only when there is no birth certificate when there you have to have to rely on what ever is available, when the one comes to give evidence in the village there is somebody who is saying the child was born the year Ila took place or they dont remember their own age. (participant speaks something which is not audible) that's right that's right. Yes! that's right age has to be determined, How the age has to be determined that's what we are talking about!

Prof. Shrivastava: Just I was, I just want to just point..

Hon"ble Justice Banerjee: So far as the accused is concerned he is going to take the point of minority only for the benefit of the Juvenile Justice Care and Protection Act. There, (participants cross talks not audible clearly) That's right

Participant: (first part not audible) you just rely that certain child is a victim or not...

Hon"ble Justice Banerjee: to begin with it will FIR is the initial document so that has to be on the basis of what is said by the child or what is said by the parents of the child.

Participant: but, your lordship, medical evidence says child victim is a between 17 and 18; 16 & 17, what, what what will treated. Whether juvenile is POCSO Act or not?

Hon"ble Justice Banerjee: 16 - 17 will definitely be a POCSO case, 16 - 17 will be a POCSO case.

Participant: and 17 - 18 doctor is opined that age is between 17 & 18.

Hon"ble Justice Banerjee: In the FIR you keep a charge under the POCSO Act but the age determination will have to be done in accordance with law.

Prof Shrivastava: So can we break for a cup of tea 15 mins. Or may be 5 mins more?

Sumit Bhattacharya: It was a nice aaaa, we will be coming back at 10:30 we will squeeze the tea break for 10 mins, we reassemble here at 10:35 may be. Thank you!

Session: 06: Contest on Age of Accused

Speaker Justice Indira Banerjee & Prof. S.P.Shrivastava

Day: 2

Hon'ble Justice Indira Banerjee: In this Session we have a hypothetical case which each you have to decide and after you have decided we are going to get into a discussion to see how many of you decided yes which way I think we should be quiet interested because I personally feel that every judgement and every judge is right its only often difference of opinion based on the reading of the fact after this we have a questionnaire to answer. (cross talk) 15 minutes(silencePeople were solving Questionnaire)many of you may not went through similar cases under the Indian penal court where the girl was below the age of consent..... thinkwrite this session is on the contest of the age of the accused which is almost be in covered by the previous session so I would through the discussion open contest on age of victim and contest on the age of the accused what are the types of problems that you face how many of you have actually decide cases under the POCSO.all of you have and issues of age of amain issues what would be the victim's age because they would try to take the matter out of the special courts yes so why dont all of you share your experience and the type of problems you see because as you can see we are basically accessing we are accessing the difficulties what are the difficulties you faceyeswith regard to age

Participant : evidence

Hon'ble Justice Indira Banerjee: today's discussion is contest on age of victim and contest on age of accused.

Participant: My lord sometime at the time of hearing of bail application the defense lawyer took the plea that the age of the victim is 18 years therefore this case does not fall under the ambit of POCSO act and he produce some document available with him reason behind why the document is available with him is because the girl has stayed for 3 or 4 month with the accusedand at the time of application ..he produced such type of document these are the document and therefore a liberal view has to be taken ...its a matter of love affair and consent whether at the time of stage of bail we can go into this question

Hon'ble Justice Indira Banerjee: why ...why not the principle for grant of bail are some what different

Participant: the question is this whether at the time of stays of bail ...bail application we can ascertain the age of the victim more particularly the complaint said which is written by the mother or by the father ...my daughter is so and so and had been enticed by the accused person her age is 15 year old 17 year old like that and now these two documents FIR it is also a document and accused also produce some document

Hon'ble Justice Indira Banerjee: so when you grant the bail any bail dont you consider the materials on the bail ...

Participant : no ..no we consider not the question whether we can give the finding on the age of the victim ...stay of the bail

Hon'ble Justice Indira Banerjee: I think in a bail application there is no script for recording and finding of any finding is prima face

Participant : I think we cannot get to the age of victimthat can be done after the trial

(cross Talk)

Hon'ble Justice Indira Banerjee: that's right bail application..final opinion why don't you use the microphone so that your colleagues can also hear you yes

Participant: the age of the victim is need to be answered at the time of consideration of bail and at that stage the opinion of ...is prima facie opinion or or it has no bearing in the prior and the appreciation of the evidence that is limited to the bail application

Hon'ble Justice Indira Banerjee: naturallycross talk

Participant: for the limited purpose of granting bail it has to be considered ...now I disagree with that why because the statement and 161 of the victim girl is there ...why dont you go into that statement suppose if she says that I am above 18 in that 161 statement then you can give benefit to the accused not otherwise dont go the certificates cannot be considered ...bail

Hon'ble Justice Indira Banerjee: in a any bail application you decide the material as a whole(cross talks)

Participant: at the stage of discharge

Participant: at case of love affair or elopement the girl disclose her age as 20 so in that case when there is a resistance only on the part of prosecution ...that the girl is below 18 years of age and POCSO is abrupt ed the court is equal to make a prima facie inquirycross talk

Hon'ble Justice Indira Banerjee: suppose in the FIR it is written that the girl is seventeen but the document is produced showing that the girl is not 17 she is 18 or above will you not consider that why not where is the bar in the law where does the law say

Participant: now you see the prima facie ...even at the discharge of of application the documents filed by only by the prosecution ...

Hon'ble Justice Indira Banerjee: Where you cannot look in to documents filed by the defense.where would you get that

(cross talk).....even at the state of charge but there is a difference between the forming of a charge and the granting of a bail persons liberty ...a persons liberty cannot personal liberty is involved because he is behind the bars so if he is wrongfully behind the bars

Participant : but in the case of granting bail only ..we are not finding verdict ...cross talks

IB: putting this in terms you are not leaving him unconditionally you are putting into terms you are saying that he has to report to the police station he has to report to the magistrate h has to give the local surety cash securitycross talks ...I dont think subject to what all of you say he is absolutely right and the charge sheet schedule formation of charge sheet you go on the bases of what the prosecution has ultimately the charge will fail ...ultimately at the trial the charge may not be proved but at the time of framing of the charge sheet you have to go by the materials produce by the.....

Participant: framing of the charge not charge sheetbail will be coming before that ...will be not producing the case for the case of prosecution by considering the...

Hon'ble Justice Indira Banerjee: no

Participant: in or fairness I do consider that we can have prima facie opinion based upon the documents produced by the accused at that stage its a prima facie opinion only

Hon'ble Justice Indira Banerjee: thats right thats only prima facie its not binding on any one

Dr. Aruna Broota: [00:15:15] May i be allowed to just express my observation not of today but since my heart believes for this issue a not here in Bhopal but somewhere else I was conducting session on counselling skills for judges and we started to do case studies how to the judge would will now mediate and a one of the judges said the boy has to be punished for enticing the girl in spite of the fact that the girl said I love him and I will only live with him I will not think of anybody else so the judge said that the girl you have presented in this case study is bloody fool this is the language and and she doesn't have her mind because she is under 18so he said that the boy should be punished *mera bas chale to mai usko mar doo* this is what he said if it would have been in my power I would kill him and since I was acting as a counselor and so I ask the judge and Sir! where is this coming from ...and he broke down crying and he said my daughter went to way like that ...so I am trying to say the kind of investigations we will make depend upon the attitude we have towards the victimthis is how we keep cases (not audible) and then decide how much probe we are going to make into the investigation ...(cross talks)

Hon'ble Justice Indira Banerjee: Judges are definitely human being but being judges have to train themselves to decide the cases objectivelyit may happen but aberration are not the rule aberration ...it is possible that a ..I am giving you hint that some training programs should be there to train judges ..some very progressive judgement also comes from a the judges and in the context of gender sensitivity I would say far from gender sensitive judgement are come from many of my male colleaguesso definitely we should shed our baggage it is possible that somebody have experience of feeling somebody...with a bad mother in law or a bad daughter in law and so the mind set is thereevery time there is a 498 A dismissive with somebody has wrongfully filed a 498A against somebody...(cross talk)these things happens but they should notsilentyes now after result which have come in 22 convicted and 11 aqua-tor now our hearts may have gone for aqua-tor having bring up to the case but here is the predicament where is law is totally but those who have acquitor I would request you to tell us the reasoning how you acquitted

Participant: the primary reason that we were to answer it in the context of section 4 but i started from 366....cross talk the boy did any over trek in either enticing or taking away then AIR 1965 *Vardhraj* and the girl was of the age of determine and all then we come to the basic issue of section 4 were no evidence worth the name that she was even subjected to any kind of assault what to talk of sexual assaultno...no..she refused her internal medical examination to any evidence that she was that she was subjected to any kind of sexual assault ...lets take it in alternative argument that she had eloped she got married and she had gone with the intention of getting married ..they got married she was 15 years and 3 months married is a valid marriage doctrine of ...will come in to play it was valid and binding marriage from the evidence of the mother of the child victim this is apparent that she has accepted and they don't have the intention of getting annulled by section 12 of the Hindu Marriage Act so there is also a sanction from the familyshe has voluntarilygirl in any case is uninterested ...so it can be done within one year of the marriage only but we are not going into that ...cant we say it matrimonial obligation rather thaneven if its a ful bench judgment of Delhi high court considering this issue only ...ultimately its a valid marriage and the fellow was performing his matrimonial obligation ..other wise we don't have evidence on record any other record

Hon'ble Justice Indira Banerjee: that is another issue

Participant : she refused internal gynecological examination(cross talks)

Participant: If my friends argument is going to be accepted then we have to abolish the provision of child marriageand thereafter this is 164 he is saying 64naturally the admission of marriage plays a vital role here ..when the accused was also confronted with that kind of.....evidence he has not given any explanationwhat is the natural presumption and incriminating to the accused and naturally 29 comes into play then the sexual intercourse is presumedcross talk

Hon'ble Justice Indira Banerjee: can sexual intercourse be presumed for marriage
...Participant: off course (cross talk)

Participant: It doesn't recognize the child marriage its a null...no marriage at all

Participant: sorry its a valid and binding marriage two acting conflict Hindu Marriage Act and this POCSO ..POCSO is a gender neutral act otherwise but it does not override the provision

of Hindu Marriage Act section 5 enumerates the ...cross talk ...this is valid and binding marriage ...

Participant: to my friends section 42 A of POCSO act it over rides all the other act(cross talk)...

Hon'ble Justice Indira Banerjee: the lawyer who make representing the wife may tell her ...dont admit it ..dont admit itrefuse the medical examination ..(cross talk)

Participant: Parliament has passed it in its wisdom you cannot question the wisdom of parliament(cross talks)...suppose she had sexual relation with the boy and she was below 18 though they were married ..whether this would come in definition of section 4 or other POCSO act ...

Prof. S.P.Shrivastava: but then it was never been proved did they have physical relationsbecause I have many cases where the couple had been married for four years but their marriage has not gone.....

Participant: the girl accepted that she had sexual relationship after marriage

Dr. Aruna Broota: now when you say conveniently the girl has said and then you say conveniently lawyer may have approached her so be sure of what you are saying(cross talks)

Hon'ble Justice Indira Banerjee: What I said is that a lawyer petent lawyer would have advised her ...not to admit it ..

Dr. Aruna Broota: but all the same when you are talking of acquittal right now it surprises me that if you have a 15 year old girl and sve got married like this she would have been emotionally very disturbed after being recovered and restored to the parental home she would go through a lot of psychological processes of remorse and rebel it will go to and fro because she is under 18 she cannot up her mind and(cross talks)

I would like to say that someone who has flamed this case study should have placed a psychological state of mind between the mother and

Participant: no...no...no.....cross talks

Dr. Aruna Broota: why is POCSO important that a child is unable to take correct decision so marriage before 18 I am arriving at that(cross talks)

Dr. Aruna Broota: guilt remorse ...why does that happen because you are not having a matured mind..... you forget the matured bodyright. then this case study is incomplete

Hon'ble Justice Indira Banerjee: may be ...may be but here we are dealing with punishing a person we are punishing a person so ..if ...let us say two students just before the age of 18 kind of mixing you have with aanything might just happen the intention is there intention to marry is also there just because there is objection from one parent ...and somebody lodges a complain.

Dr. Aruna Broota: but the fact is why is there is a constraint because the children are immature..I to live in a world where a class 4 child comes and tells me my class fellow proposed me but my mother objectsclass 4...violation is for sure the repercussion and the maturity to realize that marriage is never a picnic but it was a big tragedy sorry sorry....(cross talks)

Dr. Aruna Broota : I don't mind saying in public as just a releaser of tension my children and my grand children say bade papa is so wise and I say yes at 78 he is very wiseso that is true at 21 a boy is also not wise but question is you cannot tell them to marry them at 17

Hon'ble Justice Indira Banerjee: you cant ask him to get married but if a affair develops and some relationship has taken place after that it has to face ...punishment under POCSO ..its a dilemma (cross talks).....

Participant: and they have attain sufficient maturity to understand at-least and reciprocate that feeling with each other are we not criminalizing it...

Dr. Aruna Broota: that's why my counseling says why do you want to get married ...carry on with each othercross talks

AB: We are always in a dilemma inspite of POCSO ...

(cross talks)

Hon'ble Justice Indira Banerjee: My heart is with them

Dr. Aruna Broota: We work with the heart many many times that's you proved my point that even judges have a heart so ..cross talks

Patiala house

Participant: state would have the control over the body

Sumit Bhattacharya: So, we will be breaking for the tea ..and will come back at 12...see the POCSO case is august gathering ...very very small amount of cases have come up to the higher judicial level so what I tried as a engagement pattern I just culled out one of the judgement tried to pull out a hypothetical situation like how it bounces with different judges in a given situation saying. that's how we have a difference and then this debate come out hopefully we had nice time learning and now we break for the tea and come back at 12 o' clock and we start the next session. Thank you!

Session: 07: Challenges When Both Victim & Accused are Child

Speaker Dr. Aruna Broota & Hon'ble Justice Indira Banerjee

Day: 2

Hon'ble Justice Indira Banerjee: We now leave on to, we now leave on to Session number 7, that is "Challenges When Both Victim & Accused are Child". Now this is a very tricky issue; in fact the hypothetical case which you just decided, where many of us felt that our hearts were in favor of acquittal. Now, when child, when victim & accused are both aaaaa, children there are two types of problems. One is look his is a child he's made mistake, correct him in a special home you receive a child you rehabilitate a child. The expressions used are reception, rehabilitation, there is no question of punishment. On the other hand there is another child, who may have become a psychological wreck, by reason of something which a child may have done. Today of course Dr. Aruna Broota will be speaking, I'll just handover the microphone to her, these are issues to think. Now let us say, a bot who is 17 yrs and 9 months rapes a 3 year old, 3 year old, 2 year old infants, practically infants toddlers, they do get raped and we do find cases like that. There what is the situation the law is such, that if he is a juvenile, he is a juvenile. If he is 17 years and 11 months on the date of the crime, then he goes Scot free practically because he'll be put in a special home, he will be kept there for a maximum period of 3 years. The language used is rehabilitation and reception. In those circumstances can he be given death sentences or life imprisonment? I don't know, why they have used only the expression, "death sentence" & "Life Imprisonment", because when they say 3 years that means for all practical purposes they cannot be given anything which is beyond 3 years. So, the competing interest of a child, who has been wronged, who may have been wrecked, devastated for life, *vis-a viz* a person claiming juvenility. A person who is 17 years 16 years is not expected to go and rape a 3 year old 4 year old, 5 year old. As it happens this is one. The other problem is very similar, to the hypothetical case which is given out to you, where they are both students, in today's world of free mixing, they start mixing with each other. With the kind of freedom people get now a days, sexual involvement is not also uncommon. Even in the States we hear of parents, mixing contraceptives in drinks and other things before children go out to parties. So, times are changing, when society is changing, things were not as they used to be in our times, when the

parents would ask why you are back at 6:15 you said you'd be back at 6 O'Clock? Then you would have to explain why exactly you were 15 mins late, those things, things are not like that any longer. Anyway, over to Dr. Broota, let us, Dr. Broo, yes! Let us hear what Dr. Broota has to say.

Dr. ArunaBroota: Thank you Ma'm, with your permission, my

Participant: Connecting to this there is an issue where the girl is above 18 years the boy is 17 years.

Dr. Aruna Broota & Hon'Ble Justice Indira Banerjee: Both collectively say YES!! Yes, yes yes!! Very much.

Hon'Ble Justice Indira Banerjee: But then if the girl is above 18 then POCSO won't be attracted. That is the only difference.

Dr. Aruna Broota: But, if the boy, if the boy complains, if the boy who is 15 and the girl, let me give you a case where the boy is 15 and the the girl is 32. The boy can make a complaint. (Justice Banerjee prompts to some participant: 15 , 15) And these thing happen, please these things happen.

Ma'm with your permission may? Let me say at the outset, I think Sumit has some hypnotizing skills, because I didn't want to come and I don't know, how he motivated me to come and i agreed, so thank you for this opportunity. Why I didn't want to come for some domestic reasons but also, because I am very afraid of judges! You are very learned, you are very just, you are very fair, you've experienced a lot of life and we lead a very protected life minus me, because I practice so I hear lots of aberrations, whatma'm was talking about and I just come here to share with you those aberrations that I see every day in my office and I just want to say are you aware of what is happening, then only POCSO can get a more refined way of looking at things, if you look at the way how I start to analyze and see people. Now, today's issue that we took up was, that what are the challenges faced, when both the victims are kids? I mean none of them is like one is adult and the other is not. When both of them are children, what are we going to do? because when you resolve the other one it ended the way I wanted it to end, because Ma'm said, we all wanted to respond from our heart! and that is exactly what I was talking about, that we have a heart, and that heart is governed by our own personal

experiences and we try to say: hey! the girl was young okay, but give the benefit of doubt to the older one also, whatever whatever. But what is your heart going to do both are kids and both are equally to blame, let's see what I am talking about.

I know that I am talking something very elementary, but I still want to draw your attention, because I am going to build things and case studies around this premise.

Sexual Offence is a sexual contact, (I want to bring in this concept today "Contact") under three circumstances:

- A. When a child does not understand a sexual approach (at all, when you say the child of 3)
- B. When a child is approached sexually without her/his consent
- C. When an adolescent is under 18 and things are going wrong between aa the two of them.

and I would say, how would you define a child? Let's see how judges define a child? How would you define, this is a child ? How would you define?

Participant: As per Act.

Dr. Aruna Broota: As per Act? Okay!

Participants: (Cross talk) the child who is below 18.

Dr. Aruna Broota: Alright! but physical age?

Participant: below 18

Dr. Aruna Broota: Below 18, now I want to draw your attention to this concept that when a child is born, the child is "asexual". He doesn't have any idea what his sexual organs are? What his sexual capabilities are? So, in psychology we say that all children, infants are born "asexual" and it is the growth process that is first the physical maturity that you are talking about, that talks about sexuality. Getting from asexuality to sexual consciousness. So, what happens when that starts to happen, that a child realizes, that mothers body is different from mine or the girl realizes that the father's body is different from mine, that's when you know, interest in other people starts. And what happens when he still in the process of understanding the body differences the sexual abuse takes place. And what happens to that sexual abuse, we in our research studies and my clinical practice, I want to draw your attention to this fact that

Self-concept of the child is distorted. He begins to lose confidence, he begins to get pre-occupied.

His need for approval, (In Hindi) *sab mujhe achchaa achchaa kahen*, is satisfied through sexual approach when the victim grows up. You know this is what he learns. When you are fondling, maids are fondling the bodies of boy's infant boys, and maids are also fondling the bodies of male children, this is very important for you to understand, what happens to the infant at that time. His need for approval is satisfied later in life through sexual approaches when the victim grows up.

He thinks this is the only way to interact with others. This is the only way I can win the other person. Whether I make a homosexual contact or I make a heterosexual contact, but I must make some sexual romantic approach towards the other person then my work will be done, then he will become a friend of mine, then the teacher will like me. All these Hindi films are made out of some seeds story if they are exaggerated. Say "*Mera Naan Jocker*" children are interested in seeing the teacher's body, they observe the teacher's body and then they try to approach the teacher in a romantic way. And the reason is because in early childhood when they had a sexual fondling, they thought this is the only way to interact with the others. So, the sexual concept is the only way to interact with others that is what they conclude, with the result that when they come into adolescence, they develop depression and very often

Weeping spells; not only female child but a male child also starts to cry very easily.

Changes the dressing sense of the victim when he grows. Have you seen the girls and the boys growing in a very sexual way now? The other day we were watching K.L.Sehgal movie, there was a history and auto, sorry not auto but a biography of K.L.Sehgal coming on Doordarshan and we saw overly dressed, now I am using the word over, overly dressed the heroines were in those times. And look at the dress sense now, the whole dress sense is a sexual sense, in a sexual sense comes in the victim who has been a victim of sexual abuse and he becomes sly in social relationships and manipulative in nature. See the personality that undergoes a change. I am going to build this as my ways that takes him to sexual offences later. May I repeat?

- Self-Concept is distorted
- Need for approval is satisfied through sexual approach when the victim grows up

- Sexual concept is the only way to interact with others with the result 14,15,16 they develop
- Depression/ weeping spells without any reason
- There are changes the dressing sense of a victim when he/she grows up.
- There is a sly manipulative relationship within their personality that we should not give our total self to the other person.

This is what a sexual abuse does to a person. Can you imagine the consequences of sexual abuse?

What are some of the Preventive and Curative or reformatory steps that we can take? I have been harping on this:

- Psychometrically assess both victim and offender should be assessed because it is important you don't trust medical doctors. The bone age was flouted in *Nirbhaya case* that plus 2 years to that age was also not granted to that child or given to that child to understand that he is a huge offender, but he was let off. And victim could be the same as above the, like the offender he can develop an impulse control disorder. Did you know that very I get cases and they tell me; my husband is very bad he is having an extra-marital relationship. He is not bad!, HE IS NOT BAD! Very often a family comes to me and says we want to throw out this *bahu* of the family because she is having extra marital relations, she is not bad! Either she has an impulse control disorder (ICD) or she has a manic personality. You are all judges of today please type on google manic personality, and match the symptoms you will be shocked, and how many of us are like that. So, when as a child, you are hyperactive, you grow you develop impulse control disorder, you steal money, you disturb others in the class, you pull skirts, you tease girls, or the boys tease boys also, that is also possible you'll find that there is an impulse control disorder developing, and very often there may be a manic personality in the making. Who is a "manic"? A manic is a person who has a bi-chemical disorder in the brain. For example there are 5 bio-chemicals in the brain, in this very proportion and they are mood managers, in some personalities, if you don't eat for more than 2 and a half hours you can become like this, those 5 bio-chemicals (shows gesture), you'll feel low, you'll feel. Irritated, you'll feel depressed and in some they go like this (shows gesture), these are the manic. Whop are the manic? They talk more they walk more they move more they romance more they sex more they have no control on

themselves. They may be violent, they may be aggressive, they force you to do, coarse you to do things which you don't want to do. They can be destructive in the home, they can break the Television, they can break the cutlass, and this is a manic syndrome a personality, manic personality will be such that has a bit of everything in it. Okay! we say *gusse vwaala* he is an angry child, *iska father bhi gusse waala thaa*, his father's like that, his grandfather is like that, but we dont treat it. The moment you say why don't you treat? They'll say *ye koi paagal hai?* He's m=not mad, as if, if you have bronchitis you are not going to treat it, because it's not cancer. There you are so different, but here you are so different. And such people who are impulsive who are angry who are enforcing, who are disloyal, are not bad characterized, but they have a bio-chemical disorder, that you can treat. Why the need to have psychometric test. The need for a psychometric test is to assess the extent of the manic personality. Does it merge into psychopathy? You have heard about psychopaths, aaaa, who was that guy? Charles Shobhraj and you must have been very young when billaranga case came-up with Gita Chopra, were you, were you, were you too young at that time? But Billa-Ranga, can I differentiate between a criminal and a psychopath. A psychopath shows social manners but doesn't mean a word of it. A criminal has no guilt, no remorse for what he's done. If I had gone to "tihar" to interview Billa and Ranga, they will say *Haah kyaa hai kyun aayee hoo? Tamashaa dekhne aaye ho? Haa kara thaa rape kiya thaa maar daala thaa ,tumhe bhi kar sakta hoon*. You go to Charles Shobraj: Hello Ma'm you are Ma'm? Its very sweet of you to have thought of me. You'll say wow! What a wonderful person, how can he commit a crime? I don't know how much you read of Charles Shobhraj, but there was a girl in the Parl who wanted to marry him, while he was still in jail. So, she was a manic. A manic begets a manic! See this is the sensitivity I want to draw in you to see what is happening. You come to know of child sexual abuse, in the Court. You come to know, how I should handle it, now there is a POCSO. But you have no idea what leads to what? is there a bio-chemical imbalance in the child? Because you will find through the coming case studies that I am going to present, that there is a family pathology in parents, in grand parents from the paternal side from the maternal side and it is a genetically endowed behavioral pattern. So, that is what is very important. So, Sumitji said no, you must discuss what are some of the preventive measures? What are some of the curatives that we can discuss which can hapopen in the reformatories, but they don't. But, they don't in the remand homes. You talk of a lot of juvenile justice but the plight, I am sorry to say is very, very very poor at that level.

So, Offender may be having an impulse control disorder/ manic personality

Victim could be the same as above

So, Counseling, *Yogabhyas* are the basic essential to run a remand home along with,

Psychometric assessment. So the psychometric assessment will give you the whole idea

- What level of treatment can be made?
- How much time roughly it's going to take? If you have this in mind your heart will say something very different after reading POCSO and after reading the circumstances of the children. This is very important to understand.

If the victim and both the offenders are criminals, that means they are no gait they have a defined attitude in their body language the prognosis is very poor and punishment can be according to the POCSO Act. But if, they are not criminals, if they are offenders I think the POCSO Act should be revised to give some corollaries that if not this one chance, if not this , at the remand home, I am not saying let off and send back home no I am not saying that at all.

So, this is what I wanted to base today's theory and I want to circulate a case study, May we please? This is on challenges, can we distribute this or have you already done that? Right this is the first one no this is the second Session. It gives you the title challenges, *nahiyehbhidoosrihai*, challenges (cross talks) Alright! till the time you get it, please may I have your attention please! Please may I have your attention? I will read out something till you get your own copy. And I want to read it out to you, I have copied down changing names of boy who comes to me for consoling!

CHALLENGES WHEN BOTH VICTIM AND ACCUSED ARE CHILDREN

A CASE STUDY

Akash is ten years old. He is very shy. He makes no eye contact with his class mates or his teachers. And you will be surprised not even with his parents. (kindly look at me for a second, this is what Akash is: explains with body language. This is what Akash is! and you will be surprised that he doesn't make an eye contact even with his parents at home okay! so this is the personality I am giving you.)

His Headmistress of the school called both the parents to school. And no one knew what was happening. The child was referred to a clinical psychologist: (Now see what it says. The clinical psychologist writes:)

Akash, age 10 is the older child with a younger brother aged 8 years. He is studying in class IV at a public school. He is an average student scoring between 55%--60% marks. He shows no conduct issues in school (there is no behavioral complaints against him from the school). He smiles to himself (*baithe baithe he'll just keep smiling Haann.:*) at nothing from the environment okay!). His grasp of Maths is good and also science subjects. He was found to have average Intelligence (102 IQ).

He belongs to an upper middle class family. He lives in a joint family doing joint business manufacturing packing bottles. His *Tauji* (Uncle) has a son who is 12 years old and a daughter who is 10 years old. The grandparents are also living in the same house. The grandparents are on the ground floor. The father mother, *Tauji* and *Taiji* live on the second floor. And all the children live on the third floor. Akash and his brother are in one room. *Tauji's* son lives in a separate room. His sister lives on the second floor with her parents.

Akash told the Psychologist that when he is sleeping, his cousin brother (the older one) comes into his room and unclothes him and forces him to let him lie on his body. He said that he does not remember when this thing started. But he says that now he has started having pain in his penis. One day his penis started to bleed and his mother asked him why there were blood stains on his under garment. Simultaneously his *Taiji* asked her son as to why there were blood stains on his under garment.

Both sets of parents became suspicious. But did not pursue the matter as *Tauji's* son was clever to tell some story and their attention was dissuaded.

The Psychologist reported after history taking and psychometric assessment:

1. Akash is sly
2. Akash has been sexually abusing his own younger brother (8 years old) for the last three months.
3. Father is into alcohol in a regular way.
4. Father has had extra-marital relations (that is a Manic personality)

5. Grandfather had raped his mother
6. Akash has attention deficit
7. Akash goes to pornographic sites on the computer.
8. Akash steals liquor from home and sells it to some senior boys in the school
9. He has poor self control as he has been stealing money from home.
10. He peeps into the parents' bedroom when they are changing clothes.
11. Homosexual tendencies were also observed during the assessments.

3 children are involved. This is happening at home. These are cases that will never come up to you, because they will be buried alive within the family. What is POCSO going to do?

After all, we do have the responsibility of extending laws to social welfare also, family welfare also. Can we look at these psychological possibilities, before we give judgments according to how the laws are defined? I want you to react. I first want you to react How are you receiving this, how are you receiving this information? Were you aware that these things happen?

Participant: I think this types of cases is also reporting, Because of the involvement of the ChildLine workers and the counseling in the schools. In Kerala I think, In every school Boxes complaint boxes, one can just put a letter, just writing something. Every day, it is being In one case, there was a father raped his own daughter, she became pregnant, delivered child. The matter came to life after 6 years that too through a this way, faced a trial he has been convicted undergoing mis and match.

Dr. Broota: I know Kerala is doing better than North India at least, but at the same time since you touched my painful chord, let me make a comment: Schools in Delhi have counselors only to show to the world that we are mord. There are 2500, 2600, 2000 children in a school and there's one counselor. What is that one counselor going to do ever? I have no idea at all. I really have no idea, what's going to happen? Ma'm, any comment? Did you realize that this was happening?

De dijiye, haanji de dijiyeunko, no,no that's okay!

Dr. Broota: But Ma'm this is now becoming a menace, because the media, the television is on, the dresses that are shown, the kind of life that we have built in for our children. the kind of life that we have carved for our children, that, I can say that the family system has failed and now the task of disciplining children are in the hands of schools, and how many schools are going to take this responsibility? We were discussing Ma'm with you I think, I'll not go to school if you don't buy me an i-phone. With you, with you, with you, alright! so I was telling

you I was ageing I never remember anything. See I was discussing it with them. So, what I was saying was that, so many cases are coming for counselling to me, where the child sits like he is the grandfather, you know he is the *kartadharta* of the family and he says that, I'll not go to school tomorrow if you don't buy me an i-phone 6 and the father is saying, *beta* I don't have the money, beta next month I'll think about it, why are you giving him falsos? Why don't you have the courage to say no? The moment the father says no, *main school nahijaaunga*, I don't wanna go to school and I am sitting there and saying: don't go! But the parents don't do that. The parents don't do that, so the parents have no command to even demand respect at home, because parent's behavior is on the decline. So, what are you going to say, when you advice a child to go back to a remand home okay! And you say that he served a period of 3 years in which he had psychometric assessment, he had medication from a psychiatrist, he has had psychological help, therapy, counseling from a psychologist and now he can be placed back in the family. Which family? Where the father steals money, where the father is a perpetual alcoholic, where the father has extra marital relations with this, Akash's father brings home the women he wants to. The wife is at home, the grand father is at home. And this is what is happening. Whether you go in the extreme upper economic background or you go in the extreme lower economic background. Its happening, its happening on the 16th floor of the Gurgaon Skyscraper which is the latest, it's also happening in Delhi's Selampur locality, its happening everywhere. You see just now you were telling me that you've been to Delhi University, if you see the PG aka the the unnnn Paying Guest Hostels, not the University Hostels but the paying Guest Hostels accommodations that are mushrooming, this is what is going on daily. There are girls and boys coming around stealing and what not that they are doing to come to a lifestyle. I know, I know of a University College, PG Dept. teacher, living singularly in one of the *barsaati's* and the economic student visiting him and she is pregnant, so her mother got her to me. The girl is in BA First Year and she's exactly as Ma'm pointed out 17 years and 6 months or 7 months something like that. That's what she is. So, what POCSO are we going to do, the mother is not going to put him to the police because she'll say my daughter's name is going to come up over there, so, so, so.

Participant: And the doctor has got the duty to report it to the police if you want Act, I mean POCSO to take action against, you are supposed to report.

Dr. Broota: The Dr. has taken 50,000 Rupees and done the abortion. Is there an Act for that?

Participants: It is, It is, It is, It is, not only the offence which has to be reported,

Dr. Broota: I can't go and report i am under oath! When I become a psychologist, I do Ph.D. I am under an oaths, that this will, whatever matter comes to me, is strictly confidential, till the police know, till the Court asks me. Ma'm is the only one who can ask me, Aruna give me a write-up on this case it has come to me.

Participants: There cannot be, there can be...

Dr. Broota: Sir, Sir, at that time when I said that judges come from a family, they have their own, whatever happens in their family, I do want to submit very humbly and guiltily to you *maa is guilty, mujherahamaatahai* what if my daughter went into that position? Will I want POCSO? I have taken that oath, and using that oath to justify my guilt, see I've taken an oath so I can't go to the police I can't go anywhere, unless Ma'm brings up it and asks me keAruna *ek report banaake de terepaasyeh case aa rahaahai*. Till taht time i'll be dilly dallying and not giving it. And this can happen to you, its reached you but people are pleading to you as parents, that I want to withdraw the case.

This is not the case of Akash that you have received. This is a case of a family, its a sick family, there's pathology in the family.

Participant: not audible. POCSO Act applies to post crimes Ma'm...

Dr. Broota: Agreed so, the post crime is always there mam its an ongoing process.

Participant: No, No, even I an apprehension can be reported and the child can be given to the custody of the doctor, a counselling can be given and the offence can be prevented, can be prevented, Act says so.

Dr. Broota: Yes Ma'm apprehension can, but you have not got the point:

1) I am saying the child that you are dealing with both are children. The Session is that when both the victim and the accused are children, both are from the same family basically this time and both parents dont want to go to the police or to the doctor or to anywhere, or to anywhere. What are we going to do?

Supposing they are under apprehension they have reached you, right! The mother is going to plead to you, *mainaapkepairoon me sir rakhteehoonmujhekshamaakar do mere bachchehain*. I hear it every day. This is for you now to realize, humanity versus POCSO versus Righteousness versus Humanity versus so many psycho, psycho-social conflicts you are also parents. How is tit going to work out? I don't know. That's why I always honor the judiciary, because I say my God they are father's they are son's they are daughters they are everything in

one anything can happen in anybody's family, please nobodies family is bad. Its of families are sick. No one wants to address the sickness. Can the judges also address the sickness? This is my only contention for today? thank you very much, I am sorry if it leaves you somewhere inconclusive, but it has to be inconclusive so that you go back and think about it how can we include psychometric tests before we deal with POCSO.

Participant: Madam I want to ask one question. When in the previous Session, some of my colleagues says about the acquittal, in the cases, you have raised some suspicion and rather surprise, why the judgment of conviction has not been awarded in that case. Now, I want to ask one question, Section 19, 20 and 21 cast a duty upon you and even failure to report the offence to the police is also an offence under Section 21. Is it not your duty to report the matter to the police?

Dr. Broota: If it was really my duty, in Akash's case, if it was really my duty, why did you ask me to take an oath after my Ph.D.? That I will treat every case in utmost confidentiality till a judge asks me to report, I cannot go to the police.

Participant: No oath is above the law, no oath is above the law. (Lot of cross talks and heckling of voices, not comprehensible).

Hon'ble Justice Banerjee: Please put the speaker on.

Participant: Madam, POCSO has a saving clause, any other law inconsistent with the provisions of law inconsistent to POCSO Act, the POCSO Act will override. That is 42 A of the Act, this is a recent Amendment.

Dr. Broota: What about the mental health laws, you have not dumped that. Mental health law says that the psychologist is obligatory, that he cannot tell anyone, what..

Participant: Mental Health law is a law....under the promise of oath you cannot cover up a crime, and when the law specifically says that, it is the job of every citizen to report the crime. (a huge laughter from the participants)

Dr. Broota: Do you know, do you know, do you know, what is the clause given in that oath? The clause given in that oath is unless somebody has murdered, or somebody is planning to murder, you cannot report. That to report.

Participants: If that is so, here is dissenting, if someone has been raped or abused or someone has the apprehension of abuse and the by any means it comes to your knowledge, the Act makes it obligatory on your part to report the matter.

Another participant: Madam Section 43 IPC defines two words, "legal" and "legally bound to do". The word illegal is applicable to everything which is an offence or which is prohibited by law or which you furnish ground for a civil action and a person is said to be legally bound to do whatever it is illegal in him to omit. Then you are legally bound to do. *aap complaint karnekeliye legally bound theen.*

Dr. Broota: *ji Sir main to itnesaare judges kesaamnekehraheehoonki I am I am a victim, I have committed an offence, I have,*

Participant: But law is supreme Madam, not emotion

Dr. Broota: Sir I am not making an emotional appeal, I am not making an emotional appeal, I am not saying forgive me, I am saying combine the two psychology field and the law fields together, So, that we work in parallel with each other and these dilemmas don't happen.

