

NATIONAL JUDICIAL ACADEMY



Refresher Course for POCSO Courts

at NJA, Bhopal

03rd to 05th January, 2020

Programme Report

PREPARED BY

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The National Judicial Academy organized three day “Refresher Course for POCSO Courts” from 03rd to 05th January 2020. The participants were Special Judges of POCSO Courts from across the country. The POCSO Act requires judges to modify/tune practices and attitudes to ensure that the proceedings are sensitive to the needs and rights of the children, to adopt measures to prevent exposure of the child to the accused while ensuring that the rights of the accused are not jettisoned. The judges presiding over POCSO courts appear to face constraints in implementing several provisions of the Act. The objective of the course is to acquaint the participants with international perspectives on sexual offences, victim protection, child-friendly court procedures, and the best interest of the child and the role of the POCSO courts. The course was designed to facilitate discussion on issues related to recording and appreciation of evidence, presumption and burden of proof under POCSO Act, age determination, and rehabilitation and compensation for child victims of sexual offences. The course also provided a platform for POCSO court judges to share experiences, insights and suggestions with resource persons on issues concerning POCSO adjudication.

Session 1: Setting the Tone & the Dynamics of Reporting and Disclosure: The ABCs of Child Sexual Abuse and its Perpetration,

Session 2: The Child’s Capacity for Providing Testimony: Applying the Child Development Lens

Session 3: Evidence Eliciting under POCSO: Child Friendly Methods & Techniques for Interviewing Children and Adolescents.

Speakers: Dr. Shekhar Seshadri & Ms. Sheila Ramaswamy

Chair: Justice Shalini S. Phansalkar-Joshi & Justice S. Vimala

First three sessions were allotted specifically for understanding the dynamics of Child Sexual Abuse (hereinafter referred to as CSA) and evidence eliciting from victims of CSA. The sessions were conducted by team of experts in Child Psychology and Child Sexual Abuse from NIMHANS

Bangalore headed by Prof. (Dr.) Shekhar Seshadri. Justice Shalini Phansalkar-Joshi set the theme of the conference and emphasized that POCSO Act uses the term – “Child Friendly Court”. The time has come to introspect as to whether our POCSO courts are really child friendly courts. She stated that it is the responsibility of each and every POCSO court judge to see that he creates atmosphere of faith in the mind of child about his/her court. For a judge child may be just another witness but for a child, it may be a life-time experience. Justice S. Vimala then took over and read out a poem “I AM A CHILD” quoted on case of *M. C. Mehta vs. State of Tamilnadu (AIR 1997 SC 699)*. The floor was then handed over to the team of experts from NIMHANS. Prof. Shekhar Seshadri started his session referring to the term “Child Friendly Court”. He said no doubt POCSO Act envisages the court as child friendly, but what about the procedures. Our procedures will always be as legal as it can be. Our procedures in court also have to be child friendly and then only it will be a fully child friendly court.

Then he went on to discuss the history of CSA law in India in brief and stated that whenever one talks about the child sexual abuse our first perception is that this is a foreign concept and nothing of this kind/sort happens in our country. The majority of the peoples try to suppress it. In this atmosphere, first study was carried out by UNICEF and Government of India in the year 2007 about child sexual abuse in India. Then there came the PIL by activist Sheila Barse and with cumulative effect of all these POCSO Act 2012 came to be passed by the parliament. Then he did a small exercise involving a participants and asked them to close their eyes and memorize their childhood, good or bad, and re-experience the same. Participants were then asked to share their stories if possible and it was emphasized that you should always keep in mind while dealing with child sexual abuse that it is very difficult to handle the memories relating to it. He shared a poem by 14 year old CSA victim – “I asked you for help...” and requested the participants to be more sensitive to children. Then he explained the basics of CSA and emphasized that it can be penetrative or non-penetrative, touch or non-touch, digital or non-digital etc. but in all cases it leaves non-erasable scar on the mind of child. Ms. Sheila Ramaswamy then explained how different children have different behavioral responses quoting a situation, where if three kids have failed a test and one thinks it’s okay let it be, we’ll score next time and the other is scared of his parents goes to stay at his friends place and the third one goes to home and commits suicide, there by explaining the behavioral responses of children. She also emphasized that what may be