Participant: I think the Act has combined the both, it is a welfare legislation, it takes care of the child also, and when such kind of offences are reported, the Court is not directly taking them to task. It is reporting them to a counselor like you and it is for you to treat them and cure them.

Dr. Broota: I will treat them only when you refer them to me. That means, they have come to you independent of me, they have come from some other source, that's what I am talking of. I am saying within the family so much is happening, how many of those cases are we sensitive to and how many of you who do get the cases do you realize what is their psychology? and psychometrically that boy who was sent back, 16 age, *uski psychometric assessment ki? uski to chor do,* you studied the case on that Rajesh Talwar the dentist, Aarushi's father, How many psychometric tests took place, none of them were taken seriously. None of them, so we don't give importance to the *psychae* of the person.

Participant: Ma'm accused has to take that type of defense, there will be

Dr. Broota: *matlabwo defense lega to aapsochoge otherwise nahisochoge? Mayne boldiya mere paas case aayaathaamainenahi report kiya.* You said you are wrong.

Participant: Court is not omnipotent, somebody has to

Dr. Broota: No, Sir, see how you get away with the things Sir!

Participants: (Noisy opposition from aggravated audience) Mam Court is not fighting fault with you, Court is not finding fault with you for not reporting. It is your duty to cure them,

even if it is reported to the Court the Court in turn is going to refer the patient to you only. It is for you to prove the society.

Dr. Broota: Sir, but do you know that we sign a sheet before taking counselling that we will not report the matter without the consent of the family.

Participant: we are not asking you to report, see I am saying, when Act says otherwise leave it. When a person is coming to you for a particular kind of treatment, yes he is suffering from that kind of a maniac or whatever it is; it is for you to treat. Now, leave it. Now this Akash comes directly to the Court, by some way, some report, what I will do as a judge, I will refer the same Akash to your office.

Dr. Broota: *aabhitak to nahikiyaa koi bhi. Kisi psychologist konahikiya* (A huge laughter in the audience). In fact the counselors that you appoint are not trained counselors. the mindset of the judges is not psychological oriented.

Participant: Now the Act mandates, the Act mandates, ...(not audibel clearly)

Dr. Broota: *Siraapakuchkehrahe the pichese?*

Participant: Judges discharge his duty according with law, not emotional.

Dr. Broota: I am not saying, I am not saying that emotions are totally devoid of me. No, I will accept my emotions. I am saying are you aware of your emotions? Because very often the law is interpreted by the emotional getup of the judge. Very sorry to say that, because sometimes you are saying one thing, it was never brought out by the defendant. *abheeaapne bola Sir, to defendant nahi bring up karega to aapbhinahi bring up karoge? Yehkyaabaatbani? Main to huin*, I am a victim, I am saying I have committed a crime.

Participant: That is why the trial, the Court take the notice of all these things, and once the court finds that a crime has been committed and the child is in need for a care and protection, then only it is referred to a psychologist or the care provider and all that.

Dr. Broota: Ma'm when you go back to work,

Participant: No, no ma'm whatever, what I understand that Mam wants that a psychological treatment and trial and enquiry should go hand in hand.

Dr. Broota: Thank you saying it, that is all I was saying so far, I never said anything else! *maine ye he kahaathaaaurkuchnahi*. Thank you very much.

Participants talk amongst each other not clearly audible.

Dr. Broota: Who will refer to the counselor? Will the police?

Participant: yes it is provided in the Act.

Dr. Broota: Thankyou! Thats the awareness I wanted to create, Thank you.

Sumit Bhattacharya: My August gathering, a very inciting things. Mam would you like to make some points? Because the rush of adrenaline...

Hon'ble Justice Banerjee: No, no what Dr. Broota has said is an eyeopener for all of us. We have some idea, that there is a psyche working behind all kinds of criminality and no one is born a criminal. The wrongful things for a child when a child does it, one doesnot even say that it is an act of crime and that is why the law uses the expression, "Children in Conflict with the Law" children doing something wrong. But, perhaps we were, we were also perhaps not totally unaware that a lot of things happen in the family. But the kind of effect that certain irregularities in the family can cause, Akash's case was a real eye opener. There are provisions under the law in which, a child is often referred for psychological counseling. Now, whether it goes to the right person or the wrong person, that is, we always try to send the children to the right people for counseling and they are usually professional counselors too.

Dr. Broota: I have met a lot of them, and none of them have a degree in clinical psychology, and I'm not against them please, and I'm not the best. I'm still to go a long way to learn many more things, but I know that counselors are being used for mediation in divorce cases I know, counselors are being used for kids, i know counselors are being used at remand homes also, but psychometric assessment is not done, and some are very self-made counselors, because counseling has never been taken scientifically and seriously. *jaiseabhikisinekahaa mania or whatever you are saying. Its a disease.*

Hon'ble Justice Banerjee: Perhaps! we need to be a little more proactive to find out who are the right counselors.

Dr. Broota: I don't think that any judge can work without a psychologist. Any judge can work without a psychologist. So, if you have, like you were telling me 3000 cases lined up like that, then you should have 10 psychologists with you, who should give you a write up what is the personality and the persona of this victim or this offender both. I was asked here only in one of the workshops, do you have that many psychologists? So I said Sir, *aap propose kariyeaapko provide karenge.* Then they said willthey be as good as you? Then I said I am not good, *but jab aap heart ki surgery karaate ho to saare hi Dr. Trehaankepaasjaate ho? Ye kyaabaathui?* that's when you don't want to have one you keep finding reasons you know for

it. So, you have to, we have to work hand in hand aaaa I don't know how I can function without a judge, How I can I can function without a lawyer, because I know how lawyers can twist things, but I cannot function without a judge. The way you apprise me of what the law is, the lawyers don't apprise me like that. And Sumit this is the reason each time you call me I say *achchaa aa jaaungi*. I then curse you in the aircraft and when I reach I am very happy, that wow! what august gathering? Thank you very much. God! Bless you Sumit. (giggles!)

Hon'ble Justice Banerjee: Saying anything more would now be infringing on the right to food?

Dr. Broota: Yes! (all laugh loud!)

Sumit Bhattacharya: Ma'm with that kind of rush of adrenaline being there and wakeups , there, i don't think we should be even waiting for one more minute before the food and ourselves, So, lets break and have our food and come back.

Hon'ble Justice Banerjee: The only thing is that we were to discuss the challenges were both victim and accused are child there's really being very little discussion on that aspect really. May be later on, anyway we break for lunch now. Afterwards!

Session: 08: Dealing with Child Pornography

Speaker: Prof. (Dr.) Aruna Broota

Day: 2

(Note: The Session 7 was carried over to Session 8 and subsequently Session 8 was taken. Therefore the first part of this Session is a continuation of Session 7.)

Prof. (Dr.) ArunaBroota: Ma'm with your permission, is he there? for all those that I hear, just for my curiosity, I didn't ended like that, so I just wanted to know, supposing the case study that we did was referred to you, what will be your procedure? How would you like to work on that case study? that is the challenge.

There are 3 kids in a family all 3 are being abused. Now beginning to enjoy, just that the last child 8 year old one he is gone into that three months of sexual abuse by his own real brother.

(In Hindi) *woh main aise hi pooch rahi thi kyunki jab 2 bajenge to totomujhedoosra start karnanaa?*

Anyone wants to say? Sir *aap bahut keh rahen they, to ab mujhe akkal aayee aur, ab main aapko refer kar rahihoon, to aaapkyaaakaroge is case study ko?* (Participant talks but not audible). Akash, akash *keliye kyaa karoge?* He is 10 years old. *Jo uska cousin hai, taauji kaa ladka,* he is 12 years old and Akash is now, *ab kya Akash was being abused? and by his older brother? Cousin. Now Akash is abusing his own real brother who is 3 years, 2 years younger, he is 8. Aap kyaa karoge agar teeno hi refer hoke aaye chaheekaaya, usne aap ko saari kahaani bataai* what are you going to do? *Kya karenge?* They are at home are you going to take them to remand? Ma'm that is the challenge!

Hon'ble Justice Banerjee: the parents will have to be counselled and the children will have to be sent back home.

Dr. Broota: the parents will have to be coming constantly for counselling and not the children at all? Mam?

Hon'ble Justice Banerjee: The children also! Children also!

Dr. Broota: *sabsepehele Akash ka, psychological evaluation honichahiye. Sabsepehele.* May be he is suffering from some personality disorder. There are many kinds of personality disorders. He has not been assessed at all. The school condemns him, he doesn't make an eye contact, he doesn't make an eye contact. That's not the way, question is we need to make him functional, a psychologist aim is to make him functional. A judge or a lawyer or whatever the judicial system is will want that he should not commit those offences. Okay!

Hon'ble Justice Banerjee: That is possibly I said the family should also be counseled.

Dr. Broota: Yeah! Yeah! So, family counselling is a very vital part you know, I want to share this with everybody, I conduct positive parenting workshops, in schools and one Sunday I was getting ready, and my mother-in-law said today is Sunday, where are you going? So, I said Mom I have to conduct a work shop and I am going there. She says *terepairon me chakkarhai*, you can't sit at home, you can't sit in peace, how a mother-in-law speaks no, then I said, then she quietened down, then she asks me, what is your topic for today? So, I said mom it is "positive parenting" She says ke, *toonebataayegikiunheapnebachekaisepaalnehai?* See the mindset of the average mother. *toonebataayegikiunhoneapne b ache kaisepaalnehai? toomericharpai le chal* (She was ill) she says that, *too mericharpai le chal main unhebataaungeeki too kitneeghatiya mom hai....(all participants laugh)* So its very easy to point fingers at others, rights, duties, methodologies, but its very difficult to actually be what you really want your kids to be. Its not an easy process. See when I am asking Sir, *aapmerkobahutdaantrahe the all right now I refer the case to you, to Sir aapkyaakaroge?* He says *wohikaroonganaa jo law kehetaahai. Woh to mujhebhupatahaikiaapwohikarogejo law kehtahai, kyaaakaroooge?* Its not an easy answer. step 1 Step 2 Step 3 from legal point of view what will you do, I want to know that? *Woh to main samajhgayee family counseling honihai! Woh to mujhebheepatahai, woh ho rahihai.* But from a legal angle what are you going to do of POCSO and this family, that is the challenge Ma'm you said *kitumne challenges nahibataye.*

Hon'ble Justice Banerjee: The case will be referred to the Juvenile Justice Board, because he is a Juvenile and therefore it is the Board which is going to take the decision, with regard to.

Dr. Broota: right! But what do you think is the possibility of what kind of decisions are you going to remand them ? It is an offence. (Participants cross talks but not audible).

Participant: we will take the assistance of CWC, who has the mechanism of taking care of the juvenile in conflict with law or in conflict, in in need of care and protection. They have the scope for rehabilitation.

Dr. Broota: Agreeing, but what I am trying to differentiate for you is one offence is committed outside the house, so you get an offender and you get a victim, or inside the house someone has reported that this harm is being done to me so there is a victim and there is an offender. This is an unspoken offence unsubscribed, undisputed untalked about and I am being asked to bell the cat! So, I will do it, what are you going to do?

Participants: In that case the parents are indirectly becoming offenders by virtue of Section 17 of the Act.(Co-participant) but that is not going to influence our sentencing or finding also.

Dr. Broota: Why are parents of Akash offenders?

Participant: Why because when they come to know about it, they are supposed to correct it, they are not to abet it.

Dr. Broota: And did you think that the correction is by the press of a button? It takes years, *beta This is it, beta this is it, beta this is it*, along with a counselor, along with a psychologist, along with the class teacher.

Participant: I would say when the children are not reared properly, it is the problem of the parents.

Dr. Broota: You didn't understand Hindi, so I'll translate it for you very soon, *abhi bole main nahisamjhamaiekbaarpeheleboli the, o achchaachalo, chalochalo, chalo*, sorry sorrysorry. (Laughter)! You know my elder son says *aapnemujhemaarathanaaisliye main aisaahoon* Have you understood it from Andhra? (No Ma'm) all right! You beat me that's why I am like this! This is what my elder son says, alright, hear me out, and hear me out!! Now my younger one he says, *aapnemujhemaranahinaatabhi main itnaartahoon! mainekahaa hey bhagwaaan!* What is good parenting? What is good parenting?

Participant: Society is to be blamed in that case!

Dr. Broota: So we are, we are out on a blame game, No, no, we are out on a blame game. We can't do that! Somewhere we have to take up our responsibility. Over lunch I was telling Shrivastava Sir, and Ma'm I Said *Ma'mmaihaargayee!* I lost it very badly in life. I went to media, even when there was black & white Doordarshan I was on Doordarshan, I am on channels now, and talking about how family life, how husband and wife should be so that children get the benefit. You get the benefit obviously, there's peace at home. There's prosperity at home but I can't change, I can't change anyone, and I have nothing against men, I have nothing against men, it's the women who are against the other women and I have lost it very badly. Worked I worked I worked, Ma'm I slogged, See it's very easy to throw the blame on someone, parent had not been vigilant, *aayehaye!* Whether the parent, see how do we become parents? When we are parent of the 1st child we don't even realise what it is to be a mother or a father, we are immature; how many of us have a planned first child that we are matured? Brootasaab looks at his 1st child who's 4 months old, and says *ye rotabheehai! yeraatkosotaanahihai. mainekahatumhebachchachaheyethaanaa ab bhugtobaithke.* Because people get married they want to prove to the world that they are potent and they can be fathers. *uskebaadthoriakkalaateehai,* and then we say okay take it easy. You see it's nobody's fault, it's our own immaturities, are we ready for a family life? Are we matured to take up our responsibilities? Have we got over our own (I don't know the English of it) *Chanchalta* what is it *chanchaltaa* in english? Ma'm what is *chanchal*? No no not just restless. Chanchal is (emotional) emotional with something, restlessness and emotional *aaa* when you are romantic yourself you want to do things not only romance in terms of a sex or a love, but also when you want to do something as a judge, as a lawyer as a mother, as a psychologist you are chanchal. Do you have the patience to be the mother of a baby, it's very difficult to blame the parents. How can you blame the parents? Parents are not God. One parent is an alcoholic *wobheechahatahaiki main baapbanu,* One parent may be a manic she also wants I want to be a mother. *Akbar kakhandaan to chalanahainaa?* But *POCSO kahaankaamaayegaaaapke Sir,* Mam was saying *kitoo ne challenges kibaatnahiki! toapaisi families ko jo unreported rahihainaur ab aa gayehainaapkepaas* Through any one, maybe *mera oath, toot gaya.* Your neighbour came up with some thing, school teacher came up with some thing, what will the law tell you to do? think about it, think about it>Ma'm may I please be allowed to take another aspect of it. [00:13:13]

(From here actually the Session 8 starts)

Hon'ble Justice Banerjee: Challenges when both the Victim and the Accused are Child?

Dr. Broota: No Ma'm we have done this we are going to do the next one.

Hon'ble Justice Banerjee: **Dealing with Child Pornography!**

Dr. Broota: Yes!! Yes!! Very much. Just give me one minute: (She talks to someone and advice some medical attention to be taken for someone). (Sumit Bhattacharya expresses his gratitude to Ma'MBroota for being with NJA in the program inspite of the critical condition of her brother to the participants who were wondering as to what was the phone call all about) Life has to go on na, this is my brother, who is very critically ill he is 92, and he is not married because on me, I lost my father very young and he brought me up and if I am Dr. Brootalits because of him.

So, parents ko mat blame karobhai, there are faults in me also, I can't say they are because of my parenting of my brother, right! okay!

So Ma'm with your permission please!

Hon'ble Justice Banerjee: Yes!

Dr. Broota: This is the second thought that Sumit and I had. Its Sumit's brain child in fact talking about Pornography, and he was very worried what am I going to talk? and he was calling me up back in Delhi, read something on this I am sending you this I am sending you that, so I said you send whatever you want it adds to my knowledge, but why are you upset, don't get upset because what I'm going to do in this Session is to give you the case studies because when you sit in the court of law, you do see a lot of murder, and you do see a lot of slaughter, and you do see a lot of lies, and you do see a lot of truth that goes unnoticed and your hands are tied, but I don't want to bring to your notice that with the advancement of technology, what is happening in the urban cities today? and what's going to happen I'm worried. What's going to happen in the rural areas as Modi saab is talking about internetting the rural areas also. And obviously the marketing techniques are going to be such that mobile phones will be available for even Rs. 10 or Rs. 20. I can tell you that. Simple mobiles are going to come down to Rs. 10 or Rs. 20. I was in a state of shok in 1995 when I went to the US and

I read, ""take a internet connection and buy a mobile telephone free, cost of the mobile is \$ one". its gonna happen here and soour rural areas are going top get the internet and what language, what vulgarity is going to come in to us, and what is the challenge that psychologists are first going to face and then you all are going to face, because so far aa cyber crimes are still in the process of being organized in terms of being cyber laws, and pornography to be described as an offence or as an illness is also undergoing a debate in the West also. Is it an illness or is it just a diversity? and it makes me laugh aaaa about, about 15 to 20 years back a cold drinks bottling plant asked me come and conduct workshops for them, on inclusion of diversity for business development and I asked Sir, I haven't understood the topic, what does diversity mean? mean that in the bottling plants and in the loading of the trucks and in the delivering of the truck to various organizations we should have more women. So, I said Sir, women are diversity? So, don't look at me I know you are a feminist, I said, *achchaa I am a feminist, mujhenahipatahaa, achchaa* whatever whatever, this is how it started and today pornography is going to be one of the diversities, its going to really plague our society. Urban areas *plague ho chuke*. So, talking about pornography I want to say, we get very shocked you know, we get very shocked when we hear, that children are into pornography. You know, when adults are into pornography we still take it with a pinch of salt, *theekhainaayaar, bigrahuaahainaayaar*, you know, all that we talk. But when whom porn material falls into the hands of children we are very moved we are very disturbed and we are in a state of shock. But let me say, newly born child as I said in the earlier Session also are asexual. The age at which he or she develops sexuality, varies from person to person, but sex can be forced on to anyone at any age; whether you are asexual or you are sexual. That's when you are in the morning referring to a 3 year old being raped a 2 year old being raped, because in Delhi, when the society goes a lot against girls, they say they dress up very suggestively, they dress up very crudely, so men are turned on and they cannot control themselves. So, then I ask okay! the 2 year old was she dressed very provocatively, so why was she aaaaa raped. So, there is no answer to that. So, I say firstly a newly born is a asexual, he is incapable of understanding sex and then the question comes what will be the age at which sexuality in him will develop? and I said there is no fixed age it depends first what you call sexuality, the very fact that you see differences between two different genders and their bodies that is the onset of sexuality. Earlier we used to think that the onset of puberty is sexuality, which is not so very true. but, yet what we are concerned about is that sex can be forced on to any one at any age no matter what you wear or what you dont where. At any age interest is always there in another's body. You may be a happily married women and you may be happily married man, but when you see someone

changing cloths you do look there and you don't take your eyes away. It's a natural instinct with which you are born. That is the reason bodies are covered till the last breath or even while disposing them off after death. You know the whole process of socialization is that, that we tend to cover ourselves that we are not provocative. Is sex a natural instinct? yes it is! but in Indian culture, it is still the very suppressed one. it is the very suppressed concept a very suppressed world aaa, my grandson has made copies of this but he looks here and there when I am reading, *isme correction kar lo edit karlo*, and he says *badimammi* keep quiet, you are always using this word sex sex, I said what was wrong in that? What was wrong in that? and then he will say, *chupkaro!* So, sex is still suppressed it is tabooed, you don't like to talk about it very openly, inspite of the fact that in the A-Class cities, our language includes sexual words very easily now. You go to Universities, you go to corporate and people wont say, "go to hell" they will say "fuck you"! So, our language is getting sexual in nature it is not that culture, it is not that language which we had which was literature now we don't have that kind of classical literature. Look at the hindi songs that are coming up "*Pappu can't dance sala*" so, that word "*Sala*" has got into music you know, where as it is not a very acceptable word. So, once you include this in music it will become your daily language, aaaa, also. So, sex is a natural instinct but it is suppressed very much but relevant of course to every era, but the whole idea is why is sex suppressed to be in a civil societies? to develop laws so that no one is harassed, abused or killed for it. Children indulge in sex also, but adults get shocked. They think it is their mandate and the children's mandate at all.

I just wanted to focus on these things and I will request Sumitji to give the first case study out and will read it with them and ask for actions in return. Tell someone also to help you arround and distribute *karde, ek table pe 5 -6 copies rakhdejiyena, to wo apneaap he karlenge*. Keep a bundle everywhere so its circulated fast.

This is dealing with child pornography case study 1, all have the same one Case Study one, so, may I please, have you all got it? May I please read it with you?

(the case study material is read out by Prof. (Dr.) ArunaBroota on microphone to the participants as under):

DEALING WITH CHILD PORNOGRAPHY

CASE STUDY: I

Shefali aged twelve ma'm, loves to watch her mother change clothes. Her mother too does not mind changing in her daughter's presence. Sometimes Shefali hugs her mother while the mother is changing clothes. Shefali touches her mother and calls her the most beautiful mother on this earth.

Shefali visits many pornographic sites. She put her, (look at this one) she puts her nude selfies on face book. She is proud that her friend boys and girls have given her very appreciative comments. Her parents do not know about this.

In her session with a Psychologist, she revealed that she enjoys sex. She enjoys nudity. She asked why the body which God has given has to be hidden?

History Taking and Psychometric Assessment showed:

1. Shefali smoked cigarettes with Marijuana.
2. Shefali belongs to a middle class family.
3. Both parents are working
4. She is the only child of her parents
5. Tests showed that she has an impulse control disorder
6. (So) She is impulsive.
7. She is very good in studies (and achieves)(90%--96% marks)
8. Shefali has had physical relations with her cousin brother.(Mother's brother's son)

Shefali was sexually fondled and abused by her father and Chacha when she was 5 (or) 6 years of age.

Dr. Broota: How would you handle this? is it okay! to be on pornographic sites at the age of 12? Okay! Is it an offence? or Is it a moral misconduct? Is it an offence? or Is it a moral misconduct? This is the most important question for today. (Participants say some thing which is not audible). So, it is a stepping stone?

(Participants say some thing which is not audible) ... this every chance of these aaa mean aaa the children getting more involved in aaaa this kind of things!

Dr. Broota: You get addicted to it. I am coming to that. You get addicted to it.

Participant: Addicted to what?

Dr. Broota: To to watching porn.

Particiipant: No what she says is that I like to watch pornography,

Dr. Broota: They will get more into it and I am saying the psychological research shows that if you watch porn, you love it, so you are pre-occupied with it, so you try to runaway from some duty of yours and you get back into porn and then you get back into porn.

Participant: But he is not right.

Dr.,Broota: I don't know, I don't use that word right or wrong. *mujheapna he nahipata right or wrong? unhoneboldiya you are wrong*, I accept it. On hind side Sir, I do accept it I am wrong, I am not being sarcastic. You don't know the dilemmas of psychological practice. I get into a moral dilemma am I doing the right thing? So, I don't know whether ram Gopal Verma is correct or not. Its like the Italian's telling me you know there are less number of alcoholics in Italy because in any age go to a store and buy liquor. Whereas there are more number of alcoholics in the US because you have to be 21 or 18 (one of the two) to buy liquor. So, when you prohibit somebody like that it comes up with a big bang! and I don't know whether its correct or not? This is what one alcoholic professor of psychology told me. You know what he does, *wokullakartahai wine kesaath*.

Participant: One of the argument for making everything free, some years back there was also a debate in giving "U" or "Adult" certificate to pictures. And perhaps! Sharmila Tagore resigned for that issue from the censure board saying that there should be "Adult Certificate" others are good that, if you give "Adult Certificate" it prompts children to watch that movie because it is Adult. You give "Universal certificate" that will do. That is one of the argument, may be accepted, may not be!

Dr. Broota: But by you watching porn, is it a crime?

Participant: Its a moral, itsa immoral habit, but its not an offence so far as our laws are concerned.

Dr. Broota: Sir, I'll not name the school, I was going to conduct a workshop in a school, and *wo* there are steps naa to get down on to the lawn and so one child from class 3 was sitting

on his laptop and I was going down that stare, and I say that he was watching nude women. So, he was on a pornographic site and he was cutting a class. I asked the organizer what class is that child and why is he sitting here all alone? secluded, socially cut off? and he said he is from class 3. and this is when, this is when/ almost 10 years back, almost! So, will POCSO think about it? will POCSO think about it? whether we should include this? I don't know! I don't know what to say! IT is a challenge for me, so I don't know what to say I am doing loud thinking, you can do loud thinking with me.

Dr. Broota: I have, now this is not her real name Shefali, I have Shefali looking at child porn material. Now, what is an offence? Whether a child looks at a child porn material or whether an adult looks at a child porn material? and I am going to give you an example. I don't know if you remember and how much of Delhi news you read, some some years back, and I can name the school because it was out in the news papers Delhi Public School, R K Puram. A boy made an MMS am I pronouncing it correctly? MMS of a girl and put it on the facebook and circulated it nude, okay. She was in class 8th and this guy was I don't know in what? I can give you wrong information I don't remember. So, I was, this was in the news it was hot, and I got just a family for counseling because their daughter had failed in the exam and nothing to do with the MMS, nothing to do with porn, nothing to do with DPS. just a family by chance coming to me for counseling, because the daughter had failed in that class, whatever class 10 or class 9. So, the father of the child enters sits down and he says *Doc-saab, aapne MMS dekha? I said nahi; Doc-saab, aapne MMS dekha? ... nahidekha, I said nahi. maykhareed k layahoonaaapdekhnachahate ho? I said nahi, maiapnebetiokoaysenahidekhti.* he was so proud of saying that in front of his own daughter, so this is not a character that I am insinuating, I am saying that this is a mental disease, its an abnormality, that you have no control on your self. *theekhai* every human being has a private sex life, fine! Every human being sees some kind of magazines that are provocative, every human being! right! Every human being at night, ever since there has been star movies, AXN, f Chanel, whatever at night closed their bedroom and we all watch it, Fine! Issue is when you talk about it and share it with your kids and you are discussing with a still more elderly a person, the kids says, well I have the license to do the same, have I not? Has POCSO thought of this ? Because would you be revising it after every year? because every year is going to be a rapid socio-cultural sexual change in the life styles of children. With the internet coming in and *Wi-fikardoonga main saari States ko; Hamare Modi saabwifikarne wale hainsabkuch; sabkuch wo khudbhiwifi ho jayengemujhenahipata?* I am not against BJP, I am not a pro Congress, I am apolitical. Just as a child is asexual, I am

apolitical. But I am just looking at what's going to happen? So has, Have you thought of it? Its not a crime, okay! Sir says , if you use child porn, that's a crime? Where is it written?

Child used in pornography, which is in every remand home, I have been visiting, I have been visiting sports boarding schools at Patiala, with yesterday you had a AsheemSrivastavaji, with him I have been going, I think you know of that we went to Patiala (Pointing towards representatives from the NCPCR) So, we saw what the children were talking and the children's workshop. What the older children do to them and what the the coaches do to them? We had 2 different Sessions. So, when is going to consider this also? This is one of the issues I want you to think about.

So, what do you want to do with Shefali? smokingmarijuana,sighs!!!So far very good in studies, so far. Already physical relations with her *bua's son, no mama's son; mother's brother is a mamu*. She herself has beensexually fondled by her father and her *chachoo*. Any suggestions , what you want to do? Case has been referred to you. This is you case. Case has been referred to you, this is your case. *Ab main itni professional to nahihoonkeunhone case kiyaaurkaha 15 min lagaoiskobatane k liye, ab aapbataaokyaakarnahai?*

Participant: She has committed offence like by putting her own nude selfies on the facebook.

Dr. Broota: Is that not allowed? its an offence? under nudity Act is that an offence?

Participant: Yes it is an offence.

Dr. Broota: Its an offence?

Participant: Yes it is an offence. She can be referred to JJ Board, but Sir, (cross talks amongst the participants)

Dr. Broota: That point you have picked up now, so you have thrown the buck, that's the dustbin, you'll put everything into conselling, but as a judge what do you want to do? Don't forget judges don't only implement the law you bring about a social change.

Participant: Madam unless case is reported, to Court, judge cannot do anything! Judge can take cognizance on basis of police report and complaint to the Court.

Dr. Broota: So *aapkarishtaasirf police se hai?*

Participant: Except that complaint in which complaint is filed the Court cant take cognizance.

Dr. Broota: *Achcha Sir, aajmaineyeh case aapko report kiya, ab aapbatayenkiaapkyakaroge?*

Participant: You have not complaint the POCSO Act was taking cognizance on basis of *suomotu* and any information unless pocice reported or complaint is filed, POCSO act...

Dr. Broota: I am not a complainant,

Participant: you are

Dr. Broota: *aap ne mujhekahaatha to kyunahihai complainant Aruna? To kyunnahihai? Ab bataowokehrahenhai to hai hi nahi. To ban hi nahisakti. suo-motu se aao*

Participant: *suomotu* cannot take casuse of action. Special Court has no power to take cognizance *suo moto* So only 2 conditions prescribed under 33 of Section and police report I have complaint...

Dr. Broota: *Agar main police kokarti to aapkyaaakarte?*

Participant: Case is will be instituted and proceed trial;

Dr. Broota: *Trail me kyaa steps lete? POCSO konazar me rahkke? kyaaaaplادiko family se withdraw karte? Mera ye sawwalhai, kyaaaaplادkiko family se withdraw karte? dekhiye main police k paasgayee, police ne aapkocomplintkiheekhai, aapkepaas ye case aa gayi, ab aap jo step lenge, as per law, par mai pooch rahihoonkiusme POCSO, kitna relevant hai, kaunkaun se aspects aap POCSO keusmelagayenge? Kyaaaapbachcheko family se remove karenge? Ji Sir, remove karenge. She was abused, was not now.*

Participant: She is being used by her parents, aa father and uncle so he should be keep under control of CWC will take care and we provide protection.

Dr. Broota: Anyone else? See what he has said, does everybody agree? that she has to be removed and sent to CWC. Does everybody approve of it?

Participants: Yes!, she is a ..(cross talks not audible).

Dr. Broota: Shefali, first sence "aged 12", will they remove her from the family?

Participants: (Cross talks and cacophony) Yes!

Dr. Broota: *aap kayehinheadon collision honahai with the family, keaapbachcheko remove karengeyaabachekonahi remove karenge. Agar aapbachcheko on a daily or date basis pebulayenge, will they appear in Court? will they not appear in Court? one thing. Will they tell the truth? They will immediately say now we will look after the counselor is looking after us, leave us alone. phir wo man jo kehraheen thee ki wo lawyer ne jo uskokahaa wo wohibolrahaahai. You have to think about this okay!*

Can we have case study 2 please? Ma'm I'm still waiting for your opinion Ma'm! i'm waiting like you are senior so what does your experience say? Will the child be removed from the family by the CWC?

Hon'ble Justice Banerjee: In the given situation if CWC is of the view, that sending the child back to the family will not be sorry! under the Juvenile Justice Act if the CWC finds that sending the child back to the family would be harmful to the child, then the CWC can remove the child from the family and send the child to a children's home.

Dr. Broota: Do they have the power to rule over the parents who don't want to give away the child? Do they have the power? Because they'll very soon withdraw the case. They can't okay!

Participant: Keep the child with the family, but monitor the practices of the family.

Hon'ble Justice Banerjee: That is also possible, depends on what the CWC considers is expedient taking a holistic view.

Dr. Broota: I dont know if that is the process which you are mentioning, but how much of man power you will have to visit the family and see and how many cases you will...

Hon'ble Justice Banerjee: That is a problem, that is a problem!

Dr. Broota: That's what I am saying! Okay! now come to the case study 2 . (Reads out)

PORNOGRAHY IN CHILDREN

Case Study II.

Akhil 11 years old from a upper middle class family from an elite International School studies in class VI.

He failed in Class V when in an elite Public school. So he changed to this International school because this school is a boarding school. The children can go home on weekends if the parents want it so.

Akhil is perpetually in his room. He does not like to go out of his room when at home. He is always on his iPad. He changes or switches sites if his mother or elder brother would come to his room. He was very irregular to his earlier school.

After being referred to a Psychologist history taking and Psychometric tests revealed:

1. Akhil is of average Intelligence (IQ 98)

2. Akhil used to peep (its a wrongly spelt word) into bathrooms in school right from class II.
3. Akhil tried to lick kissing his aunts and his mother as well as his eldest sister.
4. Akhil goes to pornographic sites as well as websites of nude dancing clubs in the USA from the age of 6.
5. Akhil was caught many times on nude sites and beaten by his father. After two days, his father would ask him to tell him about those sites. Akhil said he also saw his father watching Porn stuff.
6. Akhil uses a Camera and makes video films of himself having a bath and also masturbating.
7. Akhil forced himself on his eldest sister who is 10 years older than him
8. Akhil has forced sex on his Bua's daughter who is 12 years old.
9. Akhil was caught by the police at a hotel with a young girl aged 15 at a hotel. The girl said that Akhil paid her Rs. 5000/- if she remained unclothed for three hours and allowed her to examine her body. The girl belonged to an upper socio-economic background family.
10. Akhil said that he could sleep only if he was on a pornographic scene.
11. If any parent or sibling scolded him or took away his Ipad, he would be aggressive and violent. He broke the drawing room TV set. He broke the entire cut glass in the drawing room. He was sexually abusive and violent with his mother.

He did not study at all. He was diagnosed with Manic. His grandfather and his chacha had similar behaviours. His chacha would roam nude in his bedroom with his children around.

Who to report to? sighs!! who to report to ?

Participant: Is that a Court case madam? Its not a Court case.

Dr. Broota: It's not a Court case. It's a case of morality and wrong behavior where you think counselling is required? *Ji Sir.*

Participant: I'll stop playing the blame game, in that case the parents have to be blamed, not only be blamed, they have to be booked under the POCSO, why because they are making this child to do such offences. In that case the parents are naturally the offenders under the POCSO.

Dr. Broota: Its not a blame game now you are on the right track. Because here the mother, should be reporting what the son is doing to her also, that's very important. You brought it out very well. But pornography is a menace now. Has POCSO taken care of it? You have gone through the law much more in details than I can, I'm an *unpar* as far as law is concerned. So, *mujhe to nahisamajh* but you have gone through it in details, has it taken care of the porn behavior that is coming up and that too with kids? Since we are talking of kids I kept away a case study, I was referred an Indian boy who was qualifying for a pilot ship from Australia, and he would not get out of the house, he would not sleep at night because he was on porn material, and only his 3 months of flying training was left he would have qualified it, 3 months he's done, 3 months were left, right, and when the mother saw that he was watching all these nude dance clubs at the US and the intercourse being actually happening and e-sex they call it, and you know what ever, so the father and the mother transported him to India. i didn't give you that example. And why they transported him, they openly told me the police would have taken him away. Because to those club sites if you want to see you have to put in money. So, from where was he getting that money? He was stealing it from the mother. So, POCSO has to be a little wider than what it is designed for, your suggestions have to come. *Ji Sir!*

Participant: I think it is wider. If you read the Section 3, 4, almost all the Sections ; When a person deliberately, a person makes a child to do that particular act, then that person is committing that offence. (Justice Banerjee: 13, 14, 15.) (Prof. Shrivastava: 16 & 17 also) (Justice Banerjee: 13, 14, 15.).

Dr. Broota: Because in a last Session, I don't know what the workshop was on, in Bhopal, aaa *haan* Juvenile Justice *petha* we saw a very daring documentary, how the adult uses the child for masturbation, no no for molestation and homosexuality and the boy dies, that was the documentary which was shown to us, I will give you the reference you can still see it, I have got it with me the reference and its on you tube, its on you tube you can see it, have you got it? yeah they , I think you sent me the link didn't you sweet hart? last time before we were scheduled to go to Patiala? Right! So, I think al those, people , all those people, who, who are involved with POCSO need to see that documentary. Need to Ma'm please, and its an eye opener, for you to see what children are doing to children; what parents are doing to children; what adults; coaches; teachers; tutors are doing to children and how POCSO can help these

children. Had POCSO been very active and had it been conceptualized when that documentary was being made we would have , we would have got back that life, that life would not have gone. It's in the remand home I think and one child dies because one of the care takers missuses, molests that boy and ultimately he suffocates and dies! So, so intense is the the need for porn the need for sexuality, the abarasions in sexuality, that laws has to be more specific and stringent aaa before we destroy our children's childhood! I'll end with that thank you very much!

Hon'ble Justice Banerjee: during the lunch time I had started off with a caveat, and I repeat that. that is on this aspect, aa not done much study and I wouldn't talk to a knowledgeable, I wouldn't like to talk much in a knowledgeable gathering in fact I was not suppose to be in this Session only after comming here I found my name included in this Session aswell. Except for the provisions of this Act, which relate to child pornography, about dealing with child pornography, how so I would if you have done some study with regard to this you please address the gathering, because its pointless talking on a matter which,

Sumit Bhattacharya: Aaa very honestly submitting ma'm I tried to do a little bit of research with the available resources (the judges) and during my conversations with them, I could hardly find that the pornographic cases as such which feature with them are very very less. with that, there's a limited study and limited to the number of people that I could speak to, I could arrive that, either, because pornography is not that it has appeared after POCSO has been enacted or something like that, it has been there nad it has been there,like,...So, what I could, one of the inferences, aaa, I stand corrected, is that, could be that the awareness of reporting of pornography seems to be very limited. Or if there is a reporting also, it dies with the report itself at the police level, where negotiation happens there and it hardly comes up to a litigation level. Saying that, another thing is that, I designed a small questionnaire wherein I tried to put in a few questions on this with the intention, since there is a dearth of information from the judge level if I could be enriched with such kind of points wherein, we could draw out some inferences so rather than me telling this, I would love the participants if you could share. Like anybody in your Court wherein aa some cases had arrived and how, could you manage, what is the course that you take, had taken?

Participant: I'll add one point to that,(Sumit: Sir!) It is not lack of awareness which keeps the cases away from Court, it is the awareness which keeps the Cases away from Courts. Because, once a person reports a porno matter to the Court or to the authorities concerned, then that particular man is looked down, oh! this man was watching porno and he is circulating it, or he

is making note of it all these things will affect his character. that may be one of the reasons of not reporting the matters to authorities.

Sumit Bhattacharya: Point well taken Sir, that could be very well, because we are socially so, I mean again it comes up to the thing that somehow cannot segregate ourself from the society, so that is well taken as one of the points may be. I would be really, it would be lovely if some of the participating honorable judges would share a case, a real life case which might have been closed at their end wherein any of the courts you have handled a pornography case? And Sir, if you remember in the starting Session, while we were just interacting, introducing I was just trying to jot down the number of pending cases, as we were all sharing, that was 3,800 pending and none of them pornographic as such, so I mean I just throw an open ended question like how, is it like is it not happening? or I mean it can't be that, so there is a bit!!

Hon'ble Justice Banerjee: There was one case, which I had to deal with, of course at the anticipatory bail stage *maane* not at any other stage and it does not relate to child pornography at all. What was being done was in a marital dispute, the husband was compelling the wife to take pictures along with other employees, and posting them here and there. Now, at the time when anticipatory bail application was moved, you know the pictures were shown. And the impression that was given as this is what the wife is doing and therefore she has lodged a false report 498A against me. But somehow at that time I was the junior judge on the Division Bench, I and my partner my Senior Brother on the Bench....a look at the pictures made us feel that there was something a mess, that was a different issue all together then we realized that she was forced into it, because you know, a person has an expression and that expression was neither of love nor of lust, but somebody in a practicality she had an agonized look about her, *maane* pathetic expression on her face, but beyond this as I started off in the beginning I have very little if not no experience at all of these kind of cases and this did not concern child pornography this was an adult pornography related case which came in an anticipatory bail application.

Sumit Bhattacharya: That's true Ma'm actually that was a concern for me also while planning out this Session like because as I said in the start at the very inception we saw some close to 4000 pending cases and a less number of cases as you are saying about pornography, what to talk of child pornography. So, though we have very nicely taken care of in the legislative part of it the child Pornography but, it is very unrealistic seems to be, that we every body out of what do I say if I don't talk about the number of cases we are aware that there are a lot of pornography things, pornography substance available, its being used, we know everything, but

reporting and having a litigation its still doesn't seems to be happening, so I thought that I will bounce it with the august gathering like, aa as an open forum like what could be the gaps, why it is not coming to the litigation stage and if it is, doesn't comes to the litigation stage is the requirement of I mean, how POCSO Act those provisions twchich provides for pornography, hoe it is going to be implemented, because what I fear is by the time a case comes or something, may be lot of water has flown from the Ganges and the system changes, the society changes so much, we have these orders like now the debates are like aaaa like aaaa you know, stopping of , pulling out the porno sites aaa Govt. of India has given, and freedom, Right to Freedom beyond 18 years, below 18 years so, those debates are happening at the social sector, so there is a lot of hue and cry but it doesn't results or transforms into basic litigation, so what could be these, one of the things is that as you said Sir, its awareness working reverse. So, anything else that comes crosses your minds, as to why litigation is not happening?

Prof. Shrivastava: The scope of POCSO Act where it can happen, because the purpose of POCSO Act is to prevent the children from being used as the object of pornographic materials, so if the matter will be reported, yes action can be taken. But, otherwise I think the object of this Act is to protect the children and for protection of children provisions have been made. But, using the pornographic material is not the concern of the Act. This can be added otherwise and under other Acts, under this Act the primary concern is ki we have to protect the children from sexual offences. If they are being used for the pornographic purposes, yes the person who is using he can be punished and the matter can be reported. Otherwise there is no scope under this Act to take any action against.

Sumit BHattacharya: Sir, with my limited knowledge if I can ask a very innocent question like, we say in the first days Session, when Shri Asheem Srivastava made that presentation wherein we say, and I also pointed out in one of my questionnaires that many, how often does this aaa the people who are accused of POCSO cases are nearly related, a family person or so. So, keeping that in mind that which was reported 90% of such kind of cases comes from a very near neighbor or a family, within family, so could that be a reason? because within the family only lot of abuses are being done.

Hon'ble Justice Banerjee: Abuses are within the family but child pornography is not necessarily within the family. Usually not within the family, subject to correction. This is what I have heard.

Prof. Shrivastava: They can be misused, children can be misused, but pornography not.

Hon'ble Justice Banerjee: Child abuse, sex with the child that happens within the family, pornography its usually a racket. A racket operating you know kidnapped children are used. Sometimes even some unethical parents are paid money to allow their children to be used for such purposes.

Participant: Tracing the victims and their parents will be a difficult task for the police. That may be one of the reasons for not reporting the cases.

Participant: In my experience what I think is, that child after the commission of the offence, the child herself thinks that she is the culprit. She has that guilty feeling, she feels before the society; The parents also think that they are responsible for that. So, they want to conceal this matter from the reporting. So, it has to be removed from their mind. So, the awareness has to be given to them.

Participant: Also, ...is one of the reason, for not reporting the case.

Sumit Bhattacharya: Sir, can you elaborate on that Sir, you said some thing! Social stigma

Dr. Aruna Broota: The guilt in the child is very very strong. Aaaa once I got a call from the US that are you a clinical psychologist, and I said yeah!, and they said, can you go to Jagganathpuri, we are so and so, whatever, and can you test and do, can you do a psychometric test on a particular person who is within our Aashram, and i said aaa why and then they told me the whole thing that there is a girl who is 8 years old and she has come back from India to US and has complained that her best friends father tried to molest her, when she went to spend a day with her friend. So, I said when was this? So, they made me talk to the girl, and the girl said this was 2 years back. So, she said it took me 2 years it used to haunt me and I used to hate it, and I used to hate myself for it and it took me 2 years to muster courage, that I should go and tell somebody that this is what has happened to me I cant get it out of my mind. And so, I told the authorities that what did you think Indians are that they are so deprived of good hotel that you think that you are going to tell me that we'll make you stay in a 5 star and there and you go into the testing, you are taking that man on a pedestal if he wants the testing then he should come here to Delhi and that also he should take dates from me. So, that man came and through the psychometric tests and history taking, werealised that he was a, he was one of the religious workers in this huge international religious organizationallover the world aaastarting from India and prior to joining this he was a aa jailed in Italy, and he raped his mother, and he killed his mother, and he was a fugitive from Italy and runaway from the jail and joined this organization. So, testing is very important point which will tell us the mental status of a child, whether the child is a victim or the child is an offender. but we are unable to

understand that guilt, and we are unable to understand that hatred self-hatred in children when they go through sexual offences and sexual experiences.

Hon'ble justice Banerjee: This is a very common thing, NGO's says that being abused by somebody in the position of an uncle, father's friend, family friend, and then that feeling of guilt which as a result of which they either go unreported or they report it late.

Dr. Broota: May be unreported, but we have to value what Sir says, that we have to work towards social stigma of these offences. We have to teach kids to talk about their lives and we have to teach kids that sex is a sanctity, there's nothing wrong about it. What goes wrong is what is happening to you, so that should be talked about, rather than suppressing the whole concept of sex. That's wrong. how it happens ? How it can be made beautiful ?and how it can be made so ugly ? AND HOW IT CAN BE MADE SO SHAMEFUL ? There are so many varieties to that same Act, there needs to be a lot of social work in this area aaa coming out of this stigma!

Hon'ble Justice Banerjee: Traditionally in all cases of rape, today people are being sensitized, but it is the rapist who is the criminal, and the person raped is not the, the victim is not at fault. But otherwise all along traditionally the victims used to be aaa looked upon as to be approver a consenting party.

Dr. Broota: I dont know how many of you have seen the ad on the television the girl says something and the mother says, *tune aurkisikobatayaa to nahi? koihaiaisa ad. haan, kuchaisa, ki tune aurkisikobataya to nahi?* Imagine you very own mother is putting that guilt that shame in you that you don't have to talk about it to anybody, which is very veryvery sad, so my whole idea is to make POCSO very strong and very wide and very provocative in terms of stigma raising. Because if some cases are reported in the Court and some good outcome comes of it, which is very justified. you know people will start really valuing it, that's very important.

Hon'ble Justice Banerjee: Now a days reporting has gone up of aaa offenses against children and sexual offences against women in general.

Dr. Broota: Yeah it has gone up, but see how tedious it is. What a tedious process? What a tedious process?

Hon'ble Justice Banerjee: So, we break for tea now?

Dr. Broota: I thank everybody for your patience, thank you very much!

Hon'ble Justice Banerjee: And after that what we have library reading?

Prof Shrivastava: haa we will have to go to library I think.

Sumit Bhattacharya: Yeah! after tea we proceed to the library and for those of you who have already done with that excel sheet they can read, and for those who could not do because of non-availability of computers can fill it up. Thank you very much!

Session: 09: Media's influence/ Pressure/Over reach v. Right to Know for Citizens

Speakers: Justice Hema K & Justice Gita Mittal

Day: 3

Prof. (Dr.) Geeta Oberoi: Very Good morning to all of you, I can see that 8:59 onward every one has been given a paper to work on. So, today we have, aaaa, I hope yesterday you had very good Sessions? I don't know what is your feed back I'll receive in tea break. Today we have Hon'ble Justice Hema, former Judge Kerala High Court; Hon'ble Justice Gita Mittal Judge Delhi High Court and Hon'ble Justice Roshan Dalvi, Judge Bombay High Court, who will be joining after tea break. We also have Prof. S.P.Shrivastava, Prof. National Judicial Academy all 4 of them would be there today to conduct today's proceedings with you. With this I leave it to you, in their company; who will be going first? aaaMa,m you?

Hon'ble Justice Gita Mittal: Some of you I know you personally by name, I wish I could have been here earlier. Its always very exciting personally for me to come to the National Judicial Academy, its such a beautiful environment, and its such a learning experience to engage with all of you; I am told that this has been a very interactive Session, all of you probarbly know much more about judging as well as about POCSO that I do, with only 10 years or 11 years of judging and 23 years of law practice behind me. So, I am here not only to talk about, my little experience of POCSO with you, but to learn from you and engage on the interactions. I in the year 2006 or I am forgetting 2009, Vinod and my friends from Delhi will tell me, remember better, but I had occasions to sit on the Criminal side of the High Court, as you know we don't stay, nor do you stay with the Courts. We having a system of changing rosters. Sitting on the criminal side I had occasions to deal with a case where an appeal had been filed, by a rape convict, who had been sentenced to imprisonment. Facts very briefly: A seven year old girl had made a complaint to her father, that this boy who is a neighbor 19 years old was in the neighborhood and raped her.He had called her over for, under the pretense of asking her to buy something from the neighborhood shop, when she came back with the cold drink he raped her. The trial Court had confirmed him guilty and committed him and he was sentenced to I think 10 years imprisonment, I am forgetting. But what the case threw up when I saw the whole

argument of the amicus for the convict was, that there was no evidence and the ingredients of 376 were not made out, because 1stly, when she went to the police, what the policeman recorded the girl has told was, she did some wrong activity, "galatkaam" . When her Section 164 statement was recorded, the Metro Magistrate unfortunately only recorded "buriharkaten". "buriharkaten" for those of you understand Hindi, is another expression for wrong deeds. when it came to the trial court the Trial Court also recorded her statement in an equally inconsequential words and said " jo cheezekarninahichahiye thee" or some words to this effect. That is to say that the the boy did something that he should not have done. When the child was put in the witness box before the judge and question was put to her that what do you mean by things that shouldn't have been done by the boy? The Trial Court noted that the girl said that he did what a husband and wife do at night. Now we are talking about a seven year old situation, you know if you look at it dispassionately alright she, you can be prejudiced and biased and say 376 is made out, but this is certainly not enough, bad deeds, wrong acts, what a husband and wife do at night enough to bring out the ingredients of 376. So, when looked at the evidence I had to examine what is this child know about what a husband and wife do at night. I asked myself that question. For that you have to go back and look at the child's background. Is she from a rich household? parents sleep in one air conditioned bedroom, the child sleeps in another, she has know way of knowing what happens at night. If she is a middle class there's a remoter, there is a possibility, you know, you may be living in a middle class middle income group flat and doors stay open. If you are living in a juggi or a small one room tenement, then obviously the child would have the best chance of knowing what a husband and wife do. No I am just talking about a decided case, this is the statement in court, just, just let me finish, just let me finish.

This is the statement in Court. Now I am going to talk of the whole of the Court also in this context. Now, when I looked at the statement of the father, he was a driver, and he said he and his wife was separated when the child was an infant. So 3 or 4 months. So, the child had no way of knowing what a husband and wife do, it was obviously a tutored statement. But what this case threw up was 2 things: 1) is it was a Tamil child who who was reporting an incident in Delhi, coming from a poor background was illiterate, and therefore would be better in speaking in Tamil than speaking in the Hindi language in Delhi. the police man who recorded her statement came from Haryana, the judge came from Bengal who recorded the 164 and the judge who did the trial came from another part of the country. So, what this shows is the extreme barrier that linguistics provide to a child or any person in accessing justice, because

the same expression has different meanings in different languages. Additionally even if he were in Tamil Nadu, the child's language would not be the conventional language of a literate household. She's grown up in a different background so there's several nuances, so linguistics can be a barrier. But most importantly what was thrown up was the difficulty which the inspector, the who recorded the 161, the 164 Magistrate and the Sessions Judge who recorded the theaaa trial, the evidence in the trial their own sensibilities and their inhibitions in probing a little further. So, what also this case highlighted was the fact that we are all products of our environment and despite the position we carry the same barrier to the Bench.[00:06:42] and then you know we need to engage under section 165 of the evidence act engage every in trials to bring out justice but while looking at this trial I had occasion to examine the fact that there was so many guidelines, this trial was pre POCSO, so many guidelines which have been evolved over a period of time by the Supreme Court and different Courts and I collated them and as part of that trial I collated all of them in a judgement it is Virendra v. State, I have given you the the hello hellohello Court to See the monitor the guidelines details of the judgement but I was because of this case the Chief Justice appointed a committee in High Court to see the monitor the guidelines working of the guidelines for the Court and gave me the responsibility and under this I was able to create a facility which I will show you a little later part of the day, but part of that were included. By then POCSO was enacted was trainings which we did and into this trainings we had a Session called "voices from the margin" where we had speakers who were actually gay; a declared gay person who came and spoke and we were unable to find out a rape victim, who was willing to speak about her experiences in aaaa what are in at different stages of the trial, which included when she goes for reporting the case; then the medical examination and then the trial. What's her court room experiences and before we come down to the nuances of POCSO, I'd like to share the name, the thethefirst hand account of this rape victim, who disclosed her identity, because of the tortured and trauma that she suffered and unfortunately this victim died in of meningitis in April.

You must have heard of Suzane Jordan the Park Street rape victim, gang, victim of rape. She was very articulate and would have done a wonderful job for the you know, cause of these sexual offences in the country. But we have lost her, but we were able to tape and I have her consent. We took written consent in our training, every judge. And I think Vinod and the judges from Delhi, we have, we wewe were we will we werte able to train every judge in our 2 day program in Delhi on sexual offences and POCSO. But I'd like to share the program, the statement of Suzane Jordan:

(A video film was shown where this lady the rape victim spoke about the difficulties etc. faced by her)[00:29:12]

I will also share with you see, she was willing for her identity to be disclosed. Consent is a huge part of a theaaa making The Identity public. Suzane also went on the CNN and she has given an interview, you know I think was brought out after she had passed away, when she died in fact the main accused, in the, in her rape case was absconding and she die within 4 days of fever. It was diagnosed as meningitis after her death. The trial was still not over, if there's somebody from West Bengal was aware to what happened to the trial? we'll like to hear about it later, but I'd like to share this little except about what Suzane said about the pretrial experience immediately after the offence:[00:30:09]

(A video film was shown where CNN interview Suzane Jordan. faced by her)[00:35:00]

You know, so, she is highlighted biases which we nurture in a nightclub. See happened to be in the hotel and the the she met the accused, aaa she knew the accused before from the before hand and he offered her a lift to her home. There were more than 1 persons in the car and she was gangraped. And she told I dont know if you have got on to it, they put a gun in her mouth apart from subject her to`violance. So, it was an extremely brave woman who took a fight out, the government had got after her, it was in the news a lot, you know. Unfortunately we lost her, butwhat she points out very strongly is, See I will touch on, we will deal with the media little later on, I let Justice Hema lead that discussion, but I want to close this with since you've heard Suzan and the very important facets of cases involving sexual offences; of course bias you've understood. You know it makes us think again to internalize and think about ourselves and each one of us may have reacted the way to Suzane feels that she has been treated in court. But it's very good to be wiser even post event and hopefully we'll go back to a court rooms with more clarity and the get a sens of sensitivity to such cases. But here we are dealing with not as suzane; you know we are talking of people of persons who are less than 18 years. And you know there is a strong recognition which comes from Suzane'spresentation, that is not only victims at victims of sexual offences need special treatment, needs special care, and these are not ordinary cases as murder, theft, or dacoity or TADA or something. But these are offenses, where victims and witnesses need a special treatment from us. And the following a universal uniform procedural approach, in a typical court rooms, may result in valuable casualty in case involving sexual offences.

Justice would be traumatized to my mind if you did not give them a special treatment. You know this is because largely of the proximity, the nature of the offenses, the proximity of the accused and the formidable environment which the courtroom presents, where the people are called upon to recount the violence they have experienced many times. One of my colleagues in the High Court undertakes this exercises, you know he gives a piece of paper to every Judge, who is training and ask each one of them to write on paper which was the happiest sexual encounter they have had, with their marital partner or with anybody. It may have been holding hands with her boyfriend, it may be no more intimate contact, it maybe or actual sexual activity with your married spouse. Put it on paper, folde it, and put it in your pocket. And you know people have mostly given back blanc papers. You're not even willing to share with yourself, intimacies witch are so personal. So its a huge lesson in realizing you know when you can't do it with yourself, or share it with your best friend, how can you expect somebody who's been so violated, You know who has been a the victim of sexual offence, to stand up in a public environment as the Court and to relate that? So now, this traumatization, of a of a victim is compounded, as Suzan says in alien court room, surrounded by strangers, councils of accused plus the standing next to you, snigerring at you, making gestures; you know how accused persons behave and mostlym Court rooms men Out Number the woman you know. If the victim is a woman under POCSO its a harrowing peice. Now, as part of this weeds I mean there's alittle more, imagine a SUzane who was a 6 year old 2 year old 3 year old, or even a baby you know and is in a Court room. So we had occassion to examine this and the Delhi High Court we have put in a special facility, with a protocol, guidelines working the facility some of its very material for each one of you.

We defined who aaa the child witness as the vulnarable witnesses, and the courtroom project is called the "vulnerable witness courtroom". So, if you see we include a child witnesses and victims of special offence, but what you have to remember is, that the Criminal Justice System was not designed to children in mind. Not the POCSO victims and mined. So, even a Court Room which is considered you know, speacial for a victim of sexual offence, we need special modalities and adaptations and special adaptation of our own conduct towards the witness aaa witness witness. you know this is a slide, if you see a child's reaction, it actually happened, we are all in black and white in a courtroom and a child wanted to know, why is the ...and so we must realize that you need to adapt special things, for instance I pointed out liguistics, memory, disposition, cultural context, a Tamil child in Delhi or aaaa you know a foriegner, can be a foreigner who speak no Indian language, so you know, you emphasize the need for translators.

we've been provide for them. So therefore, this is to be kept in mind when we are dealing with children. And then you see, what I you know now there are several aspects, what does the witness do if the case doesn't get over in the pre-lunch Session or a post lunch Session or the pre-lunch the case has to be kept over you know. There are several aspects, the long wait before the case reaches trial. Several stages, witness has told the police cases challan has been filed. There are several stages, long wait in the Court room[00:41:22] what happens when the case is adjourned the witness is in the Court and you have to adjourn the case. So all this you have to take care in mind, and especially using age appropriate language. You know you have to be very careful about the formulation of questions. I had had a occasion to examine this in judgment in the competency test, you know. There is no time to discuss that, but how competencies test, that is testing whether the child is able to be a witness, you know the questioning has to be very carefully done. And that details of that citation are also given to you, it would be useful as POCSO judges you please read the judgements, because in that I am not, those are not, I am not the experts, but I put together your say, aa, a lot of resources you can use for educating yourselves. I know I have come across the case with question put to a illiterate witness was to judge whether she could be competent "who is the Prime Minister of India"? A witness coming from the juggi, you have a fridge? you have a refrigerator? you have a television? they don't even have electric connection you know. So we have to be very careful about how you to do all this.

So, so so we framed these guidelines after looking at an international perspective, they are also available on the night on the net. And these guidelines were framed before POCSO came, before Nirbhaya happened these were guidelines from 2009 to 2012 we worked on it. The first Court Room was inaugurated on 16 September 2012, month before Nirbhaya happened. So, the sensitization, this is a I am pointing this out to you as we're all judges you are judges we on this side are judges, the we are placing unique leadership positions you're not only master of the Court room, but you are able to interpret and evolve laws and procedures and you are actually in a leadership position where your initiatives and your innovation can actually bring in a tremendous justice in the community. Not only to the cases that are before you, this is an instance of, this whole project of the court is in aaaaa instance of judicial initiative and judicial innovation with existing facilities.[00:43:50]

This is part of our guidelines which POCSO has incorporated.

- concealment of witness identity

- developmentally appropriate questioning
- use of screens, one way mirrors and other devices

Sakshi and all those judgments has already stated all this.

Now I'll just take you to what we have created. this the these are the number of witnesses by now they are in thousands Since September 2012.

This is what the, aa you know, I called all the District Judges and asked them who was willing to give me space to create this? we had no budgetary allocation, only one District Judge, we have 7 Districts in Delhi, one room, one court room and the judges chamber has been adapted. A separate, no this is sorry this is the second project. I am talking about the, this is later, this is a 2014 second district I have got the photographs here. Has a completely dedicated entrance, judges use it or its used for vulnerable witnesses. Accused has no access to this. This is the waiting area, you know we provided with the help of psychologist we've analysed...aaa. they said children the very proud to suggestions so don't give them books; don't put pictures and all;But we've kept toys and etc. There's a computer for the administrator who is in the Court Room. Courtroom There's a pantry where we keep snacks and cold drinks and all and we even provide lunch. We've, actually picking up the victim witnesses from their houses.

we have identified Legal Aid lawyers. A Court vehicle with The Legal Aid Lawyer picks up the witness from the Court. A pre-visit is provided to the courtroom, in the courtroom is provided in the guidelines, the judge is given an opportunity to interact with the witness also explain the procedure not discuss the case. just to familiarize, you can do it on the same day. You know the explain to the witness what is to happen, the pantry is there for them to eat. [00:46:04]

This is the courtroom if you see that. The, aaa, this is the judges dias, the furniture is vwer easy a very easy very very small room actually. What we could get the space, these are all existing rooms adapted. Now, this is now here we have provided 2 methods. 1 year or 2 year old child doesn't like to sit on a chair, you know, they may like to sit on a cushion, they may like to sit on sofa. So this is a witness room which has chairs and sofas plus a carpet the child can depose there. You can see an LCD has been providedhear to beam in the pic if you have to get an identification affected of the accused, without putting the child in physical proximity. Within the room there is a 360 degree there's a 360 degree camera which beams and the witness their image and sound directly to the Court Room. Now you have to ensure that the trial is conducted

in the presence of the accused so the in such a model where the child is in the witness room, which is behind the court room only, the accused is in the Court Room, but you know there has been instances in other countries in Canada etc. where children are have told the judge that we feel that they felt cheated, because they never had an opportunity to tell the judge himself or herself as to what their experience, you know you are perceived as judges people think when they come to you all the trouble get over. So, children also feel the same way. So then we have to provide for situation where the witness wanted to tell the judge in the court that this is what I have experienced.

So, how to keep the q's away from the child in such a case? Here we've carved out a accused room. If you see that its within the courtroom. there's a 1 way mirror, separating the accused from the child. Accused sits here with the his guard, police etc. heis got in first and then the witness. Now, this is the view that the accused gets you can see the glass and you can see the courtroom the little podiums for the defence lawyer and the theres chairs for the witness to sit with description deposit with the facilitator but the accused gets a clear view of the courtroom. So, the objective of this program is to ensure the best interest of the child ensuring the rights of the accused.

yesi am going to inaugurate the next. Sorry budget? this was existing facilities all I needed was the LCD it is just mirrors in your court room, the Court room exists we have just put in mirrors.

Participant: the whole ambiance has changed like the room panelling...

Justice Gita Mittal: The panneling infact is the Saket courts is fantastic it must be the best court Complex in the country. But I have the, I have the, Karkaduma court room also, where there is no panelling & all this, Its just clean paint White. Your rooms are white, we have just got them white paint. we refurnished the existing furniture the sofas for the witness are old furniture everything is old. You just need a few toys some chamber or the other has a small fridge the pantry you know you give a cold drink you give a cool drink you get sandwiches for lunch and all, but the difference has been the testimony, the judges who are working over almost 2000 to 3000 witnesses including adult, adult witnesses completely segregated, picked up. Initially they are very scared, when the witness, this is what the experience of the judges POCSO judges, I think you, where are you posted? I see that building it. So, you know its a very simple design I just made sure that, bring the design to my committee in the High Court but its a this I have walked the system in England i saw it I engaged with organizations who work with children in Canada and South Africa etc. The guidelines were formulated after extensive discussions. 3

years including defence lawyers go through this how can be is there anything which impacts your rights, please take a look at the guidelines after Justice Hema's presentation I'll have a few comments on the guidelines. But you know initially the child will come in with great trepidation, nervousness with 1 relative. My judges who are running these Court Rooms tell me, if the case gets adjourned in the 2nd visit they bring extended families, they want to show off because they are given so much importance and the testimony is transformed. just this segregation from the accused the testimony.

It requires hardly any additional expenses. how much you'll spend 100-200 Rupees in giving sandwiches two to three witnesses in the day you know, but this is which is coming to the witnesses is really huge.

So this is what we have been able to do in Delhi. these are minor modifications you already have computers You only need a bigger screen and the little sound; because if the accused is in the defence rooms he needs to be able to talk to his lawyer who's in the court. Now, all questions to the witnesses all weather prosecution with the diffence is give into the judge, the judge puts it and if the aaa to the child witness through the facilitator. The witness sits with the legal aid facilitator who we have trained. With the witness questions are put by the judge in into the microphone of the facilitator, ear-phone of the facility who pass the witness. So if the child is in that room either on the Sofa or the carpet or whatever, the aa the, she has no traumatization secondary traumatization from exposure to the accused or aggressive questioning or embarrassing questioning. the judge filters and monitors it. Its a huge its a very easy exercise which you should see if you carry to your High Courts and replicate the systems. I have been telling everybody to you know, means I have had discussions in Bombay, Flavia Agnes came and borrowed my guidelines, I think they have been circulated as hers with minor changes [00:52:25]and ful stops and commas, but I've been to a problem Justice Vimla Kumari in Chennai, you know please replicate this carryit over because you have to spread justice; that is my purpose in bringing it here. So, there is a huge difference in the aaaaa, this is actually what I say where real sensitization and the of judges. We've trained prosecutors you've seen that. Suzane referred to lawyers and prosecutors, in training all judges in Delhi has undergone this training the people of an identified as facilitators all prosecutor senior Inspectors had undergone the training which includes several exercise. But this is working of the save guards in POCSO a very very important aspect of your Court room work. Now we'll revert to the subject and I think Justice Hema would like to start with that, but if you want I can I have a comparison of the provisions on the media.

Justice K. Hema: I am sorry good morning ladies and gentlemen, I have some problems, now I'm confused, sorry for my bad throat. The time is out only 4 minutes left. So I do not know even forgot what the topic for the day is? Also I don't know within 4 mins what I'll have to do? I did not capture the mic because it was very interesting to listen to the general aspects one reason the second reason is I donot know whether it will amount to the contempt of court if I capture the mic? So with the 4 minutes left, the NJA has to tell me what we must do? Whether we must break for the tea, come back and continue with the Session? Specifically on the topic remind you of the topic or desktop. We will take a break and come back because general discussions you know it is required, general discussions you know it is required and we have watched a movie also very very enlightening video also. So but then after the Tea break we will confine to the spefecic topic alloted for the discussion we will make up the time that way.

Session: 10: Obligation for Reporting of Cases of Child Abuse

Speakers: Justice Hema K & Justice Gita Mittal

Day: 3

Hon'ble Justice K. Hema: Yes after the tea you are looking energized. I am happy that I am facing an energized group and a very fortunate group of judicial officers across the country. Who are entrusted with the job of dealing with the victims, children, to protect their interest their rights trying to protect them from being sexually assaulted, abuse, harassed etc. But, as I know you have been dealing with these cases since a long time and you must face the real problems, rather than me. You know day today what problems you have been facing. So, I am an illiterate therefore, I will avoid any lecture on anything which I know about the Act and the background. There is another aspect also, the listening is not a very happy thing as a judge you have always been a victim of listening. At my hand I do not want you to be a victim. Therefore I have put certain questions to you in advance to know to identify what you would like to know from this program? on a particular topic? so that, so when I go through the questions I found there is difference in opinion. Very strong difference of opinion, each and every question I put so I thought, you will be discuss, you will debate and you carry home whatever emerges from the discussion and debate for helping you to protect the interest of the children under the Act.

So the topic for the day is "*Media's influence/ Pressure/Over-reach v. Right to know for Citizens*". Media's influence, pressure, over reach vs right to know, for citizens. I put a question to you, do you know? Do you think as a judge you are prejudiced or biased in any manner? "If yes", state why you think so? Is there any special reason? 98% said "No" you are not prejudiced. Judge should not be prejudiced. But 1 or 2 said to certain extent you are prejudiced but you have to overcome the prejudice. When you say you are prejudiced you are biased or when you say you are not prejudice or biased you must know what bias is? Yes or not? Without knowing what bias is you cannot say whether you are biased or not. So, let us examine what bias is? You can discuss, we can discuss. What do you think bias is? Prejudice is? Please one of you can answer. What you think bias is? Majority said, except one or two, three, said you are not prejudiced. If you are not prejudiced, you are not biased. Why do you say that? Do you know what bias is? What is bias? Please please come out. What is bias?

Participant: (said something not audible)

Justice Hema: One minute (she makes a note down in her laptop which is projected on a screen) Pre-trial? What do you mean by that, can you elaborate on this? Pre-trial determination. Before the trial starts you determine what? What you determine? Unh? (Cross talks by the participants) We are not on media. Media, the topic is media the question is not. Media. Please, please, one minute, one minute, I don't want to know, I told you to keep the author of the answer silent. I do not want to know who has written it. We are just to encourage the discussion. So, see the question, question is, Do you think as a judge you are prejudiced or biased in any manner? It's a general question.

Participant: The topic is "Media Influence and Right to Know for Citizen", do you think as a judge you are prejudiced or biased in any manner?

Justice Hema: Alright I understand. I understand yes, any manner, any manner.

Participant: Then the matter is come before the media. Media is covered for all these questions.

Justice Hema: So, therefore, therefore you are referring to the prejudice caused by the media alone.

Participant: Only, only, that is the judge.

Justice Hema: I am sorry I'm sorry the question is not with respect to media, it is about gender general.

Participant: Ma'm you referred this question under the heading of media.

Justice Hema: I am the author of the question I am saying, that it's a general question.

Participant: *Achcha*, then the answer will be otherwise.

Justice Hema: *Haan* you tell me the answer, at least now I want an answer to the question it is a general question. [00:06:20]

Participant: Forming an opinion.

Justice Hema: No, one minute, no no we will conclude this one first. (Participant: Yes, Yes!) So, Mr. you are from which High Court?

Participant: Allahabad

JusticeHema: Allahabad, see this is the problem you proceed preconceived notion that this relates to media the topic is that therefore this is this. This question does not contain a single word to show, that this is review

Participant: Adam please see the framing of the question, you have divided your syllabus into I part Media Influence, 2nd Part Nature of the Challenges Faced by the POCSO Judge And the third is Presumption of

Justice Hema: Yes, Yes, see when we are dealing with media influence pressure etc. the first question is whether you are influenced the pressured, whether you are biased prejudiced? 1 minutes 1 minutes biased, So without knowing what bias is ?you will not be able to come to a conclusion, whether the media influences you or

Participant: Let me tell you what bias is because I answered it definitive. Take for an example I have my husband who's a drunkard, and had bad experience in his hands. So, when any case relating to that sort of thing comes before me, I initially get biased that this fellow is.

Justice Hema: So, So, I follow, you specifically said when drunkenness case, you get prejudiced. you get prejudiced. So, what is bias?

Participant: Bias depends on (voice heckling amongst the participants, not audible).

Justice Hema: predetermination of what? Sorry, sorry, Decision. Predetermination of decision. So, before you try you will have a feeling aaahhh he is guilty. So, now that is prohibited, as per the provisions it is prohibited.

Participant: Ours is an adversarial system of justice, but sometimes before the trial begins certain given facts, click to our minds as if it is correct, as if it is true, that is bias. Suppose a victim is 10 years old and if she is violated, before the trial begins, as a human being it comes to our mind that, because she is defenseless she might have been subjected to victimization?So, this is the bias that.

Justice Hema: you already for an opinion! form an opinion on the subject on the subject. Is it ?

Participant: Madam bias is totally depend on your mind. voice and not by what is Bias bias totally depend on your mind when you see a incident jab aapakhbaar me yaanews paper me kahin koi khabardekhthe ho.

Justice Hema: I am sorry no Hindi please, some body gave an answer in Hindi, I am taking there for a translation yes!

Participant:leaning towards a particular view or hating or liking something or having a particular philosophy.

Justice Hema: Leaning towards a particular phylosophy.

Participant: or hating or liking something, so many factors!

Justice Hema: So, so

Participant: Biasness is some sort of perception we do inculcate, by virtue of the environment in which we grow up.

Justice Hema: Perception,, perception, because of, because of social environment. yes! no. no, see bias because because of media is different. Bias can be due to various reasons, various reasons, so, What is bias, we have to identify first. [00:10:49]

I want you to help me, to find out what bias is. So, you are confining to media as he says, this this thing.

Participant: madam biasness is the pre-occupation of the mind, that certain fact would have been happened in such a way.

Justice Hema: Is it intentional? so anything more please add, time is already 28. I am not on media for the time being. We will identify what bias is first. Why do you say you are biased you are prejudiced? because all of you have answered except one or two as she said, she is one. But you are not biased, now you come up with so many answers, which, which gives an indication, you know what bias is. And you know from your experience that you have some preoccupation of mind that a particular happened in a particular way. Because of the social environment you have certain perceptions. And you are likely to lean towards one particular philosophy e.g. if you have been a land lord you will have a particular approach, if you are a tenant and you have suffered so much being a tenant you'll have a particular philosophy towards

that. Already formed an opinion on the subject, already formed an opinion on a subject. Children, child abuse, paternal, child abuse no it cannot, because you have never come across with such an incident. Like as a father you never do that. Your brother will not do that, the father, your father will not do that, your friend will not do that, in your society in which you move, nobody will do that therefore, you have already formed an opinion on that particular subject. that will lead with pre trial determination. this lady this woman is coming to say that her husband, molested the child . the child is coming, but you no that will not happen in the society. So, you have already formed an opinion. So do you think that you are biased? You are biased? you are biased. You are biased, no no I'll come to that. I am very happy to know that, after the discussion one person is there, who is not biased. What I am saying is the topic being media influence, pressure group etc. you already had a preconceived notion that all the questions will relate to only media. that is also a bias, its not intentional bias is not intentional at all. It comes with you because of no reason why you have thought so? you do not know, you were justifying it, but you do not know why you have done, why you have such an idea? Do you think a judge can be influenced or pressurized or prejudiced by media, its a 2nd question specific question on media. So do you think? Most of you said No. Yes to certain great extent certain people said, a model judge will not be influenced. But, model judges are rare. Do you agree with these answers? A model judge will not be influenced, pressurized, but model judges are rare do you agree? No. all of you will not be prejudiced.