traumatic for one child may not be traumatic for another. Impact of a trauma on children varies based on the nature of family support, the care and protection from the family. Then the general profile of the perpetrator of CSA in the mind of people and the reality is explained suggesting that it is not always that a person who looks sober and gentleman cannot be the perpetrator of CSA. It was explained that child sexual abuse is made possible by Coercion & Threat, Use of Lure and Inducement, Transmission of Misconceptions about Sexual Behaviors and Norms, Blaming the Victim etc. It really impacts the mind of the child and in situations a child may himself/herself guilty. The index of suspicion of CSA with symptoms and signs was discussed. It was stated that, sudden onset of bed wetting, aches, pains, general ill health are the early signs of CSA whereas Symptoms of depression/ Post-Traumatic Stress Disorder, Sexualized behaviour, clear hints given by child, pregnancy, sexually transmitted infections, genital injuries etc. are the lateral signs of CSA. The concepts like consent, informed consent, ability to give informed consent was also discussed in detail.

In next session, speaker discussed the dilemma of minimum age for being witness in Court. Sec. 118 of The Indian Evidence Act, 1872 lays down that *“All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind”*. The Indian Evidence Act does not talk about age below which children are incompetent to give evidence and not specifically defining ‘tender age’. But physiologically and psychologically, it was suggested by the experts that, a child below 1 year of age is completely unable to give evidence. A child of the age of 1 to 3 years can give evidence subject to his mental and physical development. And the children above 3 years can be a witness if he satisfies the conditions laid down in Indian Evidence Act, 1872. Ms. Sheila then conducted an activity for the participants to help them understand better identifying child development needs and how such child might have been impacted by trauma. In the activity the participants were divided into five different groups which are heads of key areas of development of child, which are -

- Physical
- Social
- Language

- Cognitive
- Emotional

The groups were required to pick up the relevant cards which they think would belong to their domain and sort the cards according to abilities and skills and arrange it according to age specific abilities in general viz. –

- Age 0-12 months
- Age 1-3 years
- Age 3- 6 years
- Age 6-12 years
- Age 13 to 18 years

The object of the activity was to make the participant judges understand the process of child development and how important it is to apply such process to determine the age of the child while taking the child's statement regarding the incident of sexual abuse. The speakers at the end requested the judges to be sensitive to the child's inner voice while eliciting evidence from child witness.

In the last session of the day, was based on theme evidence eliciting in cases of child sexual abuse. The speakers introduced the concept of forensic interview. A forensic interview is a non-leading, victim sensitive, neutral, and developmentally appropriate investigative interview that helps law enforcement determine whether a crime occurred and what happened. Interviewing of the child should involve four phases viz. Rapport Building with a Young Child, Ensuring Accurate Reporting, Training in Episodic Memory, and Recording the Statement. It was emphasized that it is not the actual act of sexual abuse but rather it is the process which perpetrator followed to abuse the child should be taken into consideration and to be understood. It was stated that perpetrators are very clever and they understand the child psychology more than anyone else. This fact should always be kept in mind. It was suggested that while recording the evidence of child questioning should proceed from general to more detailed. At the end Justice Shalini Ma'am suggested that examination of child witness should be by following chronology –

- a) Examination-in-chief of child – Covering all evidence/facts except identification of accused.

- b) Cross-Examination of child – Covering everything except identification of accused.
- c) Examination-in-chief of child – As regards identification of accused.
- d) Cross-Examination of child – As regards identification of accused.

This procedure will save the child from being exposed to the accused or being made known about the presence of accused in court hall before his/her cross-examination. It was also suggested that while recording the evidence of child, use of pictures, dolls should be made which will make child more comfortable than physically showing the body parts. The session was ended on the note that POCSO Act expects judges to be sensitive to the needs of children and this sensitivity lies in your choice of methodology.