Participants: (Cross talks) to some extent mam.

Participant: When we apply judicial mind, then no influence comes to me, judicial mind. When a judge apply judicial mind, then how you can say he is biased and

Justice Hema: We are examining that, we are examining is there any chance for getting prejudiced ?biased or influenced or presurized or

Participant: When we apply only mind, then you talk to them ki I am biased they are biased, but judges apply judicial mind then.

Justice Hema: You are a different person, totally different person when you apply judicial mind. Now your answers. Have you come across any instance in which you think any particular, see I do not want to know the author of the answer, no please, see please this question is have you, one min one min please; Have you come across with any instance in which, you think, any particular decision of a judge—(it can even be a decision of SC/HC)—is swayed by

influence/pressure/prejudice caused by media reports? You have already answered, no you will only but these questions these answers will show that HC and Supreme Court can. Not me, not me, I am above all these. But the High Court, the Supreme Court, because all of you have answered, I don't even now you say no. But these answers will show that.

Participant: Not all.

Justice Hema: I follow, but you said no, emphatic no to the question that you are biased? NO I am not biased, my judicial mind, you know, what ever bias I have my judicial mind will throw it away. My judicial mind will throw it away is the answer. I do not know how to translate in Hindi. See, when I am a judge it will not influence me but the Supreme Court and the High Court, they get swayed, and another thing, another thing, see look at this one very interesting answer, instances are withheld for judicial discipline. So, that author has a lot to say about swaying but he doesn't. Understand? then, then, it is inappropriate to allege influence. inappropriate is the word used. There are plenty of examples. But where, not at the trial stage, High Court, Supreme Court.

Justice Gita Mittal: We are model judges, ha haha

Justice Hema: In so many cases it appears that if media wasn't there, result would have been different. that is my personal view. Now, reject it, that is my personal view. So, at least 90% of the judges will definitely agree with this. If the media trial wasn't there result would have been different. So what does it indicate? there is pressure, influence, to in a decision, at least when you read it, Best Bakery Case; you feel that is biased, why do you say that is biased? the case is influenced the media has influenced, Best Bakery Case? Please please please come out with the answers. [00:19:03]

Participant: Not audible

Justice Hema: Media pressure, alright! 1 min, Media pressure, Mediapressure, Media pressure....alright anything any other reason? I Best Bakery Case you feel it is swayed by media influence, please come, please come up with the answers. the question is not whether you are right or wrong? it is to find out examine yourself. I am not giving any answers.

Participant: Again we'll say High court and Supreme Court because, Supreme Court and High Court dont take cognizance of similar cases, if its not for the sensation that will be created. I am sure!

Justice Hema: Alright, *Nirbhaya Case*, *Nirbhaya Case*, that is also swayed, because of the media influence. *Aarushi Case*, what do you think? who is guilty in *Aarushi Case*? who is

guilty? who is guilty in *Aarushi Case* according to you? anyahnn sorry, all all means the parents? anhhhh, police? police is guilty of the offence? no the question is who has committed the offence who is guilty? the parents? the police? parents are guilty. So, its not swayed the parents are found guilty is it not? parents are found guilty, but some body has said *AarushiCase* is a victim of media pressure. *TarunTejpal Case*

Participant: You know it only through media, media how do you know?

Justice Hema: Yes! that's the answer. So you said you will not be prejudiced by the media, but we are already prejudiced. understand!

Participant: Lordship! her parents may be guilty, but we have to decide the case on the basis of evidence available on record, whether there are different evidence

Justice Hema: I follow, I follow, but these answers, may be you have not given these answers. But the persons who have given these answers. Now on on discussion also you said, for certain reasons, these people have gone wrong. Who the Supreme Court the High Court have gone wrong, because of the influence the pressure from the media they have gone wrong. How did you come to this finding? from the media. Understand!

Participant: Mam from the results of the case, from the results of the case.

Justice Hema: You have not seen the record at all. You have not seen the record you have not read the record, they how can you criticize? except from the media, basis for the criticism of the Supreme Court and the High Court is the media. the influence of the media. Because of the media the influence of the media on your mind. So, this is an example.

Participant: not only that mam the stickchers that has been passed in the Best Bakery Case we conclude that its because of the pressure created by the media that the Supreme Court has gone to the extent of passing...

Justice Hema: that is what you believe, but you have not seen the records, you have not heard the arguments, you are totally out of anything about the case except through the media and the judgment published.

Justice Hema: You are inferring, you are inferring, No see the question is not that. the inference come on what basis? Media.

Participant: No when a High Court or a Supreme Court asks us to dispose off a particular case, expeditiously leaving, leaving other cases aside, that shows that there's a clear indications are

that higher courts are being influenced by the media and are putting pressure on us to dispose off a particular case. We have our own prerogatives.

Justice Hema: that is what you believe. may be they have there own reasons. You do not know that, no nono, when a direction comes you think these people they dont know the pressure of the trial courts. We have other, other very compelling case, these people they are sitting there and don't understand us.

Participants: that's truth. Mam no what can be the other reasons? When we have similar cases on the file of our Court and High Court, pin points only on one particular case, which has a hype already in the media, what can be the other reason that can be concluded from our point of view?

Justice Hema: Its all because of media? at least now you agree the Supreme Court is influenced. So, please try not to be influenced by the media, or pressurized by media. Let the Supreme Court be influenced but let us not be influenced.[00:24:38] Let the High Court be influenced but let us not be influenced. But what have you done ? So, now you are aware, that you should be, I mean keep yourself protected from the the media influence and pressure because, the Supreme Court goes wrong, the High Court goes wrong. So, you look look, instances are withheld because of judicial discipline. You are scared to say that. In a forum like this you should have said it, because nobody is going , I asked you to keep your identity silent. So, that you will not be caught. Then inappropriate to allege influence on the Supreme, because it is on the higher courts. You are, you feel it is inappropriate. Understand? So, you agree, you agree that the highest court in this country is influenced by media a group of brilliant judges have decided, you have given a verdict. But then, I am sure in being in Delhi, whether she will carry to the Supreme Court? Please don't do it. (All laugh a loud laughter! ha haha ha)

Justice Gita Mittal: None of you mentioned *Moh. Yahkoob*?

Justice Hema: So, you are justified. Yes! somebody said Capital Punishment swayed by, capital punishment in memon's case swayed by the influence. You do not know. They sat in the midnight, gave a verdict, why this is done? Extraordinary deviations from the normal sitting, Why? You believed it is media, you believe it is media, you do not know the reason.

Participant: What was the reasons Ma'm, please!

Justice Hema: How do I know?

Participant: (loud noise , laughter, etc) No how can we know?

Justice Hema: 1 min.

Participant: We can't see the file of every case? we will see the matters on the facts which has been brought by any...

Justice Hema: Sir, the question is not about what they are doing? Forget about What the Supreme Court is? Whether they are swayed or not. Question is, now the question is whether you are swayed?, influenced or pressurized? You will be swayed , influenced only when you go to the High Court or the Supreme Court. That is your conclusion. Gentleman, ladies and gentlemen, this is your conclusion. But the question is?

Participant: This opinion that the capital punishment given by such and such case is due to media pressure is also a media pressure on us We are coming to a conclusion based on what media reported. Not based on the record.

Justice Hema: That is what I am saying, that is what I am saying. Certain people will agree that media influences you also, you also, you are not above it. You need not reach the Supreme Court to get influenced. no, its a fact that you get influenced. You get pressurized and fear also. Somebody said, aaaa somebody said we are afraid. We are afraid, aa, some question you have said it. Some question! You are afraid what the Supreme Court will think about us? What the High Court will say about us? Therefore we take this decision, something like that. Somebody said in bail matters we are getting influenced, bail matters, why? because if you grant bail, a call will come from the High Court, you fear. So, its sort of an indirect pressure on you to grant bail. In one of the cases, in aaa I have an experience, I granted bail in a very sensational matter, where about 12-13 judges were against. they all took one view, I , I, I, was a loner, in that, but even after that, one judge said, one judge whom I respect lot. My superior who was my superior, he said, you could have given bail, out of the 3 or 4 you could have given bail to one and reject bail to other, one can be on stringent condition. Why? you must have the boldness to what you, to say what you feel right. You should not be swayed by the influence of media, or even the superiors, I would say, even the superiors. No pressure must act upon you. Let's alone the media, no pressure should, but is it practical? Is it practical? If in one instance one subordinate officer came to me and said, Madam on the case records, he was very close to me he was working as subordinate , when I was a Principle District Judge. SO he came he took the freedom and he asked me, Mam I feel that accused are guilty, aaaa, but I do not know whether Justice A & B belonging to the same community, will turn against me if I do something. He told me frankly. I said don't worry I am here in High Court I'll protect you, whatever you feel is right you write. So he wrote, boldly he wrote, 2 persons asked me the same question. One person

was transferred. I took a lot of pain to bring him back,. The second person wrote he his he wrote, but later the same matter came before me, same before me I looked through the concocts and I found that this honest gentleman, was wrong in his conclusions. What will that person think about me? He will think why the judge has got against the media? what is his idea behind it? What played in the judges mind? You can make any inference.

Participant: Unfortunately if it would have gone to those judges who had doubted and they had reversed, he would have thought that they have reversed only for this reason.

Justice Hema: So, yes yes , and you got answered only because of this. So, the fact is that it is likely that you are influenced, pressurized. The next question is can you stop the media from reporting? Nothing you cannot. Why do you say, why do you say you cannot? Subjudiced, contempt, from where do these expressions come? if there is a right for the citizen to know, how does it offend the media report? Why should you make them guilty? No I will take you to one decision. *Sahara India Real Estate Corporation v. SEBI*; paragraph 15

In the light of the law enunciated herein above, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under Article 21 to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the above mentioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework. etc.

So, you get a protection only if you come, so what will happen if a person comes, his name is not disclosed but he knows that person knows that he is going to be the target, he comes. then what will be the idea in the mind of the Court, yes yes he knows, he has an involvement. So, he has come in advance. Because of the Supreme Court Judgment he has come in advance, because the police must have been behind him. But he he comes the question will be , your name is not there in the records. You are not accused of, anticipatory bail, you are not accused of, why are you coming to the Court? So, may be you are guilty. Whether you are guilty or not only you know. So, there again, there is a prejudice playing. So, for the time being we'll

conclude that we are victims of prejudice, bias we are confining to media. Not the Supreme Court or the High Court we ourselves are influenced. But have you done anything to prevent being influenced? Have you done anything to prevent your self from being influenced? That is what every body does. Supreme Court and High Courts have done it. No see what I am saying is that is what you believe. But I can tell you instance where, instances where, various instances where even on facts you differ. Because of the media. One example I will say, which happened in Kerala, and the incident happened at a particular place. Say it happened in "A" as per the records. But media reported it happened in "B". 12 judges said it happened in "B" only 1 said it happened in "A". Why this happened all the 12 judges are idiots? No I wouldn't say that. They are all honest, very able, very efficient, persons who can express. Equally competent, equally ability wise honesty-wise integrity wise they are all equal. All the 13 judges are equal, but why they have gone wrong instating the place of occurrence is "B"? because they have watched the TV, they have read the media so it is already in their mind. Their wives also would be discussing oh! its very unfortunate it happened there. wives! friendseverybody will be discussing, so yes let the case come. So, what happens? You are carried away by the media reports, even about the place of occurrence, place of occurrence. You go wrong, you go..and what happened in that case 12 judges said it is it happened in B consistent with the media report. 1 judge said no, as per the records it happened in another place as per the records place of occurrence is something else. even after this verdict another gentleman, judge decided some issue in the same case. He again wrote it happened in B. I am talking on the basis of decisions, reported decisions. I am not here to say anything on my personal information. Records speakup, records speakup. Why this happens? Only because of the media. So, what will you do to get away from the media? What I am saying is this mistake is committed because of the the media influence or the media report, not because of the judges are good for nothing. They are very very able, very efficient, equally trained, equally meritorious and they are having the equal capacity to express. they go wrong why? they go wrong why? that was the question in my mind as an infant judge. When I became a judge after 6 months I started getting very very upset. Why this is happening? I know Justice A is Justice B is also so strong, they differ, they differ in their judgment Why? their legal knowledge is equal, honesty is unquestionable as far as both is concerned. But why they go wrong? why they differ? What is the correct position? how do you know, so its actually upset me. i was hunting for an answer. I walked here and there asked so many persons I did not get an answer which satisfied my personal mind, but then I identified it is because of the bias. It is because of the bias. Some preconceived notion is embedded in you mind so strongly that you cannot get out of it. you cannot get out of it, that is why I said

that example, 12 judges said that the place of occurrence 13th judge said that the place is A. And the 14 judge again said it is B because the preconceived notion is not taken away even by the 13 judge who spoke on the basis of the records before Court. He is prevented from opening the file and understanding where exactly the incident happened. Even after the 13 judgement came. So, this preconceived notion baffles you. Not baffles you, actually it is embedded in you that you strongly believe this is the fact, so the challenge before a judge is you must get out of this prejudice. unless you get out of the prejudice, no point in being a POCSO judge, no point in being a High Court judge, no point in being a Supreme Court judge. The victim will be the society. The victim will be the party before you, So, I would request the NJA to take up for all the judges the identify the prejudice. Whether you are prejudiced to try to understand whether the judges are prejudiced? How to identify the prejudice in you? because 98% of the judges here said you do not have bias, try to help you to identify if it can be done within such a short period if you have given a training it will be easier for you and then identify the prejudice then find out what are the methods to eliminate bias. Eliminate bias in you, if you eliminate bias you will not be scared of what the Supreme Court says what the neighbors says what the media will Say. you are very happy because you are out of prejudice, you have given the verdict in accordance to the case records.

Justice Hema: Now the next Obligation of Reporting of Cases of Child Abuse

Justice Gita Mittal: See the next 2 sessions actually can be put together. So, we can take a break, I think, there's another break? We can have a discussion see these are the problem areas. You need to look at Section 19

of the POCSO, which provides for mandatory reporting. You know because of want of time I actually had some very good presentations of some of the expert to spoken on this, during our training but I have only abbreviated from their presentations and the interviews few couple of slides as to what is the difficulty is. You know Section 19 of POCSO if you see is a provision which has the legislature has brought in kindly look at that:

it is to encourage reporting of offences and it is it contains a non obstante clause notwithstanding anything contained in the Code of Criminal Procedure there are two Section 19 and 20 which are unique to this Act.

Any person including the child who has apprehension that an offense under this Act is likely to be committed or has knowledge that such an offense, has been committed he shall provide such information to: I have set it out to whom:

(a) the special Juvenile police unit or

(b) the local police

and who is to give this information?

- apprehends that an offence under this Act is likely to be committed or
- has knowledge that such an offence has been committed and 3rdly
- comes across any material (this is covered in Section 20 as Obligation of media studio and photographic facilities to report cases), wherein you come across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium. Now the punishment for non reporting has been prescribed as 6 months.

The provision looks very innocuous it looks as if it's very protective of the child. Now let's see what is the impact of this. just they are the most worried, just see the "Professional dilemmas" Now here is a Questions: A mother took her daughter (19 years old) to the psychiatrist as the daughter was having trouble concentrating on her studies

- The psychiatrist stumbled on her sexual abuse when she was 17 years old.
- Should the psychiatrist report?
- What would be the appropriate order if he is being prosecuted for non-reporting?
should the psychiatrist report? and what would be the appropriate order If he's been prosecuted for non reporting? I wasn't there yesterday what was your conclusion?
Participant: Actually she was badly trying to take refuge under the oath and our people were trying to say the the Oaths and every thing under the earth is over turned by this POCSO Act.

Justice Gita Mittal: No, but yousee this is an enactment looking at best interest of the child.

Participant: She is under oath not to disclose the personal details collected. But she is not under oath to report a crime. That is what we argued.

Justice Gita Mittal: no but you look at larger interest of the community. nowlets look at the...sorry?

Participant: First she must report, then she has to take defense, if she is prosecuted.

Justice Gita Mittal: No but what about violation of the child and privacy? and there'll be several other repercussions, a police case is registered. Now see, the next slide, just look at this:

- a close relative
- a teacher, in a school situation
- a mediator, a mediation what about the confidentiality attached to the this needs to be discussed actually you know
- a family court , a child reports insets, the judge has to report.
- civil court (say, in a maintenance suit) or
- criminal court (say, in a S.125 Cr.PC action or a trial u/s 498A IPC)

(loud cross talks not clearly audible)

Justice Gita Mittal: No but this is a non obstante clause, notwithstanding anything, that's again in respect of Code of Criminal Procedure

Participant: Privileged communication, privileged communication we'll not stop from reporting why because, when an offence is committed when it comes to the knowledge of that particular advocate who is claiming privileged communication is supposed to report.

Justice Gita Mittal: Also that's a general enactment Evidence Act, this is a Special later Act.

Participant: And further, further I find nothing wrong in this provision, why because the Special court is also entrusted with the job of securing the interest of the child, by the nondisclosure and all these clauses are there. In that case interest of the child will be protected even after reporting. even if the case comes to the Court, Special Court then the interest of the child will be protected by the Court, in cases, nothing wrong, in reporting.

Justice Hema: But the question Madam puts is whether the child right is protected by this?

Participant: Yes! the psychiatrist is supposed to report it.

Justice Gita Mittal: The Act says, apprehends, it doesn't say a mother believes or she is litigating with her husband for various reasons, she is she believes, she lodges a complain aaaa believes that he may indulge in a

Participant: Apprehension is a qualitative term.

Justice Gita Mittal: No No just a min, just a min., the result is she report she brings it to the notice of the judge the judge makes a mandatory report, a criminal prosecution starts POCSO envisages a prosecution, what will be the what will be the state of the father child

Participant: No a simple reporting may not go to trial. it may after inquiry it may be found fraud. But to be false.

Justice Gita: Alright so you advocate that punishment, that criminals is more important than any other interest.

Justice Hema: Do you think that...cacophony not audible

Participant: there is a connected issue mam, the privacy, right of privacy of the child victim and her family, so again a question would arise whether before reporting the child victim or her parents had to be taken to confidence, because they may not like it. yesterday we had a case history where a siblings it was a elder sibling sexually exploiting the younger sibling accused is a minor, victim is a minor, family had just gone to psychiatrist to have some corrective measures done, behavioral they never wanted to report it. Lets say a this doctor aaaa makes a mandatory report without consulting the mother under the mandate of Section 19. what will happen? are we doing good to the child and the family?

Justice Hema: Madam is also asking the same question? Madam is also asking the same question to you? Is it not futile? But think in the opposite direction also, because it is laid down in the provisions after much elaborate thinking by the legislature, and we are bound by law, we are only implementing law not legislating, so what is the object ?are we go are to follow this that is is a challenging for us.

Justice Gita Mittal: This is a , what we are looking at is we are combining the Session into the two these are the problem areas of the Act. were actually the legislature needs to take a re-look at these provisions. So, you know, as of now, Doctors and psychologists are extremely perturbed about this . Now look at this:we have only stopped at psychologists. 17 year old girl has a boyfriend who is less than 18 as well, children are experimenting you know upto the age of 25 - 26 they sexually active and the girl gets pregnant you know, or not believe she is pregnant goes to a medical doctor reveals her sexual activity. Now there are 2 minors, 2 - under 18 an by virtue of this provision she's not pregnant. Now it turns out she's not pregnant, but has been sexually active so therefore under POCSO somebody has committed an offense thereis been a sexual offence and under Section 19 the doctor is bound by themandatory, whereas neither the girl, nor the family wants this to be revealed. So, you are bringing in to public space what may be very private action. Now add to that suppose the girl has some infection which is needed to be treated and she goes for treatment and because of the requirement of the treatment, she is compelled, a child is compelled to disclose sexual activity

and the family does not want it the girl does not want it to be revealed, the doctor is compelled, so the child may avoid medical treatment because of Section 19. So at the end of the day in whose interest does this mandatory reporting work out? is something we have to work that as it is. You have no choice nor do these people have any choice. but what about mediation? People will not take recourse to a judge in a matrimonial proceedings you know. So, even an apprehension has been made derogatorily reportable and this needs to be looked at.

just a min, just a min, mam please use the microphone.

Participant: You have any person including the child, can you prosecute that any person?

Justice Gita Mittal: The statute does not provide any any definition, its absolute, any person who has the knowledge, who has apprehension and has knowledge is likely to be or has knowledge.

Justice Hema: This also can be thought about because the object of the Act is to protect the interest of a child. so, adding a word or expression, without destroying the object of the provision or the Act, is permissible but you can think about in that line also. we are now only attacking the provisions but try to find out some other color to that. how solution to that. How we can protect the object of the legislature, you do not know, you have to think about it.

Justice Gita Mittal: But the expression any person is qualified with "who has apprehension" or who has knowledge, so it is therefore its difficult to read the statute words of the statute, in the manner you are suggesting, of course you will interpret keeping in view the object of the statute, the spirit intent and object of the statute.

Justice Hema: This is not the final word, this is not the final word.

Participants speak over and not clearly audible.

Justice Hema: Yes the question is who is that person? the discussion is who is that person? Is it the doctor, is it a the mediation person?

Participant: Madam we can take the example of a doctor, suppose a girl comes to a doctor for treatment and during treatment the doctor finds that she has been sexually abused. If the Doctor, treating an MLC reports the matter what is the predicament for the psychologists and other persons in reporting the matter?

Justice Gita Mittal: MLC is when the child has reported an offence, we are talking of treatment.

Participant: If she directly comes to the hospital for treatment treatment and during her physical examination it comes to the knowledge of the doctor that she has been subjected to.....

Justice Gita Mittal: That's what are the dilemmas! make a difference between comes under which is reporting medico legal cases the consequences I have to follow.

Justice Hema: Supposing in 313 examination this accused accused reveal Something Something, deliberately or unintentionally is reporting, is the Court bound to report?

Justice Gita: Section is very absolute, it is very clear, it says any person, including the child,

Participant: that is why I am asking if any person is influencing the right of a particular child and family why not a doctor Dr have to report.

Justice Gita Mittal: that's what we are pointing out is not what the law says it says this but there are other areas where they have difficulty and that's what's being pointed out.

Participant: lordship section 21 punishment for failure to report or record a case, any person who fails to report the commission of an offence under subsection 1 of section 19 or Section 20. when any person include psychologist and doctor also.

Justice Gita Mittal: That's exactly what we are pointing out and thank you for pointing out and I had not seen this amendment the Section 42 A has an overriding effect and it clarifies that in case of inconsistency POCSO will be prevailing. let me share a person I happen to be attending the working of POCSO program on the working of POSCO and how it was impacting and whether it was working out successfully, wherein a social worker from the government was present and they pointed out that you must hear this that the e government is running a helpline 24 hour helpline wherein anybody can ring up and discuss the problems, and how how people children bring up helpline at odd times of the day and tell this helpline about all the problems that they are having with boyfriend with parents, with teachers with friends and this social worker of the government said they didn't know what to do? because the helpline was advertised saying its a confidential facility available to all children under stress wherein all these POCSO offences were being revealed So see saved their negotiated with the SHO of the local police station and they had a system by simply used to send an email complaint so that they were technically complying with section 19 on the understanding with the police that no cases would be registered and no enquiries will be done. But its a very very difficult situation which needs very serious thought and application and somehow we have to find an answer to the section 19. another instance and inconsistency is suppose we we report the matter later on the victim and the parents are not willing to come to the court or to any forum and denies what we have reported. And we are liable for prosecution for giving a false report.

Justice Gita Mittal: `So we have agreed now I think there's no answer to the difficulty that 19 and 20 which puts a responsibility on the media and mandatory reporting on media 23 this is media Studio photography can create problem. There is another departure from the general principle of criminal law that an accused is believed innocent in Proven guilty. this presumption of culpability under section 3,5,7 and 9 this is one more problem area which I have noted and I think they all seem to be agreeing section 29 mandates the special court shall presume that such yes yes. Then section 30 is another one requires culpable mental state courts shall presume such mental state and explanations define culpable mental state as including intention motive knowledge of fact and belief in or reason to believe a fact. Then we come to what is the punishment for false complaint or false false information by a child under 16 child about 17 and for other one year imprisonment or fine. this may discourage reporting it can have a adverse effect of discouraging reporting. I have a few, no no the burden to prove otherwise on the defense will be on the defense that's all Section 30. Just look at the situations: the boy both the boy the girl are believe below 18 years of age they've entered into sexual activity willingly consent in courts are the victims required to be referred to the CWC? Are they to be treated as juveniles and produced before the JJB?

now there's no consent so how would you and your court room if such children, such an offence was brought before you how would you treat a boy and how would you see the girl? or would you treat them identically? Similar problem was raised yesterday.

Justice Gita Mittal: what was your answer?

Participant: we have to convict though we did not want to.

Justice Gita Mittal: No, both can be treated as victims. Both can be treated as victims. POCSO is gender neutral both are victims of society bias prejudice we have not treated them educated them otherwise or in any case they are experimenting Why can't we refer both to the Child Welfare Committee?

Justice Gita Mittal: If the school teacher comes and tells that both the boy and the girl are involved in asexual activity? or the parents have approached the counsellor, please help these children they are in they are less than 18 and they are only 13, 12 and they are indulging in sexual activity? So, who will be the Juvenile and who will be the victim? Please one by one its not fair, yes please?

Participant: mam if the sexual act is a forceful act on the part of one of them,

Justice Gita Mittal: Sir would you please use the mic if you have something to say please! Instead of conversing with her please share your thoughts with us.

Participant: If boy and girl both are victims and both are also offenders because, then in that case they are the juveniles in conflict in need of care and protection and in my view they should be referred to CWC.

Justice Gita Mittal: Its the the child in need of care and protection goes to CWC thank you yes boss

Participants: mam both shall be referred to the JJ Board because both are the violation of the Act. Why?

....both have broken the law so they both are offenders

Justice Gita Mittal: this is what you will take care to consider the background fact you may call for information you may find some welfare officer to give you a report and Yes!!

Participant: Everybody is thinking the moment the matter is reported it will go for the trial and it will end in conviction. No not like that report the matter, let the investigating officer or CWC or a special police Unit or whatever it is let them investigate the and come to a conclusion whether the matter has to be whether any offence has been committed or not or whether these children need some kind of protection or some kind of counselling or what. this report, final report which they are going to file the police or whoever it may be investigating the matter, they can recommend whether to send these children to home or to give counselling, or to hand over them to the respective parents and all these things can be done I if

Justice Gita Mittal: we are posing these as questions to you. we are not saying don't follow inquiry, don't do an investigation we are just pointing out the situation wherein you is called upon to decide will not be not ignoring the practicalities of saying don't look at the procedure that we're not even looking at home step by step this is just situations which can happen in society and how they must be considered that's all that's all that you tried to point out.

Participant Suppose by filing a report the judge is not automatically filing charges, he is applying his mind then why not he refers them to the concerned units for information.

Justice Gita Mittal: I am told that, no no we can come back to this lesson I am told that you are running into the tea break let's go and have your dinner break and then come back quickly.

Session: 11: Identifying the Nature of Challenges Faced by the POCSO Courts

Speakers: Justice Hema K & Justice Gita Mittal

Day: 3

(Note: Since Session 10 & 11 were clubbed by the Resource Persons, this part continued with the left over Session 10 and subsequently comprises on Session 11)

Justice Gita Mittal: less than 18 years of age, you have already done this? So, what was the answer? this is for our knowledge. what did you, what conclusion did you reach?

Participant: We have a full bench judgement of Delhi High Court which specifically dealt with the issue but it was vis a vis section 376. It was a runaway marriage probably both were about 16 years or so. It was held that it was a valid Hindu Marriage, because nobody wants to get it annulled which option they had. So at the most it was voidable but its a valid marriage. If they are not annulled. Here it was a valid marriage but if we apply POCSO, 42 as per 42A it will be illegal marriage and you, it says it has overriding effect on all the other laws. Does it override the Hindu Marriage Act?

Justice Gita Mittal: No No there's a Child Marriage Restraint Act as well.

Participants: But marriage remains a valid marriage and what she's doing is performing a matrimonial obligations. Not sexual activity, which are allowed under one enactment.

Justice Gita Mittal: No you dont need permission of law to indulge in sexual activities. hahahaha.

Participant: No it is State staring at love relations or state prohibiting the relations.

Prof. Shrivastava: The section says any body who is below 18 should not

Participant: See the end and object it says protect the children from unlawful sexual activity once they have got married, both are restricting to marriage.

Justice Gita: It strictly applied if would be an offence under POCSO.Its complete but there is another aspect to this the exception (2) to Section 375 IPC,with says that the sexual intercourse with the wife above 15 years is not an offence under IPC. So, this is another difficult area, it overrides. So, POCSO overrides all of these Acts and all these exceptions.

Justice Hema: I have also put a question whether there is any difference between rape under Section 375 and rape under the POCSO Act??that will also help you to answer this question. And there will not be any overriding as far as 375 is concerned, because, because, the the definition is totally different. Definition of 375 is totally different that the definition in Section 3. Then one thing, then the precedents in 375 arewhere a definite meaning is given to 375 which out of the court and out of the discussion I would say personally is not consistent with the provision.But it is in the interest of women. that I'll come to that later, I'll come to that later.

Justice Gita Mittal: See the expressions used under POCSO are penetrative sexual assault and aggravated penetrative, so I didn't take you through those areas presuming that you've being doing that, so its not confined to rape as rape under the IPC, so that's where the difference is. But these examples of sexual activity of the persons below 18 years , willing sexual activity not compelled is covered would be covered or not be covered or how it is to actually the problem is how it is to be dealt with by Courts before whom such who are faced with these.In the Indian Penal Code? no assault, yes and its graded is graded yes yes, no nonono, you cant define the Act, meaning you in IPC

Justice Hema: See why should you go to the provisions, you just understand as it is. The word meaning is enough, why should you go to any detail?

Participants cross talks not clear and audible.

Participant: Madam section 2 definition clause 2(ii)

Justice Gita Mittal: These are this is the gradation of the offences under the POCSO (shows a slide).

Just look at the right side of this slide:

Babita (just above 18 years old) had voluntary sexual intercourse with Arun (just u/18 Years old). Babita became pregnant. Arun's teacher learnt about it and informed the police.

Has Babita committed the offence of penetrative sexual offence?

Participants: Yes

Justice Gita Mittal: ha ha NO, you look at the word penetration by whom, its Babita who is pregnant, the boy is , ha haha , so you know look at the next slide:

Babita is just (16 years old) was dating Arun (17 Years old) with the knowledge of their parents after being engaged to be married after finishing their studies. Babita missed her menstruation and her mother took her for check up. The doctor found her to be pregnant. He informed the police.

Who is the offender and who is the victim? (this we have already discussed) Who is the offender and who is the victim?This we've discussed.

They should be produced before whom?

Participant: The offenders are the Parents.

Justice Gita Mittal: just a min, yes, just a min, just a min, yes yes, just use the mic,

Participant: In the earlier example the question was whether the penetration or not, Babita case above.

Justice Gita Mittal: No No has Babita committed an offence?

Participant: the earlier one earlier one.

Justice Gita Mittal: The earlier one yes,

Participant: Section 3, clause (c) applies, he manipulates any part of the body of the child so as to cause penetration.

Justice Gita Mittal: Alright Yes! So you got the answer. hahahahaha,.

Justice Gita Mittal: then just check the slide 17.

this this is in the context of Section 20.

A child was raped by her father. Father's picture is published in the newspaper. Has the newspaper violated the law?

Participants: Yes No Yes

Justice Gita Mittal: Because you can identify the child. very good. Slide 19

Sarita was 17 years old, was travelling from Rishikesh to Delhi alone. She befriended, Suresh and Karan, two boys her age (that is 17) on the bus who were also going to Delhi. Their bus failed midway and all passengers had to find accommodation for overnight stay. These three could find only one room with difficulty. They decided to share the room as the boys said that Sarita can sleep on the cot and they will sleep on the couches. At mid-night, Karan put his fingers in her vagina and Suresh had sexual intercourse with her without her consent.,

So, who's the So is the any offence under POCSO committed here?

Participant: Yes both the boys have committed penetrative sexual assault.

Justice Gita Mittal: 31 we have done 36 (slide nos)

Now we come to another problem area, Section 42 of POCSO, which POCSO, 42 provides alternative punishments and states that Section 42 of POCSO providing for alternative punishment states that if any act is punishable under POCSO or under any other law, the punishment which is greater in degree should be awarded.

If a person is tried for sexual intercourse with a wife between 15 to 18 years of age, what would be the punishment awarded to him?

Participants: POCSO Act, POCSO Act....noise, under POCSO Act.

Justice Gita Mittal: So, what happens to the Hindu Marriage Act, the consent?

Participant:is an offence punishable under this Act and under Section 166A 354A 354 B and many other things 376, 376A, aaaa then notwithstanding anything contained in any law for the time being in force, the offenders found guilty of such offence, shall be liable to punishment under this Act or under the IPC as provided the punishment which is greater in degree.

Justice Gita Mittal: So greater in any case is under POCSO.

Now there is another aspect of criminal sentencing jurisprudence which POCSO has not,

Participant: Madam there is one aspect, (yes) both are married, they have a right to enjoy their life and Art 21 gives the liberty of life and personal liberty and right to live. Whether this provision is not in contravention of Art 14 oh, Art 21 of the Constitution? But being a trial judge I can not do like that, but as a High Court and Supreme Court my lord!

Justice Gita Mittal: You know let this be raised before us and it will be tested you know, its actually protecting the rights of the child. This is pursuant to the special provision to

Participant: But this child is also wife of a person, lets we cannot forget this.

Justice Gita Mittal: No the legislature considers 15 to 18 not to be competent or you know, to be a wife, a aaaa POCSO has specifically been enacted keeping in view the international recommendation on the rights of the child. What is perceived as the best interest of the child resulting in this Act. But this legislature, if this aspect is challenged will be considered by the Courts. Now, just look at this aaaa an area which POCSO doesn't really deal with is compensation and rehabilitation.

If you look at this report at the bottom (the next slide please) this is nothing about compensation and rehabilitation, now heavy fines are also not been imposed and compensation under 357 Cr.P.C has been seldom been considered and in any case is not commensurate with the expense which is undergone which is required.

Now when a little child or infant a baby or a young girl is exposed to you know, penetrative sexual assault, the treatment required is huge and its very expensive as is evident from this next report these were the facts of the case:

A five year old girl was operated (Times of India reported this on 31-03-2015) upon for three hours on Monday after she was mauled by a 32 year old man in a vicious sexual assault in Gurgaon on Sunday night. "She was bleeding and crying and I thought she would die," her father said. "Her anus and vagina were severely damaged and she bled profusely," her grandfather said." Sources said the girl might need to undergo plastic surgery because of the extent of damage to the internal linings of her private parts. Police suspect he intended to kill the child.

Now unless we start engaging and awarding 357 even at an interim stage, Supreme Court has permitted that a Bodhisattva I think I examined that,

Participant: Section 33(8)of the POCSO(said something not audible)

Justice Gita Mittal: of POCSO I am sorry sorry.

Participant: Interim compensation can be granted by the Act under even pre trial stage.

Justice Gita Mittal: I am sorry,then I have missed that. Section 33 subclause 8, rule 7 alright sorry this is my mistakes but they have any knowledge of where is this vision have been utilized? what did you do? mam use the mic please use the mic.

Participant: Iasked the State Govt how much to pay the compensation to the victim under the victim compensation fund.

I have awarded the compensation to all the victims, monetary compensation 1 lacks, and I have directed In one case I have directed the local District Collector to construct a toilet in her house, that was the reason for going out.

Justice Gita Mittal: thats very innovative. No what do you premise your 1 lack on, you have get an assessment undertaken? Suppose she needs is ten lacks? just a min please.

Participant: It has to be decided on various factors, factors are there in the Rules itself. Rules itself there are several factors given which has to be taken into consideration. If the injury is that much serious when we need treatment we can award compensation accordingly.

Justice Gita Mittal; No so whats that you are doing to assess the injury assess the quantum of compensation what exercise have you undertaken?

that much period when we need treatment then we can Delhi doing to access to assess the quantum of compensation what exercise do you undertake?

Participant: Naturally from the offence reported and from the reports from the doctors report

Justice Gita Mittal: just onemin madam, do you get the quantification of what is needed?

Participant: Yes we can do it.

Justice Gita Mittal: has anybody in this room undertaken? I am putting a question to you, has anybody in this room undertaken so then putting a question to you as anybody undertaken an exercise of assessing what are the expenses actually acquired or needed by the victim or 2nd question has anybody out there taken an assessment of the paying capacity of an accused, putting aside State liability. First question answer, has anybody undertaken?

Participant: Mam I have undertaken.

Justice Gita Mittal: Alright what did you do madam? Please yo u speak into the mic.

Participant: In that Case we have appointed a State brief to defend the accused. No no Madam i have asked you a different question. My question is have you undertaken, ordered an enquiry into what are the expenses needed for the treatment? Of the victim. Yes or No for this question.

Participant: So, therefore 1st and foremost for complete justice we must 1st collect material to ascertain what is the expense to be incurred. Now, you can undertake that exercise by taking recourse to Section 165 of the Evidence Act as well as provisions of the Cr. P.C. asking directly the doctor of the hospital to give you an assessment or making an independent enquiry from a private facilitator or yu know, delegating this task to the police. Police is already so overburdened and may give you a sketchy job,. you can appoint anybody an amicus even to undertake as a local commission to undertake this job for you and get some realistic assessment of what is needed for treatment and a rehabilitation. 2nd just just a min, no no interim stage she needs money today because she cant wait for treatment the case may get decided after 10 years 2nd 2nd it is not solely the obligation of the State, we are putting the entire burden on the State you may assess the paying capacity of the accused as wel. There you may lay your orders and proceedings to subject to challenged that I am not guilty and yet I am being asked. You may look at what can be done but the Supreme Court has in case after case saying

mandatory Courts must undertake and take recourse to Section 357 you must undertake this exercise on day one you must get an assessment of age and competence if you have a slightest of doubt on juvenile, undertake this on day one. I had occasion to consider this in the very famous Katara Case you know in Delhi, where there is an honour killing and all aspects of compensation have been dealt with in the sentencing judgment the details I think Sumit has circulated to you. Its not my work, its really a compilation of the law of the Supreme Court and the mandate and the manner in which you must undertake the assessment of the required damages or compensation as well as the paying capacity the law that I found was that the multiplier principle in the MACT Act has been held to be a valid application, as can be applied for assessing paying capacity for compensation or fine you can even look at the fine that you would assess. It should be realistic on assessing the paying capacity of the accused. So please be liberal and take recourse to these provisions.

Participant: May I please invite your attention to Section 357 of the Cr.P.C.

Justice Gita Mittal: See this is what I may telling you its not the responsibility of the State alone. Please look at your, you have a rich litigant a rich accused before you, why should you leave it to the tax payer alone to be providing such compensation? then the law says that the liability is there, so 357 A this scheme is in addition to the liability and the responsibility of the accused. the burden cant be fastened on the State alone. All States almost today with the active intervention of NALSA has victim compensation schemes. The Supreme Court is actively engaging in that, what I am requesting is look beyond and engage proactively with the responsibility of teh accused as well. And if you want the law all of it is laid down there. The basis of which you must do it because even this question, how do you assess the paying capacity? how do you assess? suppose it is a case of you know POCSO offense and a murder, you know the child is killed, then how is the compensation to be assessed, and all of that has been dealt with and considered, though that case is related to adults but how it should be be computed? its there in one place for you. There was no jurisprudence for this. Its scattered in different places. We only in the Court compiled it in one place.

Next is the other problem area is Section 16:

- Abetment of offence (S. 16)
- Punishment for non-reporting (S. 21) i think you have discussed all of this. and

- Onus of proof (S. 31) and the presumption my dear sister will discuss with you after I just finish a few more slides.

Then some more questions you know which may arise:

- A young man aged 19 years old (or older) is produced before you for commission of rape at the age of 17 years. No no he is over, will you, will he be tried before a POCSO Court?

Participant: Date of taking cognizance is date of...no date of offence, date of crime, date of commission of the offence shall be considered....

Justice Gita: I dont think you are right. read the Juvenile Justice Act. 'No NOthats for the age of offence is different from which is the Court which will try it. Can thje Does the Juvenile Justice Board has the jurisdiction over a 19 year old?

Participants: Yeah!

Justice Gita Mittal: Is he juvenile as defined under the JJ Act?

- A 20 year old woman is produced before you as witness before you being the victim of rape at the age of 17 years

- A 17 year old boy is produced before you for allegedly committing murder Are they covered under POCSO?

Thats a JJB.

Justice Gita Mittal: Would the definition of child (any person) includes transgender as well. I think this answers well. Then, Medical examination of a child – is you know, I'll deal with these provisions separately. The Medical Examination has a little conflict between 164A says and what the medical examination provision of POCSO says. I'll just place those two enactments side by side, buts lets look at these few questions.

- There is an affair between 17 years old boy and 21 years old girl. They entered into sexual relations and the girl gets pregnant as a result. This we have discussed.

Next we have

- More and more persons between 16 to 18 years are sexually active or indulging in experimentation. How is their sexual activity to be treated?
- As society becomes more permissive, there are growing elements of touching in daily behavior of young persons

Would holding hands by two young persons be treated as an offence under POCSO? Now it is an offence under POCSO, you know shaking hands holding hands, sexual intent is important.

Now these actually the statistics somebody has collated these these (Statistics reveal that ‘Romeo Juliet cases’ are only 40% and 60% are actual POCSO offences)

So, these were the few thoughts now, if you want to see the provisions relating to medical examination:[00:26:34]See these are the comparison of the 3 provisions, Section 27 of POCSO Section 164 A of the Cr.P.C. and Section 89 of the IPC.

Provisions relating to Medical Examination under various Acts

POCSO	Cr. P. C.	I.P.C
<p>Section 27– Medical Examination:</p> <p>(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973.</p> <p>(2) In case the victim is a girl</p>	<p>Section 164 A - Medical examination of the victim of rape. – (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, <u>such examination shall be conducted by a registered</u></p>	<p>Section 89 – Act done in good faith for benefit of child or insane person, by or by consent of guardian.</p> <p>Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful of that person, is an offence by reason of any harm which it may cause, or be intended by the charge doer to cause</p>

<p>child, the medical examination shall be conducted by a woman doctor. <i>(It doesn't permits any exception here)</i></p> <p>(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.</p> <p>(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.</p> <p><i>(Now the difficulty is that in subsection 1 the girl child can be examined only by a women doctor, though it also says it shall be carried out in accordance with 164A)</i></p>	<p><u>medical practitioner employed in a hospital run by the Government or a local authority and in the absence of a such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf</u> <i>(This is missing in 27 of POCSO. Informed consent should have been there)</i>and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.</p> <p>(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her and prepare a report of his examination giving the following particulars, namely:-</p> <p>(I) the name and address of the woman and of the person by whom she was brought;</p>	<p>or be known by the doer to be likely to cause to that person :</p> <p>Provisos-Provided-</p> <p>First: - That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;</p> <p>Secondly: - That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;</p> <p>Thirdly: - That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death of grievous hurt, or the curing of any grievous disease of infirmity ;</p>
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	<p>(II) the age of the woman;</p> <p>(III) the description of material taken from the person of the woman for DNA profiling;</p> <p>(IV) marks of injury, if any, on the person of the woman;</p> <p>(V) general mental condition of the woman; and</p> <p>(IV) other material particulars in reasonable detail.</p> <p>(3) The report shall state precisely the reasons for each conclusion arrived at.</p> <p>(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.</p> <p>(5) The exact time of commencement and completion of the examination shall also be noted in the report.</p> <p>(6) The registered medical practitioner shall, without</p>	<p>Fourthly:- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.</p> <p>Section 92. Act done in good faith for benefit of a person without consent.</p> <p>Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit:</p> <p>Provisos—Provided—</p> <p>(First) — That this exception shall not extend to the intentional causing of death, or the attempting to cause death;</p>
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	<p>delay forward the report to the investigation officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.</p> <p><u>(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.</u></p> <p>Explanation. – For the purposes of this section, “examination” and “registered medical practitioner” shall have the same meanings as in section 53</p> <p>Section 357C – Treatment of victims -</p> <p>All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical</p>	<p>(Secondly) —That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;</p> <p>(Thirdly) — That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt;</p> <p>(Fourthly) —That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.</p> <p>Illustrations</p> <p>(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z’s death, but in good faith, for Z’s benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.</p>
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	<p>treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code, and shall immediately inform the police of such incident.</p>	<p>(b) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit. A's ball gives Z a mortal wound. A has committed no offence.</p> <p>(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.</p> <p>(d) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the house-top, knowing it to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence. Explanation.—</p>
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		Mere pecuniary benefit is not benefit within the meaning of sections 88, 89 and 92.
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See these are the comparison of the 3 provisions, Section 27 of POCSO Section 164 A of the Cr.P.C. and Section 89 of the IPC

POCSO, S not ready and willing for medical examination for medical examination guidelines regarding that back inside the Government of India has notified them a person competent to give consent Garden dealt with child is Indian Institution and offensive all the child is an institution who is the capacity to give that's why 27 has been taken over the age of consent away from the requirement of Americaaction 27 is restrictive in the sense that it is mandatory that the girl child shall be conducted by a women, compliance with 164A, presence of a parent. Cr.P.C. does not mandate that the girl child or a women has to be examined by a women doctor it permits a registered examiner practitioner, and informed consent is mandatory otherwise illegal.

Now, Section 41 of POCSO Mandates consent? I don't know how i missed it? So, they have worded it with such a backhanded exception. No they said it wont be na offence if carried out with a consent, but under Section 164A its such a valuable requirement, that you must give consent otherwise now 41 is it really doesn't covers the requirement of giving mandatory consent. 164A mandates, it says it wont be an offence if there's an informed consent. How do you synchronize the requirement of consent under Section 164A with the way 41 is worded?

Participant: The provisions of section 313 shall not apply in case of medical examination or medical treatment of a child when such medical examination or medical treatment is undertaken with consent of her parents or guardian. Now, if the consent is not taken the doctor will be prosecuted under any of these provisions?

Justice Gita Mittal: No NoNo please read Section 27, Please come back to 27. "SHALL" I'll read the opening words which I didn't read out to you: Medical examination of a child:

The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted.

So 41 does not cover 27, the areas which are covered are totally different. But but what I am just pointing out is there is a marked difference between 27 and 164A. 27 restricts medical examination of a girl child it has to be by a women practitioner women doctor and the requirement of it is mandatory it where ever a child is involved in a pocso offence is a victim it has , medical examination has to, cannot be avoided on the ground that there was no consent. These are two very valuable exceptions to 164A in Section 27 of POCSO. So this is what I wanted to highlight and point out to you.

And then the issue of sexual harassment was pointed out subsection 2 of Section 2 it says:

Words not and send used in POCSO are not defined but are defined in IPC and Cr.PC so but not defined but not defined in IPC and CRPC here shall have the meaning assigned to them in IPC and CRPC. Now the 1st schedule of first schedule of the CrPC Part 2, it provides the offence is punishable with imprisonment of less than 3 years or with fine only offence would be non cognizable and bailable. Now you look at Section 12 of POCSO which provides punishment for sexual harassment of a child. The punishment is imprisonment or fine or description for a term which makes 10 to 3 years and shall also be liable to fine.

Therefore Section 21 read with first schedule of CrPC and sub section 2 of section 2 is non cognizable and non bailable, this is your pointing out? Sexual harassment? your friend sitting next to you.

You started out with sexual harassment?

Participant: It is regarding reporting

Justice Gita Mittal: Oh! otherwise offences under this attachment are cognizable and non bailable So this is added to harmonize Part 2 of the CrPC with this section 12

Participant: I have a query regarding medical examination

Justice Gita Mittal: Yeah!

Participant: It is the consent of the parents of the girl child and not the consent of the child herself.

Justice Gita Mittal: No yes the

Participant: If the parents are ready for the medical examination of the girl child and the child is not willing for internal examination, what should be the course of action?

Justice Gita Mittal: Under 27 you have no option the medical examination shall notwithstanding has become and carried out

Participant: If she is not ready and willing for her medical examination yet she is to be forced for the medical examination.

Justice Gita Mittal: this is what you will see

Participants: There are DHR guidelines regarding that and then if she refuses to give consent for medical examination it matter has to be reported back.

Participant: But as per the Act it is the consent of the guardian.

Justice Gita Mittal: Now there are extensive guidelines on medical examination in fact the Govt of India has notified them but

Not audible.....

Participant: In that sense reasonable force can be used or not?

Justice Gita Mittal: See this is the same issue has arisen whether you can mandatorily draw samples for the purpose of a blood sample for DNA testing

Participant: that is in case of the accused not in the case of the victim. She herself is the victim.

Justice Gita Mittal: You know there is a variation in the jurisprudence and for example in a paternity action I had read that you can't mandatorily draw blood. *ND Tiwari's case* but the division bench said if you can forcibly evict somebody from a house, what's wrong in drawing blood ha haha So, my decision was overruled and unfortunately the man married his the mother of the child. The division bench attained finality so there is a judgment in this country which says you can forcibly draw blood even in a paternity action so I had held that a DNA is not an absolute test, 99.93% chance of accuracy but then there is a .07% of secondly it's a huge intervention intrusion on the person's physical body, so which is Constitutionally not permissible. It's a Human Right violation and several other areas you can't compel.

Participants voice heckling and cross talks not in context and not comprehensible.....

I think Justice Hema would like to comment on the **Culpability and Presumption:** [00:40:49]

Justice Hema: So, since we are in the at the end of the Session. we have been discussing several provisions, several provisions under the Act, the scope and several other matters, and all of you know so many things about it., but the question is, What is the main function of the judge under the Act? What is the main function of the Special judge under the Act? what are you expected to do, under the Act? What is the main, main function of the judge? It's a very simple question, don't contemplate your mind, don't put the presidential knowledge, nothing, very simple, what are you expected to do?

Participant: give protection to child, from sexual harassment etc.

Justice Hema: how protect a child? i will write the answers, I will write the answers please. (writes the answers on the laptop projected on the screen). Protect the child, one min, one min, one min, please, one min, I want to know everything from you. sorry your function is to protect the child. Adjudicate with compassion. Recording evidence, yes. Sorry, please read the question again, main function.

Participant: THE ENTIRE EXERCISE IS TO SAFEGUARD THE INTEREST OF THE CHILD.

Justice Hema: interest of the child, See I'll give you a clue, there is only one function. There is only one junction.

p: protecting the child.

Justice Hema: protecting the child? I am again telling you there is only one function. To DO JUSTICE . I i would again say to do justice you'll have to go through all the provisions, understand it interpret, so many things.

Participant: Provide the child friendly atmosphere in the Court so that the child can tell each and every thing before the judge.

Justice Hema: Alright, So, that's the only thing, as a judge you will say listen to him. that's the only thing the main function. very simple, very simple, see its not a complicated question, it is not to trap you. Somebody will say, that I trapped you. In the earlier session. While getting some answers from you I trapped you and aaa identified the prejudice in you. Not to trap you. This you must know, what is your main function, not only as a Special Judge, but as a judge in every case. Compassion, Justice , do Justice impart justice but you are imparting justice by doing what? Listening, listening to the evidence, then see whether the medical report is filed, whether the provisions are complied with? is it? Only one function, for any judge only one function.

Participant: Create the trust in the mind of the child that.

Justice Hema: Create, create an impact in the society as a whole. Leave it, leave it, there is only one.

Participant: Ascertain the truth, to appreciate the evidence called.

Justice Hema: Ascertain the truth?, appreciate the evidence, So by simply appreciating the evidence you are doing the function?

Participant: To apply the proper law, proper provisions of law.

Another participant: Kindly tell us.

Justice Hema: JUDGING, JUDGING means whether this is correct or this is correct? it is judge, then?

Participant: Proper application of law.

Justice Hema: Proper application, so if one provision is there you apply one particular provision and that is enough?

Participant: According to the context.

Justice Hema: I'll give you the answer because it is too late. To make a decision in a case Whether this person is guilty or not?

Is it not? yes, so decision making is the main function of a judge, not only under this Act any other Act. Any other provision. Make a decision. If its a Civil Court, make a decision. If its a Writ Court, make a decision. If its a High Court make a decision. As a POCSO judge make a decision. That is the main function, so many things have been discussed, without knowing how, which is the most important provision or provisions of the Act which you think you are bound to know throughly for making or taking a decision in the case. Which according to in the main provision under the POCSO Act, which you are bound to know throughly for taking or making a the main decision, which is it? come out with all the provisions 3, 4 5, 6, 7.

Participants starts responding adhoc.

Justice Hema: chain, change, child, ok child, meaning of the word child. So if you know what a child means you can take a decision? the most important, not the main, the most important? there is only, I am again telling you there is a most important provision. Most important. You please come up please come up.

Participant says something which is not audible.

Justice Hema: PRESUMPTION So, see Section 29 says, Let us see whether it can help? It says 29: Section 29 says:

Section 29 - Presumption as to certain offences: Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this 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.

So, to make a decision, whether a person is guilty of the alleged offence? what you have to do is, you must know this provision: Presumption as to certain offences. There is a presumption.

There is a presumption. Under the Act there is a presumption, you shall presume that he has committed abetted attempted,Sowhat ever be the provision, what ever be the guilt committed if you want to test whether he has committed that particular offence? Unless you know, what is meant by ""Shall Presume" under the said provision? You will not be able to take a decision. You agree? I don't want you to agree. Disagree.

Participant: We agree even if you want us to disagree.

Justice Hema: haa ha ha , If you agree then we go to the next. then there is another presumption also under the Act. This is not there in Evidence Act. This is only in the POCSO Act. Not there in the Evidence Act. "Presumption as to Culpable Mental State" this is very important because, both these provisions of presumptions are very important because, the question before you is whether he has committed the offence? You have to make a decision. How will you make a decision? You will find out which is the alleged offence? You have to make a decision. But then 29 says that you shall presume he is guilty, so unless you unless you know the scope of what is meant by "Shall Presume", you will not be able to make a decision even if you know all other provisions under the Act. Agree? I think you are hungree? hahaha ha...you are always agreeing so I ...there is a reason of a doubt.

So, this will lead you to lot of problems because, this provision is new and nobody has interpreted. Superior Courts normally I do not know, Supreme Court has not interpreted I believe? What is shall presume in this provision? has the Supreme Court interpreted?"Shall presume" in the POCSO Act? no not yet, alright! You are actually fortunate that no Court has so far interpreted it, because you can read what ever you want? understand? You can write whatever you want. Untill the Superior Court says, agrees or disagrees with you. You are about to say something you said something?

Participant: In some other cases state aaa

Justice Hema: "Shall Presume"? what is meant by shall presume? I'll come to that. So, you agree that the most important thing that you must know to make a decision in a case in a case under the POCSO Act, is to understand, realize, to import the connotation of "Shall Presume" in the two decisions, two provisions. Unless you know this member "Shall presume" you will not be able to do what ever you call justice and so many other things which you said in the 1st to the 1st question. You want to do justice 1st understand what you have to do? what is your main function? to make a decision, that you do not know, how will you make, how will you do a justice without knowing what is your function? function is to give a decision to the Parties.

Make a decision in accordance with law. So, try to understand which is the most important provision of the law which you must know to guide you to take a decision. So, this is a provision, this is an Act which contains special provisions which will guide you to take a decision. One provision says you shall presume that he has committed the offences. Just see very dangerous would say very dangerous unless you know, you are bound to commit a mistake. When a person is prosecuted it is enough he is prosecuted. Provision says, don't say no, stick on to the provision first. your knowledge may be prejudiced. understand! by the precedents and so many other things. You are saying that it is , it will not be sufficient to prosecuted, so and so ...in that decision said this, this decision said this, keep aside for the time being.

The only requirement is he is prosecuted in a case where he is prosecuted,

Participant: Madam I'd like to raise a query? At what stage the presumption under Section 29 has to be raised? just a min madam let me complete my question first...and the second part as to how is to be reconciled with Section 101 Evidence Act?

Justice Hema: Yes, yes definitely I will answer. That is a very very most relevant question, aaaa which came from one of you and I think it is you. That's the most important provision which we require discussion thread bare. So, the question is when a person is prosecuted, so we must know what is meant by prosecution? Sorry, no nono see the thing is it is sufficient if he is prosecuted. Prosecution means charge is submitted. So, he is being prosecuted. So, for the time being you know, for lack of time I will not discuss what is prosecuted means, its your work, your worry, find out I will not give an answer. I will not make you give an answer, right now. But it is enough when a person is prosecuted, for committing offence, committing etc. offence under any offence under these provisions. Specific provisions. Special Court, you shall presume that such person committed, then where's the question of all these provisions? You already presume, you already presume he committed it, he has committed it, as a case you have been.... unless the contrary is proved.

So it comes later. So, shall presume is the most important thing. In section 30 is only respect to "Culpable Mental State"...its only confined to culpable mental state. culpable mental state but there also "shall presume" is the word used.

"Shall presume" is this expression interpreted in any important decisions? shall presume? What is it? *Sher Singh*. He is guilty of giving you that material. *Sher Singh*, *Sher Singh* you have gone through the material? *Sher Singh v. State of ?* I would say that should not apply to any of

the provisions under this Act. What is your answer? Will you agree? I would say *Sher Singh* shall not apply to, apply to the shall presume, the expression shall presume in POCSO Act. *Sher Singh* is a decision which is given along with the material I would emphatically say, I would emphatically say that the principles laid down in *Sher Singh* its a very important decision which is being upheld, it has been accepted by a 3 judge bench of the Supreme Court, it shall not apply. It will not apply. If it applies finished you can keep quiet. It shall not apply why? That is why I put some certain questions,. Why i would say it shall not apply, any idea?

Yes! Questions: (It will help you to answer):

Do you think, there is any difference between the expression “shall presume” used in Section 29 and 30 of the Act as against the same expression in Section 113B (dowry death)?

Sher Singh interprets "Shall presume" and various other things under Section 113B. I say there is a striking difference between "Shall presume" in section 29 & 30 as against 113B. Can you identify? Can you please any one of you? can answer.

Participant: My lord, Section 4 of Evidence Act also provides presumption. "Shall presume", "May Presume" , "Presumption of law" and "Presumption of fact". Section 4 of PC Act also provide presumption of commission of offence.....(uncomprehensible voice)...

Justice Hema: that is what we are worried about. We will come to that, 1st try to understand whether there is your, worry is if you are asked to presume ... What is the difference between shall presume under this Act and shall presume in 113B dowry death?

All conditions precedent, see I am on the particular expression, there are condition precedent in this Act also. If it is if a person is prosecuted for offence under Section 3 all the ingredients must....then the presumption shall apply that he is guilty. Participant: Prosecution has to prove some basic ingredients of the ...

justiceHema: Yes yes, See shall presume , shall presume will take into will apply only after the ingredients are there. Only if the ingredients are there shall presume will apply. But that is not the question please, my specific question is what the difference, fundamental striking difference is? I tell you emphatically there is a fundamental difference between the expressions shall presume in the dowry death, case and Section 29 & 30.

Participant: A bare reading of Section 113B makes it clear. Here the word shall presume is used in a qualified sense.

Justice Hema: what is the qualified sense? These ingredients has to be established.

Participant: Soon before her death, such women has been subjected by such person to cruelty then only the presumption is to be raised.

Justice Hema: Here also the presumption will apply only if for example Section 3 there is a penetration, (participant crosses: for that purpose the prosecution itself is sufficient) Prosecution is a necessary, for establishing a particular commission of offence, commission of a particular offence.No point in saying that I have prosecuted for an offence under Section 3. You have to say that this person is prosecuted for commission of the various ingredients of Section 3 or Section whatever it is. Then only a presumption will arise.

Participant: where the prosecution has been defined in POCSO Act? So, 1stly you have to

Justice Hema: Question is not that? very sorry,...

Participants: Cacophony not at all audible clearly.

Justice Hema: That is, I am not in the scope of 101, I am on a very sharp question, shall presume what do you mean by that? Unless you know that you would, its difficult You will start applying....in this., understand.

Participant: I will explain this shall presume in relation to 29 alone okay.

Justice Hema: No Nono, I want the distinction, because there is lack of time, no point in saying what is Section 29 saying.

Participants: Cross talks and discussions parallel.

Justice Hema: No you think about it there can be a collective thinking on this and then we meet after lunch! come prepared. See I tell you again I have given you already the clue, shall presume under Section 113B not because of any other language in the Section is strikingly different from shall presume in Section 29 & 30. Not because of any of the words used in 113B.

Read Section 113B as against Section 29 & 30. Simple question, but unless you know this you'll be in trouble, you'll apply *Sher Singh* and then finished. That is all you have studied. These are all based on the precedents, you are repeating based on the precedents which you are studying, I want an unprejudiced answer. Unprejudiced answer totally confined to the provisions. Don't go with the prejudices I already said precedent is a prejudice is there.

lots of laughter and cross talks requesting Justice Hema to tell the answer.

Justice Hema: You want to know, no I want that several answers collective answers, You wanted to do justice I am also trying to find out how you are gonna do Justice. Section 4 of

Evidence Act is clear, so that will apply to Section 29 & 30 Shall presume , is it? No that is not the answer. That is not the answer.

Sumit Bhattacharya: Ma'm I got my piece of lunch by giving that case, August gathering honorable judges, Just one thing before we go to the lunch here in the porch we will have a group photograph and then quickly then go for lunch.

Session: 12: Presumption of Culpable Mental State and Burden of Proof

Speakers: Justice Hema K & Justice Gita Mittal

Day: 3

Justice Hema: After a sumptuous lunch aaaa I think I must tell you Good Night rather than Good After Noon. Ha haha ...All are in a drowsy mood. So, my effort is more I have to, So we are on shall presume.

As you all were anxious did you get an answer what's the difference? No you were discussing on.

Participant: Section 113 Evidence Act the presumption shall presume regarding the offence dowry, Section 29 the presumption is regarding the identity of the accused that is I think...Court shall presume that he committed, that's regarding that, when the ingredients of the offence is proved, sexual assault is proved then the question who did it?...

Justice Hema: I have mentioned it very clearly, I am not on what is stated in the rest of the provision? 113 or Section 29, the question is what is meant by shall presume? Is it defined anywhere? You said it is defined. Section 4 so that will apply to? everywhere, where ever. That is the fundamental mistake. That is the answer. Shall presume is not applicable to anywhere you find the expression "shall presume". Please look into the Evidence Act. So, this is what I wanted to tell you, wherever you find the expression "shall presume" don't presume don't give that meaning to the expression. I'll give you the, the provision Section 4 of Indian Evidence Act provides as:

Section 4 -...

"Shall presume".—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

...

There is a specific meaning given in the Evidence Act for the expression "shall presume" what is it? Presumption

Participant: Whenever it is directed by this Act, the the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

Justice Hema: Where is section 4,Yes i'll go to the Evidence Act, Section 4, Evidence Act Section 4, sorry, section 4 "May presume" is defined and "shall presume" is defined. "shall presume" has a definite meaning. Go through that.

Whenever it is **directed by this Act** that the Court shall presume a fact, it shall regard such fact as proved (This word is very important), unless and until it is disproved (that is also very important). and there is another expression which is most important and you tell me whether it will apply to Section 29 & 30?

You told me not apply, will not apply because whenever is directed by this Act, so only under the Evidence Act it is directed you shall presume, this will apply and the fact in regard to which there is a presumption "shall presume" it will be treated as proved, understand? untill it is disproved, but the presumption under Section 29 &30 are totally different.

But, 113B falls under Evidence Act. That's the main testing 113B falls under the Evidence Act, so it is nothing to do with this. You are free Madam, you are free, legislature has given you the full freedom to interpret and say what is meant by presume.

Participant: You mean to say that Evidence Act is entirely not applicyable to aaa POCSO while trying POCSO?

Justice Hema: 29 & 30 this expression "Shall presume" you should not give the meaning given in the Evidence Act. You find out, that is your task. One minute, one min, one min, I'll tell you thsi. See your main function is to give a decision, not giving justice without taking a decision, you cannot give justice to the Party. Your main function is not to find out the meaning of the definition, No, it is to decide a particular case to find whether that person is guilty or not that's a POCSO Courts function. In doing that the most important task before you i sunder Section 29 & 30 because without understanding about what 29 & 30 say, the main thing is you all has to presume mandatory, you shall presume without knowing what presume is you will not be able to take a decision. You will not be able to do justice, even if you know the entire provisions by heart. So, no point in learning all of the provisions unless you know what is meant by "shall presume". What is presume? What is presume? You are over crowded that's the problem. your thoughts are over crowded in your brain, because you have learnt lot of things in your life as a Judicial Officer when you reach the POCSO Court you have given so many meanings to presume, understand?that is why I said by the precedents lot of prejudices come in your mind,

so the first thing, which you have to get rid off is bias prejudice and look at it with an unprejudiced mind, presume, presume it is as simple as that. Don't you know what presume is? You are bound to know, at least apply your mind and try to find out what is presume? believe? Believe has a definite meaning. Why you are presuming such things? It is a word, English word. Go to the dictionary it is as simple as that, if you do not know...

Participants cross talks not audible.

Justice Hema: No, no nono, it is only under the Act, thiis word shall, expression "shall presume" is defined under Evidence act only for the purpose of application to wherever that expression appears.

Participant: Mam sorry to ...let us take 29 itself, we will not go to Evidence Act, let us take 29 itself, but theSection has to be read in whole, not in isolation, or picking up a particular, yes yes,

Justice Hema: First you read, you read.

Participant Yes yes now I'll read, now I'll read,

Justice Hema: I am thinking of the lawyers who are arguing before you, ha hah ha..Please listen to me then answer. the question is without knowing what presume is you will not be able to know what it is.

what is meant by presume you are not an English person, English man or lady, you have to understand the meaning of the word only from the dictionary and that is what the interpretations, the precedents of interpretation says, go to the dictionaries as simple as that, open it and find.

See in one of the cases you know, i was surprised a very tough question was dealt by several benches, I found that the word expression, there which required interpretation was adjourned. Who would have not known what adjourn is? Who would have not known what adjourn is? But I don't go by thta prejudice in mind, I know adjourn, what adjourn is. It is postponement to some other day, is it not? But my training self trainingself imposed training drew me to the meaning in the dictionary. There it opened a very big scenario, adjourn does not mean postponed to another day! Because of that I could tackle that issue. So, you what you need is to read everything, deal everything with the prejudice free mind. that's very very important. Anything and everything you take I will take only bias.

Participant: take it for granted.

Justice Hema: See presume the meaning that is given in the dictionary. Oxford dictionary is supposed to be the best:

Yes presume: Take for granted, that something exists or that is the case.

So take it for granted that he is guilty. Take it for granted. Don't believe, that is why the the very outset I said, what is meant by prosecuted you think about it later, no nono see if we are going to discuss on these things we have already exceeded the time, we will not reach anywhere, I am only guiding you to emphasize on this difference in the expression, the meaning in the expression 113B is an Evidence Act so the meaning given in the Evidence Act the definition will apply only to 113 but not to POCSO Act. And then "presume" the meaning is take for granted yes, take him for granted that he has done it, though he has not done it, For the time being I'll take it for granted that he has done it, that is all. That is meant by presume. May be he has not done it, I don't know. I have no material before me to believe whether he has done it or not. I have no material before me to believe whether he has done it or not. Then the question is what is the difference?

There is a definite difference between taking for granted presuming or assuming and believing. Believing, there is a definite meaning. Believing as far as Court is concerned there is a definite meaning. You cannot mix up this "belief" with "presume" or "assume". For the time being leave it. or if you have disagreement tell me. you are shaking your heads very often. So, the thing is first you understand 133B any interpretation on 113B I am sure that the *Sher Singh* will be will be brought before you. Throw it off, say it will not apply, because "shall presume" is not defined under the Act, "shall presume" in evidence Act will not apply, because it will apply only to the provisions in the Evidence Act 113B falls under Evidence Act. So, this shall presume this I mean parallel to 113B no provision is brought under Evidence Act means that is not expected to be applied to "shall presume" in Section 29 & 30.

Participant: talk not audible.

Justice Hema: You take it for granted what the Section says. For the time being, for the time being is prosecutor for this all this ingredients are there, so I'll take it for granted that you are guilty. Then come to section 20. What is section 20? Section 29 sorry. section 29, Section 29 reads:

Section 29 - Presumption as to certain offences - Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this 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**.

This I am underlining again, "Proved" But as far as Section 4 is concerned, he has to "disprove". What does it mean?

That fact is already is taken as proved by virtue of language of Section 4. It is taken as proved. What is proved? What is proved? What is meant by proved?

Participant: Believes to fact exists.

Justice Hema: You will say it by heart, but do you know the meaning? Some people have written to the question answer, it is to be believed until the....so many things...existence is so probable and all that, meaning is given as the fact is presumed means: If they the Court believes its existence are busy, so many things are written. that is because of the crowded thought in you. So shall presume so the word is "contrary is proved". No nonono, Section 4 says the fact in respect of which there is a presumption stands proved. Section 4 you read Section 4.

Participant: section 4:

Section 4 -...

"Shall presume".—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

Justice Hema: See I am only pointing out these things to you , you please read and understand it. There is definitely a different meaning. **Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.**

If prosecution has proved what's the point in saying accused also has to prove? No, if the prosecution has proved then the accused has to disprove is the word used in the "Shall presume" in section 4. But section 4 Section 29 is totally differently worded. It has nothing to do with this. What the accused has to do is "contrary is proved".

first of all you must understand what "Proved" is? What is meant by "prove"? You have being saying so many things about prove, is it defined? Section 3 Evidence Act defines prove? You are wrong, absolutely wrong. I will totally disagreeing until you agree. What is defined is only prove not proved[00:17:40] No nonono I am talking about prove.

Participant: What is defined is only disproved not proved.

Justice Hema: No yes "proved" is defined I am asking you is the word "Prove" is defined anywhere? NO. Only "proved" is defined

"Proved".-A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved".-A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved".-A fact is said to be not proved when it is neither proved nor disproved.

Very interesting, very interesting, if I am given two days for for addressing you on "proved" I will take you to some other place. "proved"and "prove".

"Proved" even if it is "prove" in Evidence Act, if the word "Prove" is referred in Evidence Act, you can confidently say it is not defined. So, whatever meaning you feel like giving give. I have given a meaning to that. But only when"proved" comes there is a problem. But you do not know, so many persons come and argue I have, it is his burden to prove. His burden to prove, it is his burden, it is the accused burden it is the plaintiff' s burden it is the prosecution's burden to prove. Without knowing what prove is you have been deciding cases. Without trying to understand or at least apply you mind to find what prove is? You have been deciding cases. Goodnight you were sleeping!

We were on the question what is meant by "prove" not "proved". you give what ever meaning you want, but I am only alerting you there is is no definition for the word prove, in Evidence Act, understand, but only for "proved". Then I'll put a very interesting question. "Prove" there is no definition but you are under some impression, but those impressions are all good until some precedents have come where it is confused you.

Participant: You said that the word "prove" if a word is defined , It should be defined in all its tenses?

Justice Hema: It is not defined Mr. judge, it is not defined that is what I am saying. "prove" is not defined.

Participant: That is what I am saying "proved" is defined it is past tense.

Justice Hema: Then then you will land in trouble, try to, if you try to understand what "prove" is and if you are saying that "Prove" is the present tense of "proved" you will be in trouble. No no one min, another question which will make things clearer, You have heard arguments before you that "I have proved" , "my party has proved", "plaintiff has proved" "the prosecution has proved" from on what basis you will say he has proved it. What is the material from which?

See I'll give you an example. "A"stabbed "B" no nonono I'll tell you "A" stabbed "B" "A"stabbed "B" its a fact, "A"stabbed "B" prosecution says I have proved it, Accused says he has not proved it. From what material in a case you will say that this fact is proved?

Participant: Oral evidence coupled with documents.

Justice Hema: no, go through the provision: from which ,material you can say that the fact is proved? No you go through this , now I will do one thing i will show you some thing, ...If the Court believes existence of a fact or proceeded on a assumption or a supposition that the facts stands proved. So, where will you find this? Only in the judgment. Is it not? whether the Court has believed "A" stabbed "B" will be seen only in the judgement. Very very technically I am saying.

Participant: If the judgment is wrong?

Justice Hema: that is why appeal is there so it depends upon the appellate judges decision. Whether he believes it?

Participants; cross talks not audible.

Justice Hema shows some slides to the participants. prepared for some other purpose but I will barely take you through this

Before this I will take you to decision making, this is what I asked you the question what is the main function of a judge? Decision making this is the main function of a judge. Which is the most important function in decision making? any case? Which is the most important provision in decision making?

Participant: Mam you are ultimately proving that we dont know anything.

Justice Hema: No NoNoNoNo I am sorry, I am sorry No I am sorry No I never want to give you such an impression, extremely sorry , I plead guilty, you can convict me.I plead guilty! See without knowing this provision will not be able to function. I'll give you, I got an opportunity thanks to the NJA. Some people say it is proved, disproved etc. some people say

relevant provision of the statute, some people... I got answers for this from the Judicial Officers in a training. All this people said it is in the preamble of the Constitution, then provisions relating to Trial Section 151 IPC. These are all answers given by very learned judges like you. There are steps: 1st step "Assertion" not any other word like , pleading, etc, by prosecution or ...2nd step whether the assertions made are "proved"?Is it enough to take a decision?