Session 4: POCSO Act with Special Reference to 2019 Amendments

Speaker: Dr. Geeta Oberoi

Prof. Geeta Oberoi initiated discussion of this session highlighting the date of enforcement of 2019 Amendments to POCSO Act. She emphasized that judges should always keep in mind that, date of publication of law in official gazette and date of enforcement of said Act can be different and judges should be very careful about it. Then she referred to the changes to the POCSO Act brought by 2019 Amendments and stated that, measure changes have been made in sec. 3 and sec. 4 of the Act. Punishment for penetrative sexual assault has been enhanced and also a new offence has been introduced in POCSO Act regarding the child pornography. She shared a study conducted by her about the sentencing practices in POCSO cases across the country which reveals that there is no uniformity in sentencing in POCSO cases. This is one of the major reason behind 2019 Amendments which limit the discretion of judges in POCSO cases as far as sentencing is concerned. Justice A. V. Chandrashekar concluded the session by highlighting that there are no sentencing guidelines in place in India and that is one of the major reason behind variance in sentencing.

Session 5: Age Determination (of victim and perpetrator): Challenges and Solutions

Speakers: Justice Shalini S. Phansalkar-Joshi & Justice S. Vimala

Justice Shalini Joshi commenced the session with a note that one of the very important issue that arises in POCSO cases is of age determination of victim and perpetrator. It was pointed out that Sec. 34 of POCSO Act gives power to Special Court to determine age but neither POCSO Act nor Rules thereunder prescribe any procedure to be followed for age determination. Here, law of precedent comes into play. Hon'ble Supreme Court has settled this issue in case of *Jarnail Singh vs. State of Haryana [(2013) 7 SCC 263]* and held that the Procedure laid down in JJ Act and J Rules should be followed by Special Courts under POCSO Act to determine the age of victim and perpetrator. It was emphasized that, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (herein after JJ Rules), where the in every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining—

- (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

Most of the participants raised issues regarding age determination and panel tried to clear their doubts. The session was concluded saying that POCSO Act is a special legislation providing for welfare of the children and in case of any difficulty of two views in age determination, it should be interpreted in a way in which it gives benefit to the child, either victim or perpetrator.

Session 6: Recording & Appreciation of Evidence in POCSO Cases

Speakers: Justice Shalini S. Phansalkar-Joshi & Justice A. V. Chandrashekar

This session was commenced by referring to the earlier sessions conducted by NIMHANS team wherein they have enumerated the issues in recording the evidence of child witness and

psychological aspects in it. It was suggested that, there are many judgements of supreme court laying down guidelines for recording of child witness, but what is more important is that a judge who is recording evidence of child witness should be more sensitive to needs of the child. The speaker referred to the case of *Karnataka High Court in State of Karnataka vs. G. Narayan Murthy*, wherein it has been observed that, “... *it is necessary for the Courts to appreciate the trauma, which a victim of any age, under-goes in these situations when one has to virtually relive the horrifying incident and in the background of emotional struggle the very serious limitations when it comes to the question of describing before the Court as to what happened. It virtually means that the victim has to almost re-enact the incident, particularly while facing cross examination which is one of the most traumatic aspect, even in cases where due to passage of time, victim has to some extent recovered.*” Other important cases viz. *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384, *Lillu @ Rajesh and Anr vs. State of Haryana MANU/SC/0369/2013*, *Jaikumar Vs. State of Madhya Pradesh* etc. were discussed to highlight the need of appreciating the evidence of child more sensitively. It was reiterated that, children may give stray admissions in their testimony or when they are exhausted, they may give admissions, which should be dealt with carefully and should not be normally termed as contradictions and should not form the basis of acquittal. Justice Chandrasekhar, urged the judges to be more compassionate while dealing the cases of POCSO and especially with child witness.