Participant: You said Evidence Act will not apply in POCSO cases, so what is the point in discussing section 101 or 102 of Evidence Act? for the purpose of Section 29.

Justice Hema: It is not said that in the Evidence Act that it will not apply, I mean the POCSO Act it will not apply, all of you answered in the positive It will not apply.It is not stated Evidence Act will apply. So, do you know where these expressions come from? Its a most important question, in a decision making, so what you have to do is, if a party decides the court to give an enactment. Yes He decides in a civil case to give a judgment, as to what as to his legal Right. In a prosecution has to the liability of the accused, depend on existence of fact which he asserts he has to prove it. You know 101 only as Burden of proof, No, This is what you are called upon to give a judgment. So, before giving judgement you give decision. Judgement writing is only later.You think decision making is a judgement No. You make a Decision first, then it is written in a Judgement.

Justice Hema: showed some ppt slides on certain important aspects of general understanding of decision making etc. particularly with respect to Section 101 of the Evidence Act.

So, in deciding making a decision whether he has "Asserted" there is a presumption in 29 & 30 which aids the prosecution,.understood? Which aids the prosecution, where your hands are tied, as far as these facts are asserted, you'll have to draw a presumption that he has committed an offence. But that will not amount to prove is another factor. You only presume. I wanted to address you on "Proof".

How will you prove a fact? A fact if you read the provision proved you will find that "a fact" can be "proved". It does not refers to "many facts" a particular fact can be proved if you apply the provisions. The requirements under Section 3 proved are established you can take that fact as proved. "A fact" as proved-section 3.

Is guilt a fact? Is guilt "a fact"?

Participant: Several facts.

Justice Hema: Bundle of facts. then why do you say guilt can be proved? By the prosecution it has to be proved beyond reasonable doubts. I follow, i am really impressed that all of you said

it is a bundle of facts, because many people say guilt is a fact. I am really impressed. Guilt is not a fact. At least *actus reus and mensrea*. *actusreus* itself will be cut into pieces, several facts, so guilt is not a fact. Then why do you say that it has to be proved beyond REASONABLE DOUBT?

"Fact" I need not tell you. Which is the provision which says that fact can be proved? All facts may be proved by?

Participant: Mam "circumstantial evidence".

Justice Hema: This is not stated in the Evidence Act. It is only stated that "all facts may be proved by the ORAL EVIDENCE" *Not DOCUMENTARY EVIDENCE*. If you want you go through it. **Section 59** you please read. All facts may be proved by oral evidence-Section 59. Very simple. Documentary evidences are all your additions, not in the provisions.

Please give an answer to this: Is there any fact which cannot be proved by "Oral Evidence"?

All facts may be proved by oral evidence but is there any fact which cannot be proved by oral evidence? Yes, facts which cannot be proved are this: except contents of documents electronic report. Is contents of document a fact? Is contents of document a fact? unh!....All facts except contents of document means? It is a fact. All Judicial officers present in this room, except Smt. "X" means, Smt. "X" is a Judicial Officer. "Contents of document" is a fact. If you want I can give a judgement on this. What is a fact? Things which is perceived by senses is a fact. this you agree? It is a thing which is perceived. So, "Contents of document", "electronic record", on inspection can be perceived by senses, on inspection by Court, it can be seen it can be read, it can be heard, if it is audio-visual, so what ever is seen heard, or perceived by senses, on inspection of the document electronic records are all contents of documents. So, what is meant by "contents of document", contents means what a thing contains, that's the meaning....

first you must know what is a document? Definition is there I am leaving it for you to find out. So, crushed paper thrown with inscription, this is also a document. So it means what a document contains, eg signature, picture, painting, writing, etc those are its contents. Am I confusing?

Participant: Sufficiently Ma'm...ha ha ha..

Justice Hema: So, I will stop it here. theres is a lot of things has to be stated.

So, who crushed the paper? Who wrote in that/ who tore it? when? where? these are not contents of document. Understand? Those are not contents of document. So, it cannot be proved by the production of the document. To assimilate it will take time, I am sorry! it'll take time. those can be proved only by oral evidence and not by the contents of document.

So, "proved" has a particular meaning that is what I wanted to say. Proved has a particular meaning. "Proved" means - When the Court believes a particular fact or presumes, assumes or supposes, it stands proved. So, that is why I made a distinction between "presume" and "belief". If you believe, the "Court believes" existence of facts it stands "proved". But that is not intended by legislature under Section 29. Word used is "presumed" not "proved" as stated in Section 3. So there is a distinction between saying "Proved" and "Presumed". You only take it for granted for the time being.

"Proved" yes this is only this I wanted you to know. (she explains Section-3 of the IEA))

"Proved section 3" - A fact is said to be proved (word is not "prove" but "Proved")when, after considering the matters before it (what do you mean by "matters"? it can be many things, it can be document, it can be oral evidence, it can be a material object any thing), the Court either believes it to exist (what do you mean by believe? go to the dictionary,... very simple: believe there is a definite meaning, "Take it as true") (I will explain it this way: "A says ", the witness PW-1 says, I saw him stabbing "A" stabbing "B" with a knife, if you believe that, "Believe" means accept it as true on the basis of the materials before you that fact can be said to be "proved". So, were will you find that "the fact" is proved? Its in the judgment. Judge will analyze and say that "therefore I believe "A" has stabbed "B" or I accept this as true, or the prosecution is proved understand?)" (So, that is the evolution of proved) (or supposed if "A" stabbed "B" has to be proved by the prosecution, no direct evidence PW-1 says I rushed to the scene but I did not find the accused, but this man dying man told me "A" stabbed. So, its a dying declaration, if you believe that "A" stabbed "B" I mean the PW-1's evidence you can only say what is the fact proved? if you believe PW-1? that person has told him, but that is not an assurance that "A" stabbed "B". But if PW-1 is an eye witness, if you believe eye witness then the fact that "A" stabbed "B" stands proved. But you have to go a step further in circumstantial evidence.) or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

So, the Section-3, either you believe or you "Supposition" the word used is supposition. So, A stabbed B you can say it stands proved only on the basis of a supposition, but that supposition must be of a prudent man, that is what Evidence Act says. understand.

Participant: talks without using microphone so not clearly audible.

Justice Hema: It is correc, it is correct, but it must be a supposition, it must be a supposition, based on the standards of a prudent man.

Who is the prudent man?- People say "Prudent Man" is that this, No you yourself is the prudent man. Yes you are the "prudent man". Don't search for any other person, the prudent man is within you if you go wrong in proceeding on a supposition you are not a prudent man. try to improve thta is all. Who is this prudent man? SO, MANY QUESTIONS ARE BEING ASKED ABOUT IT. I said what's the point in telling judges prudent man is like this follow him. No, you yourself will be the prudent man because you alone will be able to say whether the fact is proved. So, in a circumstantial evidence it is solely on supposition. A fact is proved only on supposition.

So, the fundamental mistake committed in law is applying Section 3 when ever you are saying this fact is prosecution has proved beyond reasonable doubt. Prosecution has proved beyond reasonable doubt is used only as a past tense of proved under Section 101. You should not give meaning of proved in Section 3. followed No, I want to just escape from here...ha.ha.ha..I want to just escape from here. It really it takes it must take a long time, what I am saying is, see on Section 29 & 30 these Section will not constitute "believe" it doesn't say you believe. It doesn't say it stands proved. It is only saying take it for granted for the time being that this is the assumption.

Participant: But practically we are ending up with believing only, taking it for granted for time being we believe.

Justice Hema: No No shake your I mean that type of assumption from your mind believe believe you will confuse when you are you want to take a decision whether you believe, whether you have to apply Section 3 proved then you will find it difficult. So, go by the presumption.

Under 113B you take it as proved (until disproved) so the burden is heavier, here you take it for granted that it is that person, but then he will say, that these ingredients are not there even in the charge. there are so many occasions when even in the police charge sheet the ingredients

may not be there. So, this man accused need only say he has only to say, he has only to prove the contrary.

Participant: Assuming that all the facts are there mam what would be the difference in..

Justice Hema: Another thing is when all facts are there, take it for granted but then you have to, the test is whether this man has proved the contrary?that he has not done it. So, you have to test it as against the arguments made. In each case it will be different.

Participant: What is the way by which he can,

Justice Hema: You first of all try to understand what proved is .Its not a very easy task. By showing you this aaaaa I have confused enough, so this is not the day to tell you this, go back think about it, then you will understand. Then another thing whether you can apply the meaning of proved in Section 29. YOU will apply the meaning whether it can apply the meaning of Section 3.

Participant: My loard, After framing of the charge against the accused, shall we fist call the accused that I presume that you have committed the offence now in come in defence.

Justice Hema: You have framed a charge unh, you have framed a charge alright , the evidence does not disclose one of the ingredients. So,

Participant: Even if even if there is no ingredient suppose one ingredient is missing and whether....

Justice Hema; You have to take it for granted you have to presume that he is guilty, but, then the accused will say the accused will point it out to you that that ingredient is missing, that is not proved.That is enough, the contra is proved by him.

Participants: Cross talks ...not audible.

Justice Hema: No evidence need not be adduced. Evidence need not be adduced.

Participant: Not able to comprehend....

Justice Hema : No the word disproved is not used in Section 29 of the Act. Again I am saying the word disproved is not used, disproved is used only in 113B.

Participants: Lots of cross talks and laughter...not audible.

Justice Hema: See to get an answer, you have to very seriously at least one month time has to be spent on understanding what is proved.

Participants: What will happen to the POCSO cases for this one month Ma'm? (laughter and lot of cacophony.)

Justice Hema: You have to, you have to go back and study for your self.Yes yes that is why I am saying all the ingredients are there in your charge otherwise the charge will not lye, If the law permits he can ask for a discharge.

Participant: That's all okay, Ma'm we all started with a ray of hope Ma'm when you said that there's a difference between "shall presume" under 113B and 29, we started with a ray of hope that this accused is placed on a better footing than the accused under 113B. How it should be answered now itself otherwise we will be landing in a...

Justice Hema: Certainly yes, no the problem is that then you have to understand what "proved" is, that's the problem. You have not understanding....what proved is first of all...

Participants: Laud laughter....

Justice Hema: see by merely alleging the fact does not stand proved. The prosecution has only alleged, the Court has only alleged, that you are guilty of this offence and these ingredients are there from the prosecution records. Its only alleged, asserted, but you have to prove, prosecution has to prove to make the Court believe, that this facts exists.

Participant: Ma'm one clarity mam. now I am presuming that he has done this particular things which are alleged against him. Noe you say that it will be sufficient for the accused to prove the contrary. How is he going to do that without adducing evidences that its not necessary....

Justice Hema: In some cases may be necessary, in most of the cases it may not be necessary. In a rape case there will be no direct evidence how will you presume? How will you say that this fact stands proved? on a supposition. So, it is not sufficient if you say it is,...I take it for granted I presume that you are guilty, ...you have to test again whether this fact is proved, right, understand see by presuming you are not taking for granted those facts are proved. There is a difference between presume and proved. that is why I said you don't use the expression believe to apply this word believe to shall presume.

Participant: But when once I take it for granted the prosecution stands on a very better position naa mam?

Justice Hema: however he is however he is, but don't think it is on a better footing. See, they fail to prove they fail to lead evidence on a particular ingredient how does prosecution stand on a better footing?They don't.

Participant: so, that will be constituting as not proving a fact. Which is presumed by the Court to start with.

Justice Hema: Yes not proving a fact but the accused will point it out. Yes! Presuming and Believing are totally different.

Participant: lots of parallel questions not clearly understandable.

Justice Hema: You can presume, you can presume, you can presume him to be guilty until the contrary is proved. Contrary is proved means it can be by many names, It can be by pointing out the lacunae, It can be by saying that one of the ingredients has not been proved, or it can be by leading evidence by the accused to prove a particular fact, which will be contrary to.

participants: cross talks and noise, so not reducible to writing.

Justice Hema: That is one question I put it to you. No The prosecution is not absolved from he has to lead evidence to prove it. He is burdened to prove it. The presumption is only aaaa till the charge is framed and the witness is put. The prosecution has to prove each and every ingredient.

Participants: Then what is the use of Section 29...loud noises not audible...

Justice Hema: Prosecution has to lead evidence, prosecution has to lead evidence to prove evry ingredient. See there are several decisions in similar provisions, Section 35 in NDPS Act, section 35 of NDPS Act similar provision, culpable culpableSection 29 is cautions the accused see you are presumed to be guilty. your burden is higher you cannot take it for granted, you have to be alert on your foot. The burden is on you to prove contrary.

Participant: unable to comprehend from his voice.....

Justice Hema: See hereafter, when each case comes before you you find out, hereafter, when each case comes before you you will get an answer, keep this in mind, presume does not mean stands proved. Presume does not means stands proved.

Participants: Cross talks

Justice Hema: This is the main challenge before you, this is the main challenge before you. See there is no point in learning all the other provisions and not knowing what is the scope of this provision in Section 29 & 30. This proved beyond reasonable doubt appears only in Section 30. that is only with respect to a particular fact. that also I'll tell you. section 30 refers to proved beyond reasonable doubt but that is not in respect of the offence, that is only culpable mental

state. That is only one of the ingredients and this culpable mental state is not necessary in several offences, several offences.

Participant: almost all the offences, yes, mam the standard of proof for anybody is the same under section 3 (Yes) From where did this prove beyond reasonable doubt come.

Justice Hema: That is why I say that is based on Section 101. There you are bound to the prosecution the person who decides to get a judgement he has to assert and prove. So, the question before you is whether the person who asserts has proved, established that only means established.

Justice Hema: 29 & 30 you will not conclude whether the prosecution has proved beyond reasonable doubt no. You are only considering whether each fact is proved, the conclusion you are not making, whether 101 conclusion you are not making, it is under 101 you are contesting whether the prosecution has established beyond reasonable doubt. [01:09:34]

Participant: talk about 29 yes we are doing is actually and 113 B to some extent where we believe the prosecution by proving certain facts we believe that this has happened, after the prosecution proves to that to that extent we call upon the accused to disprove these things? but there we ask the accused only to prove only a preponderance of probability

Justice Hema: Yes but now it is proved beyond reasonable doubt the accused has to prove beyond reasonable doubt because of *Sher Singh and* another decision by Justice Nariman. There is a decision. That is why I am very anxious to see that you don't apply that decision to any of Section 29 & 30....confirmed by 3 bench 3 judges bench. ...yes that is what is said unless it is changed the position is change this is a settled position now. Two bench decision has been confirmed the dictum has been accepted by a 3 judges bench. 2015 *Singh vs state of Haryana* and the other one by Justice Nariman's no no the other one is not there in the material not there is not there in the other side Justice Nariman, the citation is not there is not there there is see the *Sher Shings* case in the material supplied there is an article is given which as per which you shall not follow even the *Sher Singh Case* it is wrong, it requires reconsideration is the article. rashid's Article. So it is in trouble, I mean.

Participant: What was that 3 judges,...

Justice Hema: That citation I will give you.

Justice Gita Mittal: showcases a video film.

We now have Vidya Reddy on the screen she is also a resource person for us. She heads Tulir an organization for children in Tamil Nadu, who actually works with children who are victim in POCSO cases, so these are just one is a one min clip and the other is a two min clip, she gives us some status of the working of the statute and the offences and secondly has the experiences as to what happens when you try to get a medical examination done of the victim, I thought this may be useful because we don't know the ground reality what's happening on the ground, so just a short clip I thought you would be interested in this.

Justice Gita Mittal: these are all hands down, she had several instances but I thought there wouldn't be time I didn't bring the rest of her talk, what they had to say the stories are really difficult.

Prof. Shrivastava:very fruitful few full also we receive some nice thought provoking ideas and still I think everything now, and thank you mam Gita for being here today with us. And tomorrow we will have Justice Rohan Dalvi and Justice Hema here..... and there is an announcement I think there is a film show at 6 p.m. in the auditorium. So you can go there well in advance in time, what is the name of the film Mr. Sumit?

"*Stanley Ka Dabba*" so many of you may be interested okay by 6 PM it will start and it will be followed by a dinner.

Session: 13: Recording of Evidence of Child

Speaker: Justice Roshan Dalvi; Justice Hema K. & Dr. Manju Mehta

Day: 4

Prof. (Dr.) Geeta Oberoi: Yes! Very good morning to all of you. Today we have with us I see some... people are still coming, I know we have one minute but never the less, at least we can spend one minute in introductory part. We have today with us Hon'ble Justice Roshan Dalvi judge from the Bombay High Court. She has a wide experience in dealing with family and children matters in her whole body of work period so she would be speaking to you on her experience and as you said in the morning that you didn't get ..so many question that are let unanswered I think this the time, this is the session where you can clarify all this specially with respect to bail matters and then we also have a... with us Dr. Manju Mehta, Dr. Manju Mehta is a long clinical psychology professor at All India Institute of Medical Sciences New Delhi. She has been helping us with our programmes on juvenile justice, POCSO cases, family matters, so this second perspective that you will get an outsider expert on perspective about same issues that you have before you. We also have Hon'ble Justice K. Hema, former Judge Kerala High Court and both Justice K Hema and Justice Roshan Dalvi had actually gone through [00:01:58] Justice training had gone through not only in India but also in Wales and where they have been actually aaaa trained as a trainers to give a training in Indian context as how to do gender justice and help judges to how to do gender justice in cases before them. With this small introduction I'd be leaving you in company of our resource persons for today. I'll be coming back at 12:00 O clock, and then we'll have feedback and evaluation sessions where we will do questions answers, thank you so much. I think Justice Roshan Dalvi would like to begin.

Hon'ble Justice Roshan Dalvi: murmurings ...I do in turn, Friend these are the faces of the children of our country these are the children of [00:03:05] there are million and millions of children who don't fall in any of these pictures and for them we are meeting today and for them we are judges. so when we are judges we feel and we must understand that those children those come up before us especially when we record their evidence and of any of these. There are

various crimes against children and children have so many rights and it would be nice to just keep in our minds the various crimes we would be dealing with so we know that whatever we talk today will be for all of these about these are all that we always know about in our IPC [00:04:08] beside all of these we now have special crimes specified in the POCSO which you all know from sections from various sections of the act. silent.... now all of these crimes when children are concerned and when they are victims but first remember when we deal with any of these aspect specially with evidence these two tests the first test and my sister who is a clinical psychologist you would be able to tell you the better about this but I just give you a purview that in this two test one is lesser number greater attention it must be to a attention that where ever there is greater number we have lesser attention this is truth about our country of the entire population when the government have so many schemes the scheme are just diluted because of sheer numbers you come to courts each one is entitled to a hearing which we give and everything gets diluted because we are hearing only one party at that time we are always bought down by numbers similarly in a family if there is one child the attention is quiet different from [00:05:35] children even given by the children's own mother which is actually arithmetically speaking also you cannot devote 24 hours to your child no matter how much you love your child these are the children who are prone to being sexually assaulted because they dont have that kind of care attention custody etc. throughout and the persons who are violated such children who commit sexual offence they watch out for these children so in a simple way a mother or a father who ever it is goes with a child to put the child in a school bus everyday that child is not likely to be sexually assaulted if the mother is not a [00:06:23] father is not a [00:06:28] the child comes back from school would never ever realise that that neighbours know about this children and what to do with them. and then the sexual assault begins because of numbers that people who have told children who are told *bahar ja ke khelo* the house is too small and then they are actually prone to become violated. This is one of the thing which every where we see the three hour is an another ...another test that we must bear in our mind that is the test given by the American boys scouts and that is first you must recognize that this kind of crime happen in everywhere it is futile to contempt and to believe that it doesn't happen in my backyard its not so all the research have shown that this crime of sexual assault of various nature and various intensity happens in every society in every country and in every class of people it may be a little different in degrees but it is not in absolute [00:07:37] that a class of children will never be going to sexual assault its not like that.so first thing is that we must recognize that aspect second is resist between our way to able to do but which others must do in the society we must resist the crime unfortunately some times there are very tender children

you cant really teach them you cant have that kind of awareness programmes for them to resist, and therefore we as judges when we come across then we must remember that this very tiny tender age child could not have resistance in this kind of assault. and the third is off course report because now it is provided by the legislature that everyone who knows about the crime must report that particular victim must herself report quiet often it is not done because she is scared or confused or very young and will not understand what is reporting in which case off course her guardian must take her up that and after these three things are done our work will begin because these are two test for evidence that I will line up. These are the partners of the system of criminal justice relating to children, parents, teachers and for friends for day to day care for giving awareness that look don t go if somebody offers chocolates you must not take it from strangers you mind some other children doing that you know sometime we also say come come they will not come they are trained that way and that is very good but they don t come to us. but there are children who have not aware of these things and they may fall prey. so these four persons with the kind [00:09:33] they are for the needs of the victims because the child becomes a victim, the second is after the child becomes the victim who are the partners in the system that the child will have to have the first is the medical officer we knows because as soon as the trial is filed the child is sent to a medical officer, police officer, legal officers, judicial officers and all the agencies that all we have under the the statue , now this would be then worth considering specially, when we consider evidence and POCSO matters . Please understand that the impact and that which the child may have had on the base of the incident and that impact she may have carried for what we may call secondary victimization, when we say go to the police and medical officers and prosecutor and ultimately at the end of the matter we are sitting, OK, so these I would say are the main impact upon the child it destroys the child's psychology devastates her life its a shock, the child would be disgusted thinking about it, having gone through it a complete disbelief that how can this ever happen to me even adults ask this questions, suspicion about everyone including us and its most natural helplessness of the child frustration anxiety, loss of security, guilty feeling the fear that she has to disclose everything, confusion is that I would say is the main impact can you tell me any other [00:11:20] that such a child will be having that such a child will be having specially when she comes at the court(silent) yes, our reputation, anger (said by participant) correct anger, [00:11:44] (participant--even if she wants to tell her parents would say nothing had happen of that sought having compromise with the accused in such a situation ...(good Hon'ble Justice Roshan Dalvi) and very trauma...traumatic situation she comes and speaks to those into court) (it will happen it will happen Hon'ble Justice Roshan Dalvi) but let

us take the case first of the truth we we believe in the *Satye mev jayate* so soon the people will speak the truth in our court by large huh ..we begin with that when it comes to speak the truth that we really considering now as soon as she under go. any other impact that she would haveloss loss correct confidence lossloss of memory (participant) absolutely right ..depending upon the time that has gone passed also and that is why there is this provision also that within thirty one days please record we must have this system now throughout the country that when we get cases of children especially only one thing has to be done first record the evidence, and take another case, record another case, take her evidence, don t go to the end at least until you finished recording the first evidence the most important is at that time after her evidence is recorded that you will also understand what this case will be all about you will also know that she has already has to say [00:13:25] stern or style or there is nothing much it was a really a case of small love affair say a between 15 or 16 year old girl and 19 year old boy or something like that, which is not a really a crime against society it is a statutory rape and no one understand what is the distinction between those cases are I call them the real rape cases and the statutory rape cases when did you miss that distinction in our constitution also there is classification we have class legislation but there is classification and treating unequal equally is discrimination in our constitution only, this is remain from the British era when we had these IPC now the society has gone in the n number of children going out staying with boys or even they are not staying with boys they are having some kind of affairs or whatever and that is all that is in that crime it is not like a *nirbhya* matter when it is complete violence all there is there is so much intimidation or so matter of a exaggerated sexual assault that is two different kinds of cases which you will realise when you will record the evidence of the child first Ok so that is the loss of memory that is not learnt and that is not in the statutory judicial, anything elseOK so this is also enough that we know that we keep in mind that this is the impact on a child. the most important thing of this evidence is re victimization or secondary victimization please remember when the child comes to our court look it is like you are mugging, mugging, mugging, mugging everything that as an exam and on the last exam day you are going through all the chapters ..this is what all our children do and we say that our children are undergoing through so much trauma of the exam now what about this exam of that child she has come with her final exam now and she has gone through the police investigation, through medical examination then comes the court trial, OK ...now when that child is going to start then there is yet another dilemma and that dilemma that we have in our criminal justice system is what I would call is a child verses victim dilemma, the child verses adult and the victim verses the accused that is this kind of dilemma. our criminal justice system is based with the accused at

the centre stage we do not have the victim at the centre stage in our system. the chair been there but its not there because at all the time what we are told in our system is the state prosecutor is the kind [00:16:21] so the state an we are closed and the victim don't even know what is happening to the matter happening to the matter did they know that you know they don't know when it finish and when it begun except when they have to come to court and this is with all matters [00:16:35] whatever OK now when there is a victim child then it becomes a mock fragile situation she is the child as if every where she is different children are treated differently now this child and adult everyone else in the court room at the time of evidence is an adult [00:16:53]

and we must understand that she is under that absolute minority we consider so many minority rights so many people can take care of themselves and we have to take care of that minor, child she is really in the minority that's one thing so we have this child atmosphere which is statutorily provided section 33 but other wise also it have to just come out conceptually I would say we didn't even need the statuary when i have session...no statuary..but to lead these cases and we cannot innovate and this is now come into block print. OK can this victim versus accused syndrome is always there even with adults with more other child because in the evidence she is treated as an accused she have to be cross examined first of all ...the accused is not going to be cross examined and for that cross examination as if to say she has committed the crime which also we have gone very far ahead now under the statuary which provides and which ..I suppose every time before the evidence begins just go through those sections so it gives you that thing...that you are in control. and this syndrome will not remain now for this syndrome we we have what is called vicitmology ..i.e. doctrine of victimology that consists of three aspects of victims, victim representation she must be represented by her lawyer or by an NGO or whatever under the statute now victim support which court can provide in some some instances the government revised and victim participation in the trial that victims requirements even through an adult must be considered separately and ...you are not doing any other trial. of course we are ..plenty of tolerance in judiciary.. any one say judicial and so would I ...this happen that happened...these are all the road blocks and the obstacles we have to pass through them and come out of it...so the some cases which are not reported now it is made as an offence not reporting the case, but we know since evidence cases are not reported they would not come to us for evidence. then they some cases which are not pursued as the lady said the case is filed but they don't want to pursue it and the wrong notion that you should not be brought to justice it should not come out in the daylight ...however wrong you may think it

is however rightthink it s to abide the law ...in the court of law. and that cannot be countenance by ussome child witnesses were tutored which also must be present to our mind now basically we say they are essentially in to other kind of case ...not really sexual assault cases. but cases where there are children who are giving evidence which would take that extent in the purview of POCSO judge but when she is a victim is what we really consider about it under this act OK. so whenever the child is there we may keep this thing in the back of our mind she may be tutored and then we have to see the evidence as it emerges and once we realize particular incidence has happen to her which has violated her send her.....that is must all slow and that a judge can find out in my presentation i would be giving you a example to may be to get you going on that or may be I tell you now it self there is one matter before me which was a case of incest and I really thought when I was keeping... my mod etc this is the case of incest the man has beenhe was not granted bail he was dropped he was working in Dubai or somewhere and he came here and the charge of incest and I wanted to see the daughter etc...come to my chamber for recording the evidence the daughter was sixteen year daughter and quiet a big child actually but a child in our systembut quiet a sensible young lady and she gave evidence and the father was quiet and i had taken all those precautions which we always doand thein her cross examination what came out was that her mother and father separated the mother was living.....there were four childrensomething like that and they go to the mother house also and father house also and they live in the father house in which they were brought up ...and mother had gone out and after some time the father was.....wife she was a young girl and the father use to give maintenance to the mother and he would be transferring money from his account and he was working in Abu Dhabi or Dubai or something.....and after he got married he stopped rightly or wrongly he stopped that ...and perhaps that he married to a younger woman etc. the first mother of this child to make a false complain she made the complain of incest she gave the evidence that in my chamber right in front of me when she was cross examined by the fathers lawyerunder this scenario this happened and she lived with the father quiet a few years ...nothing at that kind happened and after the brother got married again this case come up so this was a really tutored case there not many of them more cases are off course of sexual assault may be we have to judgethere are these types of cases also and I realised that she was tutored and I ...I was happy to do that because I have solved the caseother wise it would have arrived a...the father actually the argument was the children remain with me both my daughters remain with me from this date to last date when I was not married and nothing had happen and that time why would anything happen after I got marriedso you see we do come across all of us do

come across this tutored case ...and that is our trouble because we have to find out which is which just because there is some difference indoesn't mean ...some kind of tutoring always and then off course some witnesses turn hostile we know that and we know how to appreciate that evidence even without POCSO so part of the evidence which has come that much we can always consider and then off course we can give chance to prosecuteto cross examine her and find out ...even if nothing else comes we take some body else s evidences and if it is collaborative we can make it ...and that is there real function of a judge there may be any illustration will help I have a matter of a young a very small child of about five years when she was ...before me she was 10 years old she re-coursed that he took me to his home and I went and he closed the door etc. and she was completely under pressure and she looked at me and could nt go up and ... she saidshe did nt said anything more.she was not hostile in that sense she was completely overtaken by fear..and that was impact ...as soon as it was notthere neighbour said he heard screams coming out of the roomand he did not opened it for some time and when he opened it he was like ..etc.etc...so keeping this two evidence together the picture was complete there was nothing more to say now similarly in the case of a hostile witness also we do have some evidence which we can link upand before thebecomes hostile ..the best evidence comes up it is to appreciatethan off course cases are doctor and...has to same and sometime there is collusive investigation also when the police may bewith the accused and after every judge now for this evidence this entire case this is kind of a micro level we are considering our case but at the macro level also we require all these kind of things to do the best ...that POCSO has to perform one is the infrastructure with the Government has to provide which is different then ..states then we know in...absolutely safe but every where it is not like that and so we go along what we are expected to do even if we are not under the infrastructure how can we both make the ...situation. that is what most of the country is required so here some victims ..some centers in the big cities where the victims are cared and there are some NGOs ...these are all very well settled in the West ...when I was in England I saw a victims support center which was like a three star hotel I thought you know which is like that that country can effort but we cannot we have whatever we have ...that functions quiet often when victim examination suits there one judgement very nicely given by POCSO judge in Bombay where the child actually been taken for TIP police station .. POCSO judge said no you conduct that in the court premises or yopu conduct that in one of those places where those children are kept and you are not allowed to go thereall the accused are rounded up by the police can bring them but they were asked to be brought to an another place so that she does nt go back to the police station, so that secondary victimization is not dead and then

off course the recording of statement and evidence which we will be doing specifically so I wont do it here. and the second aspect is sensitivity our lecture is on sensitivity which will be called climate and court room conduct when we just come to so when we come across the stage of bail we will be doing in the next session ... the stage of evidence what must we understand is consist of two parts one is recording of evidence and the other appreciation of evidence both are equally important we will be dealing with how to record evidence which is in POCSO 33 under on wards but even the appreciation of evidence is very important specially for a judge followed by the decision and that is for sentencing fine compensation and rehabilitation and I may now tell you sentencing off course minimum and ,maximum is all up to you there is no discussions except we didnt get exception fine off course please remember that fines can go on increasing as prices can go up in our country go on increasing some how ...dont increasewe can always fine a person couples of lacks of rupees also given his situation when there is a accused of that nature ... compensation have you heard of a case of Ankush Shivaji Gaikwad [00:30:09] now Ankush Shivaji Gaikwad 2013 onwards saysin every single criminal matter you have to consider the matter of compensation you many not grant it but you have to consider itthat is now the law and that law is most applicable in POCSO case .because she has to be compensated for whatever has gone for the rest of her life so that is also a part of POCSO ...and off course rehabilitation is which we have do you have in your jurisdiction ...I dont know but I think in most of the jurisdictions in Government homes, there are NGOs there are private homes etc. and we POCSO judge must have a list .where to send whombut I suppose if we go along everythingand maintenance problems but we have to see certain rehabilitation unless she go back to her parents. now this judicial sensitivity which we require even if we dont have the infrastructure specialare noe form under the POCSO special officers are there they say preferably women judges because a child can speak to the women judge perhaps better ...priority in disposal its you to continue that the law cannot do ..how would you consider priority can you tell me? which are according to you the cases deserving of the most priority ok if there is a boy 19 years old who has lived with a girl for one week when she was 17 years old and he is not been released on because of some weird reason he is in under trial prison will you take her matter firstsilent.....thats correct we are considering priority and when we consider priority we must keep that in mind something like a balance sheet and asset and liability statement if I take up this matter what will be the ultimate result what will be the impact you may send one lover to jail ultimately if you convict any body if you ultimate you will find that the girl has turned hostile and there is no evidence before you even though any tactical rape has taken placebut as this lady says as you come across a case

which is a clear rape case its a weird case ...a rape on a child its a true POCSO case for which the act is formed the act is not clearly enacted for those lovers it is enacted for the true accused the violators when it is the question of prioritythat is the priority that you must consider and I will give you one hint when you consider the priority for recording the evidence one case is under 376 another case under 376 and 363 just by reading one line you will know what the case is about day in and day out you are dealing with that so what the lady said is will be in 376

these are the peoplebrought a book these are the children to whom justice has to be been really done and he spends so much of our time to going after two small lovers who dont cause any complication in the society accept that the are not up to the come of age accept that they should have waited a little longer and the parents complain and on such thing and i ultimately these children want to be together but we should also tell them that you should have not done this early before because we think that you cant do it ...and we are capable of thinking for ourselves and Alas! the law is not with them ...so those are the cases we have and we find all along that it is prioritizewrongly considered as a gentlemen says or even if the lady said ...and if you going to take this broad set of class legislature under trial process....thousand of thousand under trial are there but within the under trial prisoners who are the prisoners who are to be brought under the book. correct off course one thing will remain that under trial prisoner whom in all probability you will.....because there will be no evidence ultimately and in all probability thereparents now at least become adult and and now let them go happy for that this boy has to continue to remain in jail and that possession consider in next session when we will be considering bail I wont take up your time for now...so this is the priority when you consider evidence when you record the evidence of victim because those victims are under the impact which we thoughtmuch impacted she thinks that everybody is against her her boyfriend is in jail ok but the impact which we consider is mainly for those victims as the lady said when there is a real case of sexual assaulting then the fixed date and times which you would be giving like their are several judges like yesterday i came accross one judge who keeps all the evidence of in the afternoon because the mornings school are there so after the schools she can comeeasiest thing to dorecord her evidence and you are done. take up another case victim support and representationthe support must be given by the judge the support must be given by the judge, NGO mother elder sister whoever is coming and they are to be always with her contact with court officials is important because then you have police officers and also the prosecutors ...now keeping the child under contact with some of them prosecutor

is now taken to be a good thing to do and the NGO go and introduce the childbecause then the prosecutor is going to ask question etc and that is good so far as we see that the child does not come under contact with the accused because everything turns topsy turvy in that case ... so next thing is no contact with the accusedfor the trial begins and then we have the court room conduct where actually recording the evidence one thing is we consider in our system yet ...evidence in camera ..now this in camera trial may be in a court room , in a court room we sit on a desk..witness box far away ok now we have to consider in POCSO case how we are going to arrive in this kind of a court room scenario or court room conduct just tell me when the child come under an impact which we consider done when the child will have which people will the child have the impact or fear or.....confidence loss orone min..one min.. from the accused ? advocate , police all three correct anybody elseoff course....judge even..judge staff, yes....any body elsebut who constitute the court room atmosphereother litigants ..how what she will think about litigantproperty case so how will she impactedpardon..

Participant : other crimes

Hon'ble Justice Roshan Dalvi: several accused pardon anybody else besides lawyer, prosecutors, police officers , she said so all these persons areand accept for the other accused or other lawyers as you said all these persons are going to be there we can not take away anyone of them we can at the most tell the police officer to be a little far that's all he would also be requiredor some kind of articles and thing like that ...she knows that he is the IO and he is going to be there and in a large room it's a court room that kind of large room gives an added security now what happens is we have some kind of affiliation to number when we are working on the roads we move on the roads suddenly fears up somebody may come in there is hedge and a robber may come take away the watch some robber may come when some ten people or 20 people walking on the road we don't fear we have confidence in numbers now when we have in camera trials we take away the numbersthey are the least last in the wholeo God he has got the papers she will fear somebody coming in and going out she doesn't even understand who is the accused or who is the lawyer, who is the victim or anybody else they are just individuals they don't come in uniform actually fearing she will not fear him if she knows that these are also the people who were sitting ...and they were accused and that man is also sitting with several people and her accused person is talking with them she will definitely fear those people also if she finds lawyers of the same uniform she may fear to her lawyers also but

otherwise her fear is remote fear somebody is like this what is going to do I don't know but the other people she met the prosecutor before presume she has seen the accused before she knows about some accused who is going to appear seen the judge couple of timesthen she fears them she sees the judge there and thinks God damn my fate is in his handnow in a big room with few people suddenly a different impact comes and that is an impact of fear and better is in camera , in chamber trial and that is why the act says that rules under the act that we must have a court room scenario which is completely different so that in court room we have a chamber scenario. when I was a sessions judge and when I was having a very small chamber and when I had a matter of child victim..no POCSO I never ever dreamt of for you all today I said iam not going to have in camera trial in court room because in witness box the railing only comes up to hear. there was one judge who kept the child on a stool so that the accuses lawyer can see him properly he was very concern and sensitive. so the child stands on stool to give this kind of evidence just imagine one judge kept the child on the hedge whatever is the railing of the witness box. its a thin railing and she has to sit there so that the lawyers can see him. so when you go into the chamber when you have a separate room for this kind of thing where the judge comes at the level of the child and the judge is right in front of the child the prosecutor is on one side and the defense lawyer on one sideany hot probability if you have recorded the evidence of the complainant mother so the the mother can always be brought in otherwise she is not been brought in then some other guardian may come in with the child and she can be on the other side so that the child sees you and the mother...so when we have this scenario the child sees the mother who ever is the guardian and these two persons will be very close to the to the child ask her questions softly now when you first do this you get the child in immediately ..after you make all these arrangements after your management with your staff get the prosecutor and the defense lawyer by now because its under POCSO they all know **out** these things and they are going to have to obey but at the time I did it i did nt know any of those things and I started it as a innovative thing in my court with the hope that it will work and with the fear that it will not. but it had work ..POCSO came in 2012 and its working lets go ahead and do itas soon as the the judge goes and the child comes in first just one smile is enough no body is saying you to give her a chocolate or give her a piece of cake or any thing like this but just one smile in the meantime those two people came the prosecutor and the defense lawyer ...I said tones down they said yes mam..yes mam..they did ...please dont ask me the questions ...there sakshi versus union of India and we went through that stage and we actually created this scenario which has come up ..now after these people come and sit down and before the evidence starts put one stool or chair right behind the child then call the accused

sometimes your steno is already there the mother is already sitting there these two people have come and they are all getting ready the child has to speak they have to ask questions in the meantime tell your peon to get the accused behind he sits there he hears the entire trial he can see the entire trial his right of natural justice is completelyhe sits right back with the result you will be able to see him as you will be able to see the little girl. and with you right in front of him I dont think he is going to make any mischief but now I can say for sure because his lawyer also must have told him now all this provisions are made by the legislature ...let him be careful let him be carefulbut at my time it was not sofundamental rights were to be infringed right to liberty you know that kind of thing but in the first trial I conducted where I have confidence and all that .because I directly I was looking at him and her him and her without leaving my gaze everything went of wellI just told the prosecutor identification best ...I only told so he have to do that ...and of off course identification has to be done ...so after the story was recorded when we ask her who is this man who did that then it make all tve difference and what happened was first she said madam *vo uncle nahi aye* she knew that he is not there and she gave the entire evidence knowing that he is not therethat makes a whole difference I say again and again and again even if you have a curtain and you know that he is there and actually speaking she cannot see the guy he can hear the trial. In England they have a one way mirror the people on one side cannot see the the accused the accused can see all of them

Participant: Identification is not necessary ?and section 36 mandatory provision special court shall ensure that is child is not exposed in any way to the accused at the time of recording of tve evidence

RD: Sir, who has done it you dont want to know any one coming and telling you story ...you will convict any one man you will ...convict the man is that man

Participant: but the provision is mandatory..

Hon'ble Justice Roshan Dalvi: then how provision says the identification of the accused will not be make lets see that I may be wrong can we have the POCSO you said it is section 36?.....silence

Participant: *agar kuch galat kaha ho to* extremely sorry mam but I am confused

Hon'ble Justice Roshan Dalvi: how I will read section 36 is not that the child will not say that this is the man who was into that incidence I really don't see that how that much cannot be said see all throughout her life she is going to live with that trauma always that she has been sexually assaulted but this can be a small or grave..offence whichever way it is

Participant: but the what is the object of section 36 of POCSO act legislative act

Hon'ble Justice Roshan Dalvi: its not the object but the provision objection are in the statement of objection reason this is a provision and therefore you have to see to it she does nt go on see the accused ...leading evidence as I understand the judgment of Supreme Court are considered some identification has to be done.

Participant: but what is mean to is section 36

Hon'ble Justice Roshan Dalvi: ...It is 951 i can not go on and on with one section this is my thing I may be wrong the identification of the accused(Cross talks)....some body comes and says a man came she does nt even knows his name or his fathers name or surnamedriving license how are you to connect the man but I think we leave it at that.

because if Iam wrong I am wrong(cross talks)so that the truth comes out see we are not able to ...trauma for a life time and that is not our function she may go to some psychologist to that we have to see during, before the trial she is not so traumatized that she doesnt gave her evidence.yes yes now suppose let us take this scenario she has given her evidence etc. after that we say he is not here so I actually told her *nai beta hai idhar udhar sab jgah dekho* and he was quietabsolutely quiet he was sitting behind her, so when she turns I saw her face getting white now even if she does not say he is the accused the identification is complete. it was my first experience her first experienceyou know but when I saw her face there was no needwhen she turned and said *yehi hai* ..she did thatfor me that identification is completewe are not doctors we are not psychologist we are not going to give her that *marham patti* every timeultimate justice ...somebody was telling me how can she go through that trauma if for one minute if she cannot go throuhg that traumawe have a particular function and we have to do very best for her if we can do thing one the aspect of that large room complex goes two the vice Councillor three it costs us nothing ...maharashtra judicial academy she said she put the accused between the two cupboards now in her chamber so that the girl could not see him ...go on with the trial I had an open room so I thought I will

do this and the police stands at the dooreven if some damage is done ...we have to make all those arrangements and now you are doing the trials every day and you are having that umbrella of law all that times. So please dont say that we dont have infrastructureand I will call it sentipathy it is sensitiveness and ampathywe are sensitive to her andevidence in chamber and i told you the place for all and the victim confidentiality that you know we dont gave a name out etc. we must give out the name of the accused no bar recording of evidence ..through court that also in the ...you just say no ...rest time and break time also provided this completes the scenario of court room conduct. thank you very much.....silence...

.tea break...cross talk we can have the tea .. instead of going to the lunch room tea will be served here and we can continue the session.

Session: 14: Bail in Cases Involving Several Accused

Speaker: Justice Roshan Dalvi & Justice Hema K.

Day: 4

Hello.....Madam there is a tea break I think, I think we can continue and have the tea served here (probably by the resource person)

Ya that would be bettersay something because it is related to this only so continuity would be better (GO) so what we are planning that instead of going into the lunch room for the tea, tea would be served here and we will be continuing with the session (R.P)

Dr. Manju Mehta silent....

Dr. Manju Mehta -I think madam has given very important points and she has tried to a deal with the situation am..the way it should be done and she has covered a lot of points from the psychological aspects also because of her vast experience and because of her training the information that she has given a is really very valuable so my role is as a psychologist you know what happens a number of times a being at AIIMS we have had number of occasions where either the child is admitted in the ward with a [00:01:41] and we have to do the recording over there that is the case of extreme these thing sometime there are minor cases like a there have been cases where like two type cases are there even there are allegations on sometimes on the doctor and then [00:01:58] and then we have to find out that while taking care of the child and in the medical situation and the patient has put accused that he was a.. a.. um prime to a to molest the child so we come in there also we have called by Supreme Court a number of times where the judges find that the child is not speaking at all and we have to get the evidence and so please come an help us number of times it comes at the police brings the child that this child was found in a destitute condition and she was taken to the police station and she a is mute for four five days and we want to know that what is happened to her did medical examination reveals that she was been raped but this is abandoned child and so they want to know about the child so they have set the locations where clinical psychologists and i was child n head of the child in adolescence psychiatry unit so these thing would come to us so from that point of view when it comes so I would be adding on to few things which madam has said so madam's perspective has been more from the legal perspective my

perspective will be more from the psychological perspective but always these two things they are to be combined when we are going to collect the evidence whenever such a type of case comes and we know that in many cases a whatever it may be a real case or it is tutor case or it is a different type man has mentioned it is always a very challenging task because this is a very sensitive issue even for adults we want to talk about sex which is a tabu and that even in direct language is not used so when we are talking to to the child it becomes even more challenging and in this it becomes very important thing that we have to make rapo with the child a rapo building is essentially what mam was saying that we have to make the child comfortable we have to make the child be free of all the fears of the courtroom and the person there the communication part is also very important I would be dealing these challenges separately the time factor is also there because very often it happens that police in is rush *isko abhi abhi pooch kar ke batao ki isko kya hua hai* and the child is traumatized and doesn't wants to speak so may be number of sessions are required and in one session we may not get the information so we may have to spread the sessions the informants are also very important and to deal with them because some of them may be hostile some of may aa try to get into lot of information one of the things I tell you it was just after the Nirbhya case that some how you know awareness and all of this cases became too many and one of the case from Rajesthan was brought to me in paediatric surgery ward this child was admitted she was about 12 13 years old child and in this I have to go and interview the child and when I went there the mother was there and she was not concern about what I am going to ask the child the first thing she asked was *hame ghar mil jayega ki nahin vo Nirbhaya wale case me to sarkar kah rahi ki usko vo ghar denge to vo hame kitna compensation milega* they were not concern at that time it became that a concern about the welfare about the child that the child was depressed and not talking and was lying on the bed with all that but the mother's concern was that we should now get money out of this particular situation so informant of the number of time there motives are very different also it is becoming these days I was...Sumit had earlier asked me that what are the problem you see and a when these particular cases are brought over there difficulties so I have brought one of them difficulties was also this that these days they trying to misuse this act the landlord wants the a the tenant to get out of the house so they find this is the easiest thing to blame the young son of their that he came and did something to their daughter so he should be taken out of this [00:06:49] so lot of even ..so how was the information the moment they are providing that becomes also very important the setting of thoughts is there and as madam has said that infrastructure is there and which many situation it is not provided so these are the things when a.. we have been doing a... this type of help to the court awe have being using

certain methods and the first thing is observation a then the interview a... if we talk about the interview mam has gone to the details about a how to interview the child in the setting also but the other very important issues like drawings and [00:07:41] and the questionnaire and I am trying to reduce my presentation because a I know you have another session also(not audible).no you also have very important issue into that. so first when we do a go into the observation as a mam had said there may be a situation where it is actually a like tutor cases or there have been sometimes a 2 and a half year old girl was brought from a play school and in that situation the mother was very a ..very agitated and she says that something had happened to the child as may be she has been[00:08:29] ...because it was in the school and the child was with the diapers and a the mother has later found that the child actually been rubbing her self and then she call the gynaecologist friend to look at her and she found that that area was slightly swollen and red so the mother of [00:08:53] she reported that this could be because of somebody has tried to manipulate with the child so that is why many times a the small child may not say but the parents they do observe that something has gone wrong and it could be in form of physical symptoms and many times when the physical symptoms are not there even the psychological symptoms are there and now this is another girl who came to me for therapy a in this particular case in the school, this girl is from fifth class and during the break time one of the boy came and she..he tried to feel the girl in the playground itself and the girl got very traumatized and after that she stopped going to school and she stopped talking about it that did not become a legal case in that matter because a aa...in this case of school authority also did not know the girl did not report any where and it was a she get quiet but parents of girl knew that something has gone wrong and it was a after four five days that the girl could barely communicate to the parents that she is traumatized because this particular situation took place in the school so a.. sometimes the child may not even report what has happened so parents have to be careful and they have to look about you know the warning signs and theses could be behavioural signs, these could be verbal clues or they could be physical signs a so a..the behavioural signs could be shrinking away from or seemingly threaten by the physical contact like the child who has been traumatized this particular girl whom I am saying a for her a it was if anybody came closer to her she would have a [00:10:49] and many times this type of response is which continues for a long time, there is another girl who has had her sexual abuse during her childhood now she is a 20 years old till dates a she gets startled and frightened when somebody comes very close to her so these are some signs that the physical closeness is very threatening they could be regressive behavior like thumb sucking changing hygiene. this is another child who was brought to us a and in this case the girl was about four years old and she

was also in a school setting was a abused and this girl regressed and starting behaving like a one year old child and she would not get a like she always wanted her father to carry her in his lap and would not let her father go to work and the moment she was separated from any of the family member she would scream and cry and her entire behavior like she started thumb sucking even the milk she started taking with the bottle and stop taking it from the glass so there was extremely regressive behavior that happened so these are some signs when the child is not talking but these are symptoms that can show that something has happened to the child and things has to be taken care of similarly for other things also there certain verbal things also like the child has start using words if somebody has talk to you adult language and a they may start using that or sometimes they may become absolutely mute and they will not talk a aa.. together a the physical signs off course in the case of this two and a half years old girl it was all swelling near her genital area and these things were there a when we are talking and interviewing the this thing with a very small child a we have to observe and we have to use the child's language and in this case a number of times we also have to interview the parents and the caretakers a but if the child is a teenager then the the child it self can bring the entire information and the interview can be given so what mam is saying a a.. all those things can be applied in that thing so there are type of sexual abuse I will a go into a ..skip these things I would actually come on to the child's experience is also something which is very important a in some cases you know a the shame and guilt is so much that would blame themselves specially in the age of 8 to 12 years period and all because initially in the smaller age group the child doesn't know what has happened they only know that this is some trauma and all but as you understand developmentally about sexuality then the blame and guilt and these things and fear and frustration can come more often so we also need to understand these things and a though you are judges and you are trying to deal with the sentencing part and the fine part aa as the mam says that the *marham patti* would be done by the psychologists but some times while interviewing these things.

(participant)- mam what is this *marham patti*

Dr. Manju Mehta-No she was saying doing bandage and all that ...providing first aid ...first aid *marham patti* is actually first aid that is what the mam was saying but in this particular case that first aid is also a little bit important it is actually these days first psychological first aid because if you make the child comfortable give a little you know aa mam has used another words like [00:15:01] these things but these are psychological first aid because if you want to listen information you have to make the child comfortable you have to make him confident and

if the person is blaming or being depressed or anxious we will a you know in the state of anxiety all the information is blocked it is just like mam was again saying all the examination children who are actually who go for exam and who are very anxious and they forget everything and they say i know everything but when I saw the question paper I became blank and I could not say a word the same thing happens with the child because they are also very anxious and when they become anxious the cannot speak or communicate a words that they want to say and even lot of information that you want from them they may not bring out that information because of their anxiety so we have to they may have to do all these things there are certain questions and guidelines a where we have to go about these things but again aa in these things there are certain guidelines about how when when has to talk to the child aa in non threatening environment is very important where the child can open up and in this case the man has all ready gone in to details that the court room is not the right place so similarly in the police station also that is not the right place a so having a special creating that room which she very rightly said its very important. aa mam also said about picking up the time and place very carefully because she said afternoon because that time the child is not going to school a there could be times when the child is actually too small or too disturbed and the person is not going to school at all so in that case it has to be time when the child is not, when the time when it is close to lunch time and when the child feels hungry or the child is you know aa tired because of other things the child should be the time should be fixed according to the clock of the child when he is more comfortable where the child is aaa free of all other problems at that time hunger (not audible) any thing and if the child is having fever or the child is having other problems even at that time even if we want to talk to them it will not be a right time because after trauma many people they start having aches and complains they also start having physical complains so we have to see when is the child is child is feeling much better so.. and what the mam said it is 100 % percent about the torn part because if you talk in the friendly tone the things would be much better and whether it is court room or all the tone is very important because the child will get confidence only with your tone. if it is commanding type of tone then the child will be scared and that information that he wants to give will not be possible but if you talk to him like a friend and in a normal tone then he would try to bring out more information and generally what happens is initially always there is a ice breaking time is to be required because if you think that the moment you start with the conversation the child would come up with everything then that would not be possible, child will take little time to come to that flow of thought where he can aa communicate to you more easily, so give him some time and that particular time initial time can be used to not talking about a the case but in general knowing about the

child(not audible) for example, how do you begin the session a sometime it is simply that you can appreciate the child that, or asking where do you study, what do you do, which is your favourite toy, which is your favourite cartoon that you like so you know few things you make him comfortable and you enters in to the child's world to understand what the child's likes and dislikes are, what is the level of communication that you will have to do because what type of language you will speak so those things are also aaa , there are few things you know which in the questioning you may have to use certain language where aa the information is a to be taken indirectly aa for example asking the child, like somebody is being touching you aaa with one more interesting thing is that there have been case coming to us where it was actually a case of where the father was aaa doing and after sometime the child got so interested that started enjoying that aa the mother came to know and then the mother took the child aa out and went to some relative's house mothers house but this particular girl would speak out of that house and then go and make friends and then start having relationship because she has in the habit of enjoying that and so it became even difficult for the mother to control the child's behaviour.

So this is what we are saying that sometime you know it there are instances where about the reaction of the child and using child's language and what child says you can make out whether what types of reactions the child is giving to it that also becomes very important because the child may say that aa sometimes my cousin touches me like this and this happens and the tone in which the child says you can make out that these experiences what they do that a there is also important to avoid any judgement or blame or the child we have to reassure the child and we have to be very patient, in the questioning part its very important that no harm is done to the traumatized child and no harm is done to the investigation also because in investigation you have to ask certain questions and but these questions can be framed in a way that you get you investigation also but at the same time the child also doesn't gets traumatized this both the things are very important and then many times it becomes important that a...a... a that if we ask him in the presence of too many people about the experience the child may feel difficult to say that so its better that first we visualize our selves that if we are in that situation how we will feel that helps us to understand the child's reactions put in our selves in the child's shoes would help in many ways to understand the child's responses, inhibitions, resistance and that would be there and parents who suspect their children that they have been aa ... abused they also do not ask the question directly this is something very interesting which a in a I was also going to a voice observation home in Delhi and there the number of cases like this and where

they would not admit a especially the accused would not admit that he was involved in the crime a aa.. and this is a very simple test drawing a human figure draw man test we call that and I use to ask these people that you draw a child's a human figure and this particular boy a he drew the face of a girl in a lying position and this girl look like the girl from north east and things I asked aaaa....after that the test the drawing is made you ask some questions from that and because this is through drawing and this drawing is called projective technique that your own feelings and emotions comes through the drawing and through this drawing a then the boy immediately said this was the girl that I am involved a aa. .. in this particular crime and then he gave the stories that how it was ganged and raped and his friends called him and he got involved in this and the judge over there said that earlier he was not committing that he was the part of of that gang and he has done something to the girl and when they show that the description of the girl [not audible] north east so many times when the accused is not committing through questioning and all through bribe and psychological tests it comes out very naturally and then once they have done it they then realised that this was part of it aa ..a again with very small children a we have used a number of times some toys which are depicting the pictures of the family and friends an all and through games and all they come out and they can explain that in fact they can go to the extent of the act also to how much extent the accuse has been done so because the vocabulary and expression in children is limited but through game and things they can enact the things in a much better way so drawings and plays they become very important and they give us a lot of read in particular cases the case that I was telling you the girl who become mute and was brought from hauz Khas police station in that case these a a like the this particular case she was a young girl of about four years old so it was only the toys which helped her to you know aa play and do the (not audible) and then ring out her emotions and give idea about what has happened to her and it was through play only that her...aa..a. we have to take three four sessions and after that she started speaking also so it helps in both the ways in bringing the child's cooperation level in reducing the trauma of the child and bringing some evidence in the child so these are also things that do happens a there is also now some questionnaire are available because now this has become a very hot topic and a lot of people are working so these are some questionnaires are there a which a about aa ...abouta a impact on a child and also it is about what all has happened and whether there has been some abuse or not can be brought in to it I have taken out prints out of this and Sumit will have these copies so those who are interested can get the copies of these questionnaires because some times we may be handy to you and since this is the orientation programme

so acquiring knowledge about all the things which are happening is the goal of the so that is why it is given over hear.

Sumit: Excuse me mam, can we distribute a soft copy of this I can bring them.

MM: Ok, fine...

So there is also a ..am.. the approach finally a that how we have to deal with these children so in this approach it is first we have to understand the case because sometimes the person a lot of children they do not disclose what has happened and this may be a little beyond your this thing but for your knowledge sake I am telling you as mam was saying that sexual abuse has been there for ages and the children who had sexual abuse many times when they are not able to express themselves they also turn into mental disorders and one of the problem is mental disorder is somatoform disorder earlier it was hysteria and convulsion disorder and in this what happens is that the person suppresses the information and he doesnt tells that but these days because of legal awareness and things this becomes very important that how the disclosure comes whether the child is telling himself or the parents suspects and they feels that it is coming because the entire thing becomes different and when it is from two perspectives when the child wants to disclose that it would be different thing and when parents observes sometimes parental anxiety and parental over involvement is also a bring out things which may not be related to a particular case. We also have to respect the child a and we also have to use the techniques in which the child tries to do instead of pressurising the child that you tell us this and that we have to create a situation where the child can be comfortable in giving his self disclosure or bringing out information on its own so when we say a free recall of a situation or a free recall of a narrative of what is happening that information generally gives you know a very important information and without any pressure and it is more reliable also, so what i said we can say initially talk and we can talk about neutral things and then it would go and then many times private interview may be required specially for children who are little older they may not like to say everything in presence of parents and then you may have to do something a in privacy also there are certain habits of the child for example the way the child communicates and in this sometimes for a very small child you can give a picture of a human figure and ask the child what does he calls these separate parts of the body in his own language and then when you know that what part is expressed in his language then in your questioning then you can use those words which would give you better responses so building rapport is again is very important thing because ones the rapport is there then the child would be much better some

people also try that to meet the child in advance so that the child is comfortable. a.. then during the trial the child doesn't feel that he is in a strange environment and he is habituated ... to that particular thing sometimes you didn't begin by asking about the pets or the best friends and then favourite videos and all mutual questions are there so that means that aa.. to sum up the aim of getting of evidence from the child is that we have to focus on the incidence that is taken we have to find the facts a we also should we through matters that we are using there should be whatever information is been provided whether this is a..a predicable or not this is that we have to do and many times multidisciplinary team is also required a a...some friends .a.also help taking a help of the experts of other field it the mam says the of all the people who are there the psychologist were there(cross talks not audible) but the line which i get was about a this thing .. so these were the techniques which would be there so the rapo development and there are in this particular evidence a..a through all these technique these are the main things that we have to use is that a who went where what and how and ...and it would come after the drawing ..we can make a story based on these questions also and tve story that child feels its a play and that provides full information about the child ...(Cross talk not audible) open ended question is something that if i ask that what is your name OK..so simply you would have choice to say my name is this but if I say is your name Ram? that is close ended ...(cross talk not audible) the child does not have chance to elaborate on that is close ended like when we have MCQ we give a statement and there are the options out of that we are doing that is like close ended but when we have a assay type that you write assay on this particular thing it is like you can write whatever you feel like so in a open ended question we have lot of open ended question that might worst experience of ours and then it will give lot of information about what the child experience. and then we will say my worst experience was a being with him, that is close ended so this is the difference and generally with children when we have to and lot of time in the interview a it is also that you go from one question to another you take lead from that and try to give them like open ended type like ok what happen after that or who was there? do you recognize him who , what do you think this person could be what happen how did he approach him. so like that if you keep going in that so it become easier for him and to (not audible) so a this is about from few points which can be from the psychological perspective important in a sitting information from the child who has been accused thank you.

.....(not audible) this to be collected.

.....aa(cross talks not audible)..[00:35:28] (Probably Justice Justice Hema)see ..what do you do in camera proceedings normally ...what is your experience as a normal judge not I am not talking about the POCSO. What is normally done sent every body out of the court order yes only you and the child will be there. yesterday I told you whenever an expression comes which are just not familiar to you go to the dictionary, the same camera proceeding, in camera means as per the dictionary in private room of the judge its not the court room at all so the answer is very simple it is in the chambers ...not in open court it is in the chambers so keep in mind the importance of understanding the words which are not very familiar to you have a might a look into the dictionary, I knew this I have done this because case where no in many cases I do it in chamber even as a trial judge not as (not audible) ...so I understood this meaning then I first time in a in a district where ask (not audible) to be taken in to the chamber the lawyers raised objections (not clearly audible) can not be done ina a chamber I said why because we would not get that mood to get in to that mood we have to stand and then then talk to that person mentally retarded person ...I said no that is how it is been done I said no ..camera has a specific meaning and I showed them the dictionary. so there is absolutely nothing.. in camera proceedings are to be conducted into the private room of the judge . and see this Blacks law dictionary also contains the same meaning it is not the ordinary dictionary it is Black s..in law dictionary also the same meaning is given so absolutely there is no problem. if somebody says I want to hitch against the bench and ask the question tell them...this is to be...that is one and then your question who had said it section 36 ..missing (cross talks) or not visible to meno no...see this is a very good question and a child is not allowed to see the accused at the time of testify child not to see the accused so the child should not see the accused when at the time of testifytestify I come to that testify ...go to the dictionary ...the special court shall ensure shall ensure that the child is not exposed ..exposed ..so exposed also you get to see in the dictionary in any way to the accused at the time of recording was this will stop this the time of recording the evidence, what is meant by evidence(not audible) very fast there is no time left what is meant by evidence tell me please very fast there is no time left ...sorry ...evidence goes to evidence act we never proceed evidence means I have gone through it just nowall statements just act all statements it is statements which the court permits or requires to be made before it in relation to the matter of fact and all such statements are called (not audible) only the statements this identification for other section section to (not audible)36 this identification fall under 36 yes yes...some body says no please please...this identification found under section 36. sorry ,.....(cross talks).....identification does not involve or a test or a statement identification strictly speaking does not involve an oral statement child is not

evidence I'll tell you please read what you do in identification ...you show the person please show ...whether the person which who has committed offence and be both (not audible) so the girl will say there, show ..showing does not involve involve an oral statement it is only pointing out(cross talk) you please look into it

Participant: (not audible) is covered under section 9 of the evidence

Justice Hema :sorry section 9 is actually identification it is actually ..no..no...no..identification by merely stating you cannot(cross talk)....

Participant: but ,madam ...the object of the section 36 a victim is four year old then he victimize and then heand then she ..saw the accused then he suffering from trauma already ...this is the object of (cross talks not audible)

Justice Hema : yes yes yes I am only on the technical aspect of the section 36

Participant: I..I. my English is not so good ..I i

Justice Hema: No ..no Why should you feel sorryyour English is absolutely fine I am only a..you were not here I was searching for you ...you were not here so we have passed on to some other aspects. what is evidence... so strictly speaking identification is not by making a oral statement, identification can be only made by only showing or pointing out but you record it the person identified (not audible) he pointed out , pointed out and identified then what is your problem ...madam so he did not involved an oral statement though you record that the person has showed the accused pointed out, and he correctly identifiedmay be she may say something but that is not necessary where identification does not amount to does not involve an oral statement or an evidence therefore it is excluded from 36 for the purpose of as madam said at the last toward the last ...you said so many things beta like beti ...but madam...I saw..(cross talks not audible)

Justice Hema :can you show that person to me you see somewhere around

Participant: but madam...I wrote...I wrote...she being accuse then the breach of 36 of the section 36 a..a shall ensure that the child is not exposed in any way ..any way means ...

Justice Hema: see we were only on 30 minutes we were on evidence at the time of recording the evidence that is the expression used(cross talk not audible)

Justice Hema: No..no..at the time of evidence alone child is I mean child need not see the accused but evidence going by the meaning of evidence in evidence act it only involves oral statement but identification does not involve oral statement

Participant: which time see the accused , which time after evidence?...then a after evidence she ...(not audible)

Justice Hema: See the problem is you were not here when the discussion startedanother thing (cross talk)

Participant: there is one confusion my lord has stated that we cannot shall presume, may presume (not audible)

Justice Hema: Oh you are going back to child ..(cross talk not audible) we will meet in another session

Participant: For the purpose of section 29 for the purpose of evidence My lord in Section 36, I cannot take te definition from Evidence Act(cross talk not audible) why should nt we take the dictionary meaning

Justice Hema: No..no..you this evidence because I mean prove comes under not one you have to prove it by evidence evidence as defined is aaa so now I will make you do some exercises, you please go through the chit given to youno start please very fast....chit given to you read it carefully and please obey what is written, Please obey what is written in it go through it carefully and then think think think think.think about

please follow the instructionsin the paperplease have you finished...you thought about itread some thing so so you have finished reading it ...you have gone through the exercise now..to the next exercise ..tell the experience to the next person sitting to you please do it..please do it. you thought about it ..you have to be very honest about it ...then please please tell the experience the person next to you....please please...your are looking at me I will not ask you to say ...

Participant: why i have to share my experience with others...no..no.

Justice Hema:(cross talks not audible.)...finished within such a short timethen you please tell her ...you wont do ...we are not talking crime....I will tell you enough ...now from the exercise what is disclosed is one person is adamant he will not tell you ...but when a child

goes through it the traumatic situation all these experiences you must be thinking it must be a good experience but a traumatic experience she is force to say ...gentle man did not say but in court there is no other way but to say and when you also say a very bold lady judge was sitting in front of me last year ...she is hiring a fees ...with a book as if she is reading....understand she will not tell her neighbour because he is a man...rather she will prefer ... she will prefer a woman so think about the ...object of the ...the women must be there I wouldn't say ..but you feel comfortable to tell women feels comfortable to tell(cross talks)....you have gone throughthe trauma of answering the questions and then exposing...yes.....Ladies and gentlemen just see this picturesnow ...i don't know....now that you have done this exercise a new onejust see this picture ...just see this pictures for two minutes ...and then I ask you a questionso when the child comes before you to give evidence think what you have gone through in this room I understand that this girl will be very very very embarrassed and she will go to several other trauma think about this when you record evidence ok now if you see this picture and just keep looking at it for a little while and I will ask you some questions (silence) OK done, now tell me how many persons are there in this room?... three how many claimants are there in this room ..four ..who is sitting on the chair two boys ...two persons is any one else sitting on the chair.....two persons ...no what is the colour of the curtain brown....what is on the wallwho is standing with his right foot up ...no onewhat is the shirt of the colour of the shirt of the lawyerblue and is one of the judges wearing spectacles? which judges wearing the spectaclesleft one now what is the colour of the suit of the judge ...how many knobs can you see on the wall of the barrister of the judges there two knobs...four knobs in the polish which polish is darker of the emblem on the wall or of the panel of the judge emblem ...on the emblem what do you find in 3Dthat is not 3D anyone else have found something on 3D all right OK I think we can call it again what the point that we wanted to make oneone about oral evidence which mightthere are certain things which you might not speak..you may not be able to tell the truth ...that I cannot speak so so I am not speaking please excuse me we may find out reasons why you'll not speak ...it will not amount to some offence and some sectionsthose justifications come out ...there are some persons who may speak some good some kind of questions like this gentleman spoke to this gentleman(cross talks) fine fine...see we we when we consider this matter we consider basically the majority of the cases ..when it comes to discuss ...most of the people ...we don't discuss one rare case because we are the judge ..did we come for that no..so we solve by consensus that people thought this is not something to speak about ...it is not something to talk about I may not tell you now I may tell you in private ...I may not disclose ...I may not show

what i told ...so what the ultimate point she made was these are the compulsion of the people ..therefore we began with the impactyou are free Indian citizen you are on the top falcon of the society because we are judges ..we all know the sexual acts but here we fear...that we don't want to speak about our sexual acts ..what happens to a traumatized seven years old girl then you will say you have to speak ...if we have to think ...think about that..that is all she said..yes ..now about certain evidence we have to disclosewe are not compelling you we know that not speak..we know that its not something easy to speak and we have shown you that but when you have to describe and then you have to speak ..then there will be cross examination of whatever are the scenario of that time....one scenario from one of the pictures I have got heresome ideas were right some answers were wrong you saw this scene one minute before you start answering you are allyou have to answer me ...ok..yet some answers were wrong no...some people didnt knew that they were CD or no CD..why because these are ...element thingswhen you look at the picture you look at the pp first.....you try to make some sense of the picture you think this is some kind of moot court in a college ...a court in real lifethen what are the furniture ...something like a table near here..three four tablessomebody got confused about the project ...why because there is a confusion question(not comprehensible) this is what happens in oral evidencethe witness cannot see the peripheral fellowoh what is the colour of the wall ..blue....but when the child is being sexually assaulted she is not going to see the wall and remember it she doesnt knows that somebody is going to ask her she does nt know when they are going to ask her and and her memory will say it ..and you accept ...with all these compulsion she is giving her evidence record, it is no joke we all has not given such evidence because we all are fortunate people, this unfortunate girl has to give evidence before us and we are loco parents, please remember this and not only thatOK...no one more thing when evidence is given the reasonwith a compulsion in this court I could not compel you but the child is brought your court and she says I wont say because its shameful for her to say that or there may be so many reasons ...she may be reluctant ..what would you do ..you are bound to say the child ...explain you are bound to ..some judges will say ..no this court some judges..compel but use soft words train the child understanding the child understanding the trauma which you have gone through please..be considerate one aspect I want to tell you about consent ..consent of the child its not...it is not at all relevant ...there is an instance my daughter after completion of law she was addressing children on sexual abuse then I think her presentation was so effective children start running to her andthanks one child told us jiji in my flat security uncle when I was smaller security uncle use to come and do this do that but then I enjoyed it I had some pleasure in it so I enjoyed it but now I know

...that its not correct when this man is coming ...victim to that ...why you did not tell your mother she said see when I was very small this uncle started doing this if I tell her she may ask something and sometimes I say I consented ..she was taking pleasure under this so this is not a shame my mother knows this buteven my mother knows this its better to kill my self...so so when it comes to the court she will always have that fear if somebody ask me my parents were around people are around its shameful she does not know consent is relevant or not ..this fear is always there so keep this kind of..mind while you are examining the witness this trauma which this child has gone through and the trauma to which she will be exposed ...when there is consensus for sexual abuse not knowing things ...she was just enjoying it she mentioned it but then my daughter told me that session one psychologist was also there when she raised some objectionsay no ...no ..no..question enjoying it but fortunately this example came that girl went running to her exitI enjoyed it jiji but suppose my mother ..if I tell my mother I wanted to tell her my parents won't be at home this uncle will come and do itbut if I tell my mother there is a problem ..I just such a shame on me even to my mother she is unable to sayso this consensus ...I mean a ...its very dramatic as far as child is concern so that's all ...

We are having another tea break at 11:15 ...have breakwe will just break for 5 minutes ...tea will be served here onlyjust have a little break

Session: 15: Evaluation and Feed-back

Day: 4

(Note: Justice Roshan Dalvi, continued her presentation in the preeceeding Session on Bail to the first half of Session 15)

(Note: In this Session Justice Roshan Dalvi takes the help of a White Board to explain on a comparative basis "Grant of Bail" in cases of general offences of greater degree under the IPC viz a viz POCSO Act. For the purpose of convenience the same shall be referred to as X and Y respectively in this write up of the verbatim report)

Justice Roshan Dalvi: ...Got an element of violence, somebody doesn't want at all there is resistance from somebody else, oh! baba!, but here there is no violence in it. Now it is for you to judge, which kind of rape cases or sexual offence cases you will not grant bail, and you will grant bail. Whether you will paint everyone with the same brush, or whether you will really classify and say....this is not done. Now, take into account a murder trial, most of the murder trials you are not going to grant bail. So what reason:

- Gravity
- Repetitiveness
- influencing
- absconding all sorts of things

Yes you are not going to grant bail. But yet in some of the murder trials with some of the accused you do grant bail. So, instead of he not done the the offense or he has not used the weapon only, he was just standing near the door or something like that. What do you do? You distinguish, because this is an *intelligible differentia*. So, we distinguish. We say a person versus there telling him somebody is coming or not, you are not going to treat him just the way we are going to treat a man, who actually stabs. Would we do that? No. You have a sexual offense, would you not use your discretion to discriminate between two entirely unequal kinds of cases. That is the question before you, because if you are not doing that, you are actually not a judge, you are some kind of a clerk or a mathematician, it is so and so Section, there is so and so age therefore I don't grant bail understand? But if you use your intelligence by asking these questions to yourself, what is going to be the impact of my order, then you will say here (X)

the impact of my order will be, he might go and influence some of the witnesses. He might abscond and I may not have him at all. But here (she points to the side of the white board where sexual offence has been considered i.e, Y) he is not going to influence which witnesses is he going to influence the father of the girl will give that testimony the girl will not give in any case, if she doesn't want to give in any case, and where is he going to abscond? he has his own house to go to, his parents want him back, okay, so all those (X) there is a distinction. Please draw that distinction like a balance sheet when you are going to conclude a case. Because the the stage of Bail also requires a lot of sensitivity. Now, one last question that remains, somebody said I will release on bail after all the evidence is recorded. What happens... Yes yes! after the entire evidence of the prosecutors is recorded, now if in a 376 case where the evidence is good where his lawyer says that I don't find there is much of a chance now, is he not going to abscond?

Participants: Yes yes cross talks (loud).