Session 7: Presumption & Reverse Burden of Proof under the POCSO Act

Speakers: Justice Shalini S. Phansalkar-Joshi & Justice A. V. Chandrashekar

The next session was Presumption & Reverse Burden of Proof under the POCSO Act. The session commenced with discussing the concept of presumption and kinds of presumption under Indian Evidence Act, 1872. The terms like “May Presume”, “Shall Presume” & “Conclusive Proof” were revisited and discussed to highlight their relevance with POCSO adjudication. Speaker then explained the concept of reverse burden of proof stating that normally in criminal law, accused is presumed innocent and it is for the prosecution to prove beyond reasonable doubt that he is guilty of the offence charged. But in reverse burden, it is for the accused to prove that he is not guilty once the prosecution establishes certain facts. The culpable mental state i.e. mens rea is presumed

in POCSO cases and accused has to prove positively that he is not guilty. No doubt, it sounds strange but is necessary in the age of increased CSA. Section 29 of POCSO Act states that, 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. Here it is always open for the accused to prove that he had no mens rea or has not committed any offence. Here, burden on accused is not to prove it beyond reasonable doubt but to prove it on the basis of preponderance of probabilities. Justice Chandrashekar concluded the session with a request to all the participants that whenever the issue is of interest of child, try be more sensitive to child and think about his future.

Session 8: Rehabilitation and Compensation for Child Victims of Sexual Offences

Speakers: Justice S. Vimala & Dr. Bharati Ali

The eighth session was Rehabilitation and Compensation for Child Victims of Sexual Offences. Justice S. Vimala started the discussions in the session explaining the aim of the session and emphasized that judges job doesn't end when judgement is pronounced in POCSO cases but they also need to focus on the aspect of Rehabilitation and Compensation for Child Victims of Sexual Offences. Law provides ample powers to special judge under POCSO to award compensation to victim even at interim stage and also at the conclusion of trial. The decision of the case viz. acquittal or conviction should not have any bearing on the award of compensation. Dr. Bharati Ali explained a study conducted by them about the award of compensation and expressed that judges need to be more careful while deciding the quantum of compensation. Many factors like, emotional and psychological trauma, treatments, loss of wages/job, relocation needs, etc. need to be considered while passing orders of compensation. Rule 7(3) of POCSO Rules envisages certain factors to be considered while deciding the quantum of compensation. Again it should also be looked that the compensation is paid in time and not only in paper. Important judicial precedents viz. *Nipun Saxena vs. Union of India* (2018 SCC OnLine SC 2772), *Bijoy @ Guddu Das vs The State of West Bengal* (Supreme Court Judgement dated 02.03.2017), *State of MP vs. Mehtab* (2015)

5 SCC 197 etc. were discussed in detail. The scheme of NALSA dealing with compensation to victim and its relevance was highlighted.

Session 9: Age Determination (of victim and perpetrator): Challenges and Solutions

Speakers: Justice S. Vimala & Dr. Bharati Ali

The last session of the refresher course was POCSO Adjudication: Challenges and the Way Forward. In this session, the participants were asked to share the challenges and problems faced by them and also share their experiences as to how they dealt with it, if at all. The most common problems/challenges were lack of proper infrastructure, non-availability of services of child psychologist, no support from prosecutorial agencies, no proper training to medical officers, Non-availability of forensic reports on time, non-cooperation from defence advocates, non-availability of translators, no exclusive POCSO court, informal settlements by parties, lack of training to persons dealing with POCSO investigation and inquiry etc. Another important problem was of romantic relationship cases involving children of 16 to 18 years of age. It was suggested that, lack of infrastructure is a common issue in India and at government level as well as higher judicial level it is being discussed on top priority. So we hope that this will be solved in near future. As regards other issues, judges need to be more proactive and manage the things in right perspective. At the end speakers appreciated the active participation by all the participants and thanked all of them for making the refresher course a great success. The refresher was concluded by Prof. D. P. Verma, Additional Director, NJA Bhopal by expressing vote of thanks.