Justice Roshan Dalvi: That's upon your choice, because that's what I wanted to tell you, and actually speaking, in just in that writ petition which I have, which I just told you about, What they have told us is, that as soon as the prosecutrix, means that victim child. who was being rescued from a brothel or any such place and if she comes and gives evidence, and if that evidence is reasonably good then after that we find that they are absconding and then what you have to do is the trial is very terse, issueailable warrant, not executed extendailable warrant, all that goes on happening. Now, if this evidence is recorded in any case and if you find that the evidence is good evidence, why should you at all release on bail? Its a case of rape , refuse, don't think more.but start ...that up. Then in that case of course, if you find that the evidence of the prosecutrix is nothing, on this evidence you will not be able to convict`and you will have to go through perhaps some more of the trial, because in our system, medical evidence has to come, and you know it is real find out that some of the cases are lost cases,you can always release on bail at that time. You will let that application. So, just because the evidence of the victim is recorded,please doesn't mean that you release on bail. Consider that evidence then.

Participant: Madam connected with this, is an issues, that if you don't release accused on bail, in such cases where the prosecutrix has given good evidence and chances of the conviction of the case are substantially high then to expedite the trial also one can refuse bail, because in short dates...

Justice Dalvi: Absolutely correct, in fact that is a weapon in your hand. I am not going to release you on bail, but I am going on with the trial, good! convict him. If you think that the case is good and this is the best evidence you are going to have, okay! and followed by this will be the medical evidence. That is the second best evidence that you are going to have for what ever little corroboration that you will require. So, these are the various parameters of recording evidence and of Bail separately in POCSO Courts.

Participant: Madam whether, poverty and social background can be looked into?

Justice Justice: Poverty?, I don't think so, because this is an offence of sexual assault, whether it is done by a poor man upon a poor girl, or a rich man upon a poor girl or a poor man upon a rich girl, how does it matter?

Participant: Cross talks, not audible.entire family...

Justice Dalvi: No what happens to that girl, the family is dependent on him, but that family the upbringing of that family is such that he has become a rapist, and you are talking about this cases, he has, he has the the life of another girl is ruined and you are thinking about the family, then how are you thinking about the victim?

Participant: Speaks out of mice so not comprehensible.

Justice Dalvi: Absolutely right, correct, exactly, that is the distinction, that a judge would make, that yeah if he is stealing something it may be okay! he is a poor man. Like there was that aaaa, there was that incident aaaa I read some anecdote that

One poor man was caught stealing bread, so the King said that you will be sent to the gallows. And once he was going to the gallows, he said that, aaa, I was told that the man who will pull the gillotin thread should be the man, (he was asked for his last wish). so he said he should be the man who has not committed any crime. So, nobody wanted to pull that chain, because they saying that I can't, that is what is his last wish. And then he tells, the King that I am a poor man I stole the bread for my stomach, you, you have got your Ministers and this is the Court and the Royal Palace, and yet there is no one who is unblemished? So, the King let him go, we don't let him go but the King let him go. So, it is like that.

But, as she says, rape is not one such matter, where you have to consider poverty and all and please remember one thing: All judges of our country we have got one tight slap from the legislature. Have you thought of that? I'll tell you, before the last amendment, of the, after

the *Nirbhaya Case*, and I am talking mainly about the IPC now, not about the Evidence Act and the Criminal Procedure Code. 376 was the only Section where we could give less than the minimum punishment. I have been giving this kind of workshops at least from about 1996-97, when I came back from England and I was asked to do it. We went to various other States also, me my other colleagues etc. All the time in this kind of workshops of cases of atrocities against women and children and all that, we were saying that, please don't consider that he is poor, or that he has got two children, or that he has got aged parents and give minimum sentence, because the entire thing dwindles down to nothing. If you find that the offence is committed and you are now understanding that this offence is a serious offence, its against the society, its against our women, its against our children, then when you see that the offence is committed there must be a conviction. And when you see that there is a conviction there must be a proper sentence, otherwise what is the use of your working? If ultimately it comes to nothing. That is what we were saying, now all the time we found, that trial judges said that he has got two young children, he has got two old parents, he is the only bread earner in the family etc. ect. therefore, 2 years, now 2 years one and a half year is over after six months he comes out and he shows the girl see look I am out. And that was wrong, it was very wrong! it was most insensitive and Now, what have we got? Now the legislature has taken away that discretion. Now, if we have got a case of a young boy, who has just had an affair with an young girl, and if she says that yes, I have gone out I did not want and he took me etc. etc. and the consent also has no consequence; even if she went with her consent, you will have to sentence him for 7 years. You see! So, I would consider it as a great affront on the judiciary, because people were seeing this. We were in all these kind of workshops, we were all the time telling please don't use this kind of discretion. Discretion must be used judiciously. It can't be used on wrong parameters, because he is poor, okay! because he is poor, you say that you work in the jail, you earn in the jail and you make a living and you send it back to her parents, or any such thing. BUt trying to do that, then why are we do so only when you are going to try a rape case? Then you find out in the beginning when the charge sheet is filed are you poor or are rich? If they are poor I will not go on with the matter, I have got so many other matters. So, I'll take up only matters which are rich at case. Why would you do that? Please understand this. I am giving you this kind of crass words only to make you think, and it is for you to introspect. So, this poverty etc. you know its in our Hindi films its okay! *Hum Log Poor, Hum Log Garib Hai Isliye aisa hota hai, taise hota hai* and all that, But if *garib* people cause crimes we have got to protect the society. So, we have to think judiciously. We can't be carried away by this and as she says Yes

for a stealing yes, you can still think of poverty, it is a correct appreciation, but not for rape, Alright!

So, these are the parameters and what we would only do is, because we find this, that, at least I am talking about Bombay only, I don't know about other jurisdictions, but I understand, and I suspect and I am, I have been told about others only hearsay of course, that this happens in other jurisdictions also, that you are fearful of the High Court, that you are releasing accused on bail and therefore you are not releasing this kind of accused (Y) , we find that you are releasing this kind of accused (X) so why don't you fear the High Court when you have got this case (Y)? Why should you fear the High Courts when you have got this kind of cases (X) only? If you want to fear? But I don't think you as judges should fear anyone if there is no political pressure, why should there be any judicial pressure? We have to discuss, we can't *indoctrinate*. I am telling you please consider these parameters, these parameters are open way for you. I can't tell you you pass this order, can I? So, you please consider all of these aspects and what you will find is this kind of a balance sheet (points to the white board, where the distinctions on situations for grant of bails in crimes under IPC and Sexual Assault under POCSO has been drawn, as discussed above). Mainly the first two aspects and I am happy that the first two aspects that you brought about are these.

When there is repetitive offence we never give.

When there is threatening we never give. and,

When there is violence we never give.

If all these three things are not there, then why don't you release the man on bail and put the whatever conditions he'll come. He'll not attend his college and he'll come to the police station. But, let him go to the college some other time, he is to be a good citizen after sometime, some years. And this he is doing once to one girl, he has not taken away two three girls at one time, if you have such a case of course don't. Because the fourth girl has to be protected. Thank you.

Participant: Madam recitative offence, means simply by lodging a 3-4 complaints against one.

Justice Dalvi: No, 3-4 complaints, I am sure you are a judge, you would find out who has lodged that complaint also, by and large. But, if you find 3-4 and then of course then you will have to weight his while because until you find out that all these 3-4 complaints are all inter related. But, you see these repetitive cases are generally the trafficking cases, Because there is

one trafficker she may be a women, he may be a man and he actually procures girls and most of these girls are minors, because after 18 years their appeal is lost, so, people go on wanting girls of 14 years 16 years for trafficking purposes. They are put into prostitution and when you find, you must do that statistical study a little bit in your office. You will find that that trafficker is a trafficker in 3, 4, 5 cases and as soon as you find that, the police tell you, the prosecutor-tells you, now a days there is so much of aaaa, we get so much of assistance from NGOs. There are NGOs who work actually for the children who are trafficked, for children who are brought into prostitution and then they will show you, that this trafficker is in so many cases; immediately refuse bail and they are prone to absconding also, because they go somewhere else and they carry on that profession. It is a profession in crime. They have entered a career in crime, that you must stop. Just as you know, you will not grant bail, for example to a robber, who has got many cases in your Court because he uses a weapon, he takes away chains or what ever. So, he is going to do it as soon as you release him on bail, correct? But if you are going to release this kind of a lover on bail he's not going to go and just get another girl. So, please think of that and this repetitive offences if at all in POCSO cases or otherwise also, you have trafficking cases remember under Section, under Article 23 the Fundamental Right is not to be trafficked. That nobody has considered in fact, there is one judgment now, which has come out in the Bombay High Court, there's a case, just now its not even reported I think, it will be reported soon, you can see. That is a case under 376, 363 & the High Court has released on bail, when the trial judge did not release him on bail. On all these parameters. There is no violence there is no question of repeating, he is not going to abscond, he is going to go to college, after wards when you put him in jail, then you have reformation in jail, then why not let him be out and let him go to college. His parents are paying for him. So, all those criterion must be present to your mind, okay?

Participants: Cross talking, discussing [00:16:17]

Sumit Bhattacharya: So, after this 3 and a half day long journey we come to a very happy beginning I would say, because, I am very fortunate to have you all and with an expectation that, whatever the workshop has delivered, or you could gather from the workshop, you would be our ambassadors to sensitize people around you, once you are there out. This is the most important Session Part, which you would be delivering us back. I would also request that there was a Session 9& 10 Questionnaire yesterday, some of you might not given back to me. If it is feasible for you to give it back to me I would be happy.

Prof (Dr.) Geeta Oberoi: I know you people are filling the form. Its the evaluation form that's being given to you? But aaa you know I will have some issues to discuss before you can fill that form, you have, you will be given 10 - 15 mins. First of all I would like to learn from you, I mean, if we have next year conference designed, again this conference, which are the issue that you would like us to take, which we have missed in these Session? This 3 day 4 day conference? This is what first question I have for you. Second question is that we all, I mean Sumit has sent to all of you a pre-training evaluation form, and I think everyone has submitted that? We also require because you know this is new area, its a developing jurisprudence. If we go and search for High Court cases and Supreme Court cases which can act as guidelines for Special Judges who are designated as Special Judges for POCSO Courts, its very difficult very few cases are there. There are cases on child sexual abuse, but, they are before POCSO Court, this Act came into force. Now, just under POCSO Act we have very few judgments that all of you also know about it. So we want, we have requested Sumit has also requested and I am also requesting that all of you can if you can give your best 5 judgments, decisions, orders which you have passed under POCSO Act, these we will try to compile as good practices, and circulate it throughout country. We want to prepare a bench book. Basic idea is to prepare a bench book, the bench book will consist about principles guidelines that you have laid down your self, as POCSO judges, because then they would be used for future POCSO court judges.. So, please cooperate in that, please send your 5 best judgments to us. Some of you have sent, We have received from almost 10 judges but we aaaa require from 23....and we are also preparing POCSO Court Directory. That directory we have til now 500 judges? (asking for affirmation from Sumit Bhattacharya).

Sumit Bhattacharya: Yeah! plus mam.

Prof. (Dr.) Geeta Oberoi: 500+ judges, these are only POCSO court, designated POCSO Court judges with their E-mail addresses and phone numbers, so that if you have any issue you can actually in you State no, who else others apart from you are dealing with this POCSO Court jurisprudence and talk to each other. So, this directory will also be very shortly in a months time be sent to all of you. In your this evaluation form, please dont forget to mention e-mail ID's because we will be sending through e-mail ID's but the bench book in hard form also we will be giving those judges who have actually presided over POCSO Courts in India. With this if you can give me like some feed back like which are the issues that I have left which we should take next year.

Participants: Involvement of the police officers.

Prof. (Dr.) Geeta Oberoi: Okay!

Participant: If somebody who represents a child in need of care and protection would have been called in a combined Session that would have been better.

Prof. (Dr.) Geeta Oberoi: Mam can you come...involvement of police officers as resource person is taken,

Participants: CWC members and other organizations engaged in care and protection of children this should have been good. Medical Officers, forensic science, scientists. (Sorry) public prosecutors, (Public prosecutors).

Prof. (Dr.) Geeta Oberoi: No what are you telling me should I call public prosecutors, medical officers, CWC members in a conference to address you? (No no no) then you want their training? They must be sensitized, but that is a work of State judicial academy and we will tell them. But I(some participant interrupts to speak up something) Okay so stakeholders meeting is required. So, we will may be next academic year instead of just having POCSO Court judges, we will have many stakeholders meeting almost, that will actually have 40 of you ...

That is stake holder's meeting, (Participant: Along with POCSO judges) So, that is what I am saying, we cannot call as training because we don't have mandate for that. So, we can only have stake holder's meeting. Yes! and any other issues?

Participant: Eminent lawyers as a Resource Person.

Prof. (Dr.) Geeta Oberoi: Eminent lawyers, okay! Which kind of eminent lawyers, I mean its a very big...like good experience number of years 10 -20 years experience.

Participant: Particular subject, ...last when I attended the last training in February, there was a lawyer from Supreme Court, who is dealing with cyber crimes, he was very good....

Prof. (Dr.) Geeta Oberoi: Okay!

Participants: not audible. ...

Prof. (Dr.) Geeta Oberoi: Yes directory will be there and directory would be circulated to you along with the judgments, yes. No we did, we had sent all the 500 plus, we have sent to every one. In fact many judges have sent their judgments aaaaa.

Participants: cross talks not audible!

Prof. (Dr.) Geeta Oberoi: No unless we discuss about this project, how can I pass you his judgments. You will say in what context you are circulating me these judgments ? we have to tell you the context.

Participant: Madam I have got one suggestion, if the this academy really wants to collect the good judgments from all over the country all of the States, because I am, because I am coming from West Bengal, So there are another 18 courts are there in West Bengal, like me, so must be passing more good judgments than me. Supposing I have only 5 judgments yaa 10 judgments why cant you send this...

Prof. (Dr.) Geeta Oberoi: No we have sent this to all 500 plus judges.

Participant: No why cant you sent through the Registrar general of High Court so that you can collect more judgments and and a aaa better judgments, that also can be done.

Prof. (Dr.) Geeta Oberoi: Yeah we have done that. We have written to the Registrar Generals of all the States. We have, ...apart from you other people have sent their 5 best judgments to us. In fact about 15 odd judges who are not today present in this, and they are POCSO Court presiding judges, they have passed on their judgments to us, and we are in the process of analyzing and presenting the bench book. Any other suggestion?

Participant:They must be circulated, instead of circulating all the judgments.

Justice Dalvi: ...because they don't know what to read. Either you underline what is the real thing that is in a particular judgment, say its on bail where it is considered very well, or you know something like compensation aspect is considered in this judgment very well. That you know this judge has felt that, why sentence, sentence can be less but compensation can be more because in this particular case that will be the real ends of justice to meet. What ever that, that theme must be told, so, then depending upon the situation, that judge will read. Because the judges have got so much work to do, they cant read judgments of 500 judges. 500 X 5 is 2500 judgments and orders. And then so many will be similar. but when a judge sends he may not think it is similar, but there must be some kind of grain and chaff business you know, before you send it.

Participants: Also some selective judgments , what should not be done in it, what things should be avoided in it.

Justice Hema: unh! bad judgments also must be circulated.

Justice Dalvi: Yeah! to show that this is not so good.

Justice Hema: Yeah not good!

Participants: may be, may be , may be all selective judgments, may be all selective judgments.

Justice Dalvi: See, I will give you one very stag, example of the High Court, aaa , when I was discussing this matters on aaaa gender justice, atrocities against women cases, one aaa lawyer feminist lawyer who does a lot of work only in this area. She drew to my attention, that in one

case, it was a case of gang rape, the trial judge has convicted some 4 accused or so, and the High Court has released all this accused, or rather acquitted all the accused on the ground that in the scene of offence condoms were found. Now, you see this much is enough to set us thinking. One whether if condoms are found you would read into it consent of the women? at the scene of the offence? which is on a road-side. Two, whether condoms would mean that it was one by one, so that they had the time. Three, what is the purpose of using condoms that the accused also would feel, that they would not want to be contaminated. So, how does it mean, that because of that the High Court has acquitted? So now, ...

Justice Hema: They were pointing that Supreme Court judges and High Court judges are less sensitized. They openly said it.

Participants: laugh! ha ha ha ha ...

Justice Dalvi: So you see, these are certain parameters. So, we have to think about those cases now you know, and this is kind of compilation in our minds. but I think somebody tells you to give your 5 judgments you are not going to give your worst five unh? are you?

Participants: cross talks not audible.

Justice Hema: they will not label it as bad. They will not label it as bad. The academy is not going to label it as bad. When you reading the so called good judgments, if another person finds that it is bad, he can avoid that, that is all.

Justice dalvi: No it is not bad and good, it is not bad and good, see we must not get, we must not be carried away by some kind of critique. Our judgments are bound to be critiqued. There are 2 points of view, now take the case of that aaaa, of that, victim of sexual assault, what's her name? The *Uber Taxi drivers case* in Delhi. Where the High Court has said re-record the evidence, the re-examination of all the witnesses, including the prosecutrix and the prosecutrix has gone to the Supreme Court, and she said don't make me repeat all of these things please, its of no use, and the taxi driver says that my lawyer did not do a good job, I have got another lawyer,. So, now I want to record and the High Court has allowed and the Supreme Court has disallowed. And said this is enough, you went to the lawyer of your choice this is the evidence and that will be considered, you cant re-examine the evidence. Now, suppose that High court judgment was circulated, you can circulate that judgment, to critically examine how, re-examination can be done and cannot be done, why should you not do that? You must not be carries away. See, we are judges, so, our judgments are in the public domain, these are public documents, anybody can criticize our judgments.

Justice Hema: No No Nobody is going to tag.

Justice Dalvi: Not to be like this, very good enough, that's all. But why shouldn't we learn from somebody else's mistake? We should not have this complex. See let there is say for example, there is a judgment where a judge has considered the evidence in this kind of a picture which I showed you. And the judge says no, this witness has not said, that it is 3D, but it was 3D. Let's say for example huh!, now this is a very very innocuous aspect, which a witness on a crime scene is not going to see. So, therefore the answer may be right or wrong, but a judge lays

emphasis on that answer which is irrelevant. Now a judgment is circulated, it must be circulated so that this aspect is actually brought to the notice of the reader, that oh! in this aspect, see the judge has said see the emblem which was not 3D is told to be 3D therefore I don't believe the testimony of the witness, and therefore I think that the witness has lied or any such thing, and he has acquitted. So, this is wrong, it is worthwhile to consider that,...but you must understand the subjective analysis, you are analysing various judgments, so you are analysing the good of certain judgments, you are analysing some other judgments to say that you will not do that again. That is actual learning. So, in the learning process, I don't think ki I mean I don't mind if somebody,

Justice Hema: No when you read certain judgments, when you read certain judgments, of the High Court and the Supreme Court, there are various situations where we find, we feel that no this should not have been done. So, what's the point in your saying that it shall not be the circulated. Only if you circulate and read then you will know, I must avoid it.

Participant: argues...not clearly audible...

Justice Dalvi: No because draw your attention!

Participant: But now, we have an academy circulating a judgment saying that this should not happen, that's going to be...

Justice Hema: no no no, that's not going to, that tagging will not be there.

Prof. (Dr.) Geeta Oberoi: But anyway, academic criticism is allowed. If we will not allow, someone else will write and it will be published in Harvard Law Journal, so, I don't understand such a big thing about it!

Justice Dalvi: See, *am not getting, some child sexual abuse case, Satish*, There was a case of a child abuse, an alleged child abuse let us say, aaaaa, of two parties, the parents who had separated. the mother came from America with the child., and the the accusation that was made was that the child should not be sent back to the father, because the child has alleged that she has been sexually molested by the father. this was it. The Supreme Court judgment, deciding on the question of discharge began this judgment, I think you will get it on the net, an "erry judgment against the father". It is Sathish some one, Satish Wadhwa, or Satish Verma or something like that case, and we have discussed this in this kind of a meeting that, look the Supreme Court says an "Erry Accusation" as made against the father. It shows that such an accusation can never be made against any father. But the reality is that we find that, there are some fathers, who may sexually molest their children and some years ago it was supposed to be unheard of, unthinkable, absurd kind of thing, and no no you can't make such an allegation, that is if allegation was made. And we have debated on this that he has been discharged on this case. Such an allegation? Can never be possible and discharged the man. Now suppose this judgment, let us let us take this illustration, because its a concrete one, suppose this judgment is even circulated by the academy to you as a kind of a refresher training after you go back. today you are going back, then you are going to introspect, and you are going to actually have the cases before you. The purpose of this workshop is what that you will think for yourself and

that you may not do one thing which you would have done if you had not comfortable. That is the purpose of the work shop. Otherwise every thing is forgotten. Now, if this judgment is circulated, "An Erry Accusation as Made Against The Father" and ultimately it results in discharge, its not even a charge framed against that man of sexual molestation and now we feel that that judgment was wrong, should have framed the charge you should have found out, how can you discharge a man like that? there must be evidence. Now, no judge will do that, now this judgement to my mind not only should be circulated, but it should be circulated underling this term and leaving you to reflect. leaving you to reflect, that look there is a case of a man he is a father, there is a charge of sexual molestation, the Supreme Court and nobody else, Supreme court says, this is an Erry acquisition and discharges , what would you think now? So, otherwise you may miss it, the purpose of giving you this judgment is to show you this very same line, nothing more. So, it must be shown, it must be told,that is how it must be. And why should we be scared of anyone? like I told you no when I did this, When I thought that I had gone quite a lot ahead when I realized there was no, I never thought that there was going to be a POCSO afterwards, but, when I did this somebody, said what have you recorded the whole evidence nicely, but then you told the the child to identify, and then she had the trauma and you say that her face became asham, but of course I had to do that much, but if this is circulated, and if that person critiques my judgment and says that no, that child had fallen short, even then the child had fallen... then you would think should you do that or should you not? Is identification required or is not? should the judge had not have even identified the accused or called upon to say that who has committed all of this thing and she has to point out? Otherwise you will not think.

Justice Hema: See I will tell you one example of a judge I mean judgment which I have seen, that was a case where 17 year old girl, was allegedly raped by a person who was employed abroad. Dubai! the Court commented, that the persons from Dubai, is a good catch for the girls these days, and found him not guilty acquitted and directed the amount which was deposited to given to the girl as a presumptive gift from the Court. What do you comment about this? understand?

Justice Dalvi: Now, this is a new thing, it may be good or it may be bad,

Justice Hema: See 17 year old girl was allegedly raped. See the Court found, the person to be guilty, the Court, I mean passed an Order sentenced him for fine also, and compensation also. it aaa i mean appeal, the Court finds the accused not guilty. And the accused not guilty and a comment is made: that these days for girls and parents a person is gone abroad, who are working abroad is a good catch, then after finding him not guilty, directed the amount which is in deposit , which is to go back to the accused to be given to the girl as a presumptive gift. imagine, imagine? What is your comment about it? No no that is not, see I felt, the girl is insulted, insulted and who wrote this judgment? None other than the Supreme Court. No see, it is not the question of getting money or not giving money, I felt insulted, to say that a man from Dubai is a good catch for the girl! No for giving false evidence, oh! you take this as a presumptive gift, if I was a lawyer, I would have sent that money to the judges daughter. Just imagine, so shocking? But it came from the Supreme Court.

Justice Dalvi: But you see the *Bhawri Devi Case* have you heard of it? It was of our generation and not your generation I don't know, but its a long ago case, where there was this, where there was only this observation. that a man from a higher caste would never have raped a girl from a lower caste. Now, we know that there are so many such judgments, so now you have to circulate that judgment, so that you miss that i would say you must underline that, that this is the observation. Then there was that case very popular case of a domestic violence, where the judge asid that it is a victim aaaaa, ummmm, what is that called? ummm this women was a victim no where she was domestically violated and the observation was; that this was a victim initiated something, she asked for it, in short you know. that the husband could have been violent. So, what if the husband beat her up? She invited something, I am not getting that expression Now, may be...I am not getting it just now, But that was the only observation, the rest of the things were the same. If this judgment is to be circulated to you , you may miss out this observation, and you may say why have they circulated this judgment? There is nothing else in it. So, but the judgment will be circulated to make you feel that this kind of bias in the mind, the gender bias, leads you to a wrong conclusion which you should not have. that is how you can enhance yourself. that is the purpose of distribution, and therefore, I told Geeta that please don't just distribute all the judgments which are sent, if they are more or less the same that everybody else, there is no need to distribute. You find out if there is something new, something innovative in it, underline that, distribute that. then you know, from each one you can learn. If you want, don't give the name of the judge its very fine, why should we know which judge from which State has done that? We should know, what is that?

Even that thing about, in a rape case there was a judgment, an English judgment, where, because the girl wore a mini skirt, the judge said she called for it, she asked for it, and he was derided that you can't say that she asked for it? because it doesn't mean that because she is promiscuous you do that. Now you have to hear, you have to take that judgment, every thing in that judgment there is no need to read. but this underlined portion and then you will think that this is because of your gender bias.

Participant: Not clearly audible....

Justice Dalvi: So, therefore it happens you know, some time if you question is asked in cross-examination, this judge has asked such a question. 10 other judges will not ask such a question if they read it what is wrong in showing that?

In fact it should be shown to that same judge. that's the best thing you know? So, that the judge thinks that have I done that? I will never do that again. What is wrong in that? that is how we learn.

Participant: Madam in case of 437A compliance of Cr. P.C. after judgment, a poor man or a poor accused he is not in a position to give bail, for compliance of section 437A of Cr. P.C. even though he is acquitted in the case.

Justice Dalvi: No No, if he is acquitted then afterwards I don't know how you can grant compensation? If he is convicted?

Participant: No No Ma'm not compensation,

Justice Dalvi: Ah ha, achaa achaa, a haa haa, yes yes..that's the amendment now,...the the law.

Participants: noise not at all audible to be reduced to writing.....we are facing too much problem Madam.

Justice Dalvi: So, you can't release him on bail, because he doesn't give ...

Participants: cross talks.....He is before us but he is unable to furnish the bond, because no one is there to feed his surety, one the judicial side we are acquitting that man.

Justice Dalvi: how can you take him in custody when you acquit him? One judge has decided that there is no case

Participant: Then there is no compliance of Section 437 A. That is the mandatory shall. the word is used shall.

Justice Dalvi: See these are the things that we have got to think when we ...

Participant: What I think Ma'm, i think he should be released then and there only on peer bond. what is there, what is the necessity to take all the bail bonds? If you are acquitting him, is it necessary to take any further bail? yes!

Justice Dalvi: But personal bond is contemplated within this that means.

participant: No, no Ma'm.

Justice Dalvi: Bail bonds with surety?

Participant: Yes, with surety. Section 440 will also become operative. He can always seek that I cannot produce, because i am Bombay I've been tried in Delhi, there is nobody around her, my family doesn't know, that I am under trial? he is a vagabond, he has nobody else in the world and nobody is going to be surety for him.

Participant: the bond will be in existence for 6 months, so whether we have to keep him in prison for 6 months? we can't, we can't.

Justice Dalvi: I don't think that will ever be contemplated if you are going to acquit him. Because otherwise what is the use what is the value to you of your own judgment? You say that this man cannot be in jail, now he has been in jail, I am acquitting him, then how can you keep him in custody again? After seeing all these evidence?

Participant: In my opinion it is not applicable to indigent persons, (others hoot out it is applicable in all cases)...

Justice Dalvi:: See this provision has come because of the difficulties faced by the High Courts actually, that after appeal against the acquittal nobody comes, securing the presence of the accused. And in the appeal, for that purpose.

Participant: When there is a appeal against acquittal.

Participant: My Lord again another question on the same point, suppose Hon'ble Supreme Court has granted the Bails, after recording the evidence, I find that clinching evidence is there, and then I take the accused in the custody. Whether it will not amount to be the contempt of Court? Or it will not amount the subordination?

Justice Dalvi: In-subordination?

Participant: yes.

Justice Dalvi: My answer would be no. Because my answer would be that you are the right judge now of the facts of the case, you are the...

Participant: But the criterion of cancellation of bail is something different. for granting the bail, that is provided separately. Once the bail has been granted, that is very difficult to cancel until, unless some ground is there, which is there, accused is not appearing etc.

like that, no let us take the practical situation, if you don't put him in to custody, how will you secure until you finish the trial, you will, if you will be able to secure then it is fine, i think we need not worry about supreme court because, i think we need not to worry about High Court or Supreme Court because 309 gives power to the trial judge to take the accused in to custody any time, but for any time means for change circumstances, pardon, madam we can take in to custody where there is a breach of the conditions of bail, that is very clear, that is a different situation, both are right on that, his question is different because now what we got the situation that formally what was the situation, you start a case and you finish that case then you take another case and you finish that case, that is the best situation, under 309 that is contemplated that cross examination go day to day and all the witnesses are examine one by one but now in the POCSO you have to record the witness of the prosecutrix or the child victim first within 30 days and finish that up so you are recording evidence of only one one one one witness now a days because of that situation will be after that evidence is recorded there will be lot of time gap where some years until you come back to the same case and you are able to finish it then in that case what it says that all your effort go down the grave, it is the travesty of justice that you record the evidence, find out that the evidence is good, don't do any thing about it, take a long time, allow the accused to abscond and then say sorry, no but there is a reasons available in the Cr.P.C., who is speaking, we can issue NBW, we can claim proclaimed offender, we can attach his property, of course you can do all of these things but which get you nothing, which get you everything except the accused, yes mam, you know that, you know that better then i do, it happens every day, it use to feel that all the time and we don't to go wasting out time

issuing the nbw that is what i said we actually want to record the evidence and do that constructive works on merit that is why he wants to do otherwise all the time we can you know some judges are there cancel the bail, that way we don't want to do that, because of the POCSO if they are going to abscond, i this that will be the travesty of justice and i have found this, i have been told that the matter is before me under the trafficking cases, under ITPA cases, that this girls are rescued then some of the girls gives good evidence and after that evidence, there is nothing like, you record the evidence of that child first under the ITPA act, there is no such provision so trial basically goes on, but as soon as they get in to situation that this evidence is now given, she has witnessed the cross examination and this evidence is good then they abscond that is the actually writ petition before me, this is what actually happening madam and then they have issued NBW, they are not getting the accused, but my lord i am asking one question, pardon me for asking that question, during your career as session judge after getting the clinching evidence in the matter, where the Hon'ble High Court and Supreme Court granted the bail, in how many cases my lord has cancelled the bail, this law was not before me, i have not cancelled the bail, when i find that evidence is good, i just go on quickly with that trial and i have not adjourned the trial, that i was doing, because in my case 309 was absolutely applicable and i use to say once i take up the matter, i will finish the matter then, so there were times when i use to go up with the trial and what the accused would do, he would say that advocate does not come, so i can't do anything, i use to go one with the other witnesses, you record the evidence, i called the matter, i called 6 witnesses, i was constrained to do that but what i did was after the first evidence was over etc. i recorded the first witnesses, third witness, forth witness, no cross examination, he use to just cancel, he can not stand up and say, my lawyer is not there so i can not be examined. how long you can go with the court like this and then u have to call witness again and then his lawyer said, now i will not release you, i will cross examine everyone so there are various things and these are different technical methods no but i have not cancelled the bail of any one, that is correct.

mam, section 309 i beg to differ you, as far as the interpretation you have given that the trial should be conducted day to day basis, to my mind and to my own knowledge, the witness to be examined and in case any witness remains to be examined the only it has to be adjourned for the day, yes correct, not otherwise, absolutely right and 4 witnesses can be called on the given day under the rules, under the criminal manual so the prosecutor have to make them, day

to day trial does not mean that a case has to be listing to the very next day only, it may not be but it should be, the very next day, the very next day, ideally so that you take up that one matter and that is in fact the whole point, yes yes it mandates that but you can always call the other witnesses on the next day, no body prevents you, you do not have to call the witnesses after 23 days only, you can say tomorrow now they can bring the last witness, please remember always you are the caption of your court so it is not so that section does not say that i have no power, its not like that so gentlemen asked whether i have cancelled the bail, my honest answer is no, i have not cancelled the bail just because some evidence is recorded but when i have found that this evidence is good, i have held on to that case and i have finished that up.

309 explanation (2), pardon,309 explanation (2) exactly the same words, i just read that - the terms on which the adjournment or postponement may be granted, explanation (1) sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears that for the evidence may be postponed, may be remained by demand, this is the reasonable cause for remanded, the accused can be remanded, no need to cancel the bail, can be remanded, no no no no, this is after trial, this only comes in to picture after trial. If the intention is just to remand him, we are not considering gain remand because if he if the trial is going on and he is on the bail, we can't remand him into custody, it is clear that we don't do, madam, but there is nothing that prevents us from going to day to day, it is so simple and you see once that whole climate is settle, i believe, that is my experience, that lawyers also come to know that see this judge means business and he or she going to go on and finish it up so they make their arrangement after some time and after they try their level best to sort of pollute down, ultimately they feel they we will have to go, we will have to go and you can finish up the matter, this is the best thing, madam i beg pardon for a silly question, when you are talking about this demeanour, demeanour of witness. yes, what is it mean? is it the demeanour during the trial or pre trial stage when he or she appeared as the case may be, the witness appeared, whether it includes or not, i think only trial, may i submit, may i submit, may i submit , may i submit , in POCSO case, initially in 2014, last year, sorry, i conducted a trial in order to comply with the precautions and the safeguard provided in the act, i directed the doctor, who was present in my court to bring the prosecutrix from my chamber, while doctor and the victim child they were inside my chamber, i put certain question to that girl, she was at that time 15-

16 year old, she was ravished by her own grandfather then i noticed that while replying the question which were put by me, she avoided the eye contact with me, ok, and when she appeared in the witness box, prior to recording her deposition she also avoided the questions being put to her by the public prosecutor, so should those demeanour come under the definition of demeanour or not, strictly, but this demeanour which you said is the same in trial and pre trial, so in the pre trail its the same demeanour, but the question which i had put to her in the chamber, whether included the demeanour or not, there is no need because you said demeanour at the same time so if the demeanour is the same in trial that is enough for you, during the entire recording of her deposition she had avoided the eye to eye contact, by and large it would be like this only because suppose the case is false, it is false forever, if this case is truthful, it is truthful for ever so that the demeanour will not be drastically different at two times for the same witness for the same case, it cannot happen, it can be cover under section 165 evidence act, yes 165 evidence act you can record, whatever you want and you have to record the demeanour of the witness like in one matter in rape case for lady went on doing this without and she was really, not wept but she was really sort of change her so the judge recorded that she has always been flicking with her sari or pallu, madam i have a question, with respect to section 35, there is a mandate of, of, POCSO, 30 days i have to take the statement of the child witness within 30 days, yes, so from the date of taking cognizance of the offence, which is the date of taking cognizance, first January, how will i tell you..hahahaha. judicial minds..haha..there are conflicting views, taking cognizance, as per 193 of Cr.P.C., yes, when the committal proceedings, yes and exception of the., yes section 193, whereas the various High Courts especially kerala High Court says and the supreme court says that when the judge is applying his mind, judicial mind, that is the date, recent supreme court decision, contrary view has been taken, as a POCSO judge, see what i would read is we want to do our very best, don't we? whatever we have to do, we do, now this section to my mind says one thing do not go on and on with 6 witness in every case when various other cases remain in the backward, two record the evidence as soon as possible, before she loses her memory, intimidate her, before she dies, before several things would have happened, that is the real purpose and objective of this section, now instead of 13 days even if you give 30 days also you are not going to be dismissed from the services, actually we know as a judges we know that legislature says 30 days we cannot accord 30 days, even if you sit for 15 hours a day to go and record the evidence because our matters are so many, in Bombay there is lot of back log, tou first take up that so instead of from this date or that date, strat recording and finish recording instead of doing this, you know, so on merits you will decide the best, then let the supreme court decide, they have

got lot of time, they have not recorded any evidence, decide that which is that date and all that, you are bound by the supreme court judgment, madam, madam, another question, as per the mandate of section 33, the special court shall ensure, it is the duty of the special court to ensure that the identity of the child does not disclosed any time or during the course of investigation and trial, in 99.9% cases the police file the challan, reported in section 173 Cr.P.C., disclosing the name of the prosecutrix, yahi hoe raha hai, yes they are doing because we have no control till the challan is not filed in our court, but then that requires police officer to be in this room..hehehe..then we will deal with them also, i have conducted one training of police officers in mumbai when all these questions were there and it was quite some time back now we are back we have got POCSO so formally also we use to day do not give the names, ink it out etc, it was not the law at that time so therefore, the refrain was but how can we do it like that, it is the, in delhi also, in my state also, mam it is at several places, MLC, initial report you have the name, list of the witnesses you have the name and address and in some FIR the, even have phone numbers, mobile phone numbers, child, yes they use to give, arre Geeta, what is your mandate on this, there is a national police academy, we will tell them to look after this issue, now i think its time to say goodbye and give a big round of applause to Hon'ble Justice Roshan Dalvi, Hon'ble Justice K. Hema and Ms. Dr. Manju Mehta, claps ...and to all of you as well. thank you, thank you so much and please also give some round of applause to Sumit Bhattacharya, this is his first programe you need to encourage him and please send your judgements we are not going to categories them as bad good or any thing worse or anything, no categorization, no labeling, its only that we have a jurisprudence culled out in this particular subject which we do not have.