

Are Special Laws really implemented in a Special Way?

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Dealing with CSA: Need for a Different Approach

Sudesh Jhaku vs. K.C.J. & Ors. [62 (1996) DLT 563 : 1998 CriLJ 2428]

The court observed ...

It was high time when a fresh look was taken and principles evolved which, while protecting the child, do no harm to the defence.

Sh. Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors. [115 (2004) DLT 174 : MANU/DE/1088/2004.]

The court observed ...

Radical improvements are required with a view to nail the real culprits and save victimisation of innocents so that the faith of general public in the criminal investigation system is not eroded.

Time taken for recording a child's testimony

Chart 8.1
No. of Hearings for Recording Victim's Testimony
[in per cent]

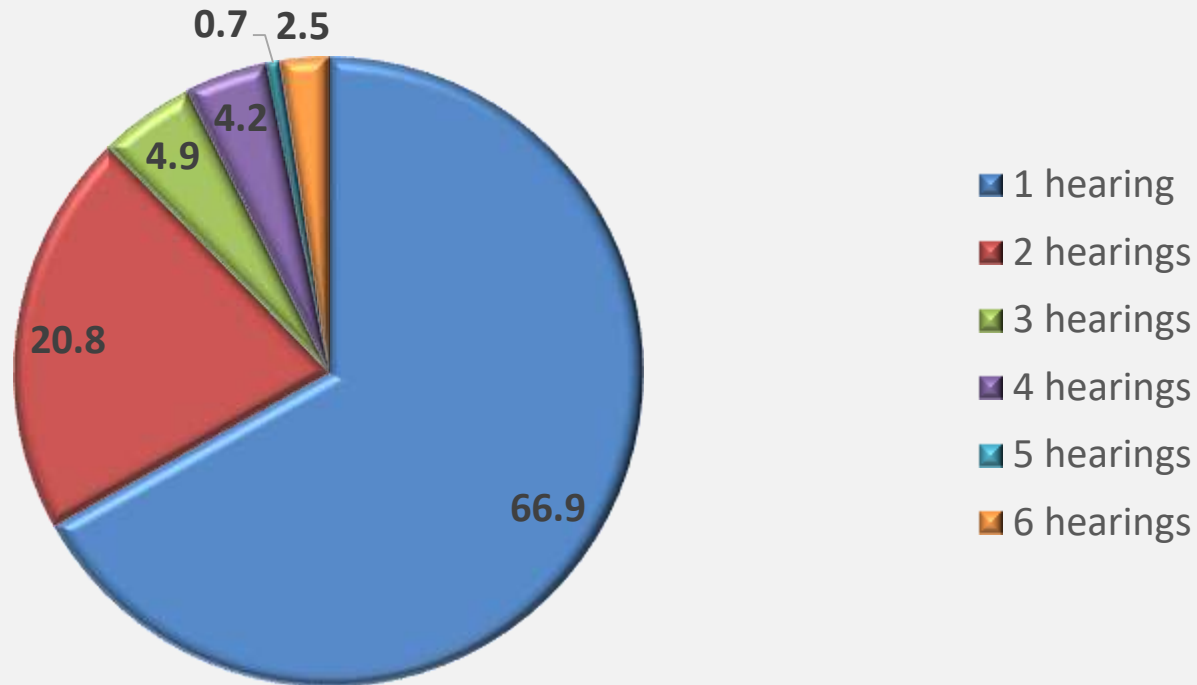
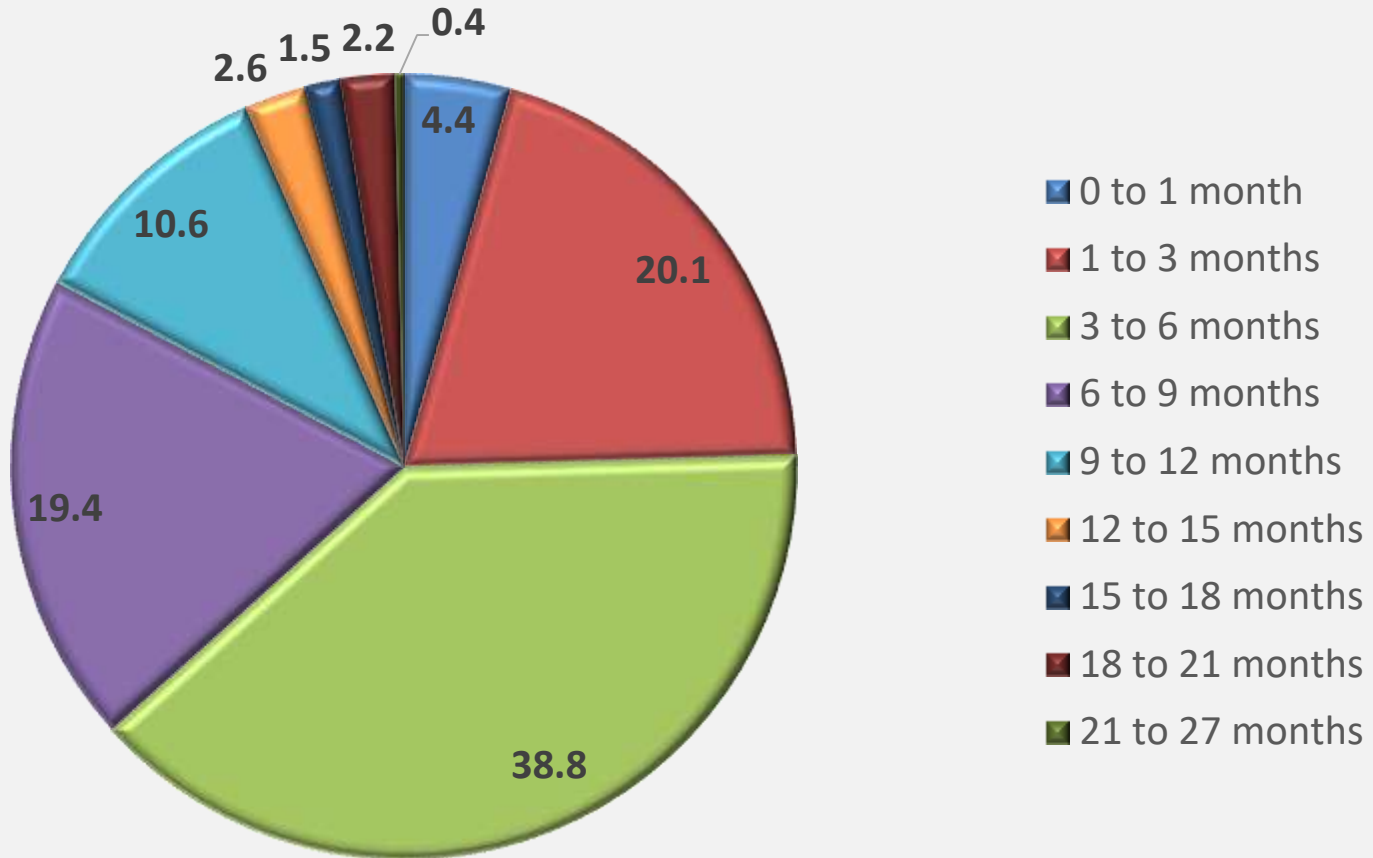


Chart 8.2
Time taken for recording the testimony of the victim
[in per cent]



- In 66.9% cases, children came to court only once for getting their testimony recorded

BUT...

- In 89.4% cases, children's testimony was recorded beyond the period of 30 days from date of cognizance, extending as far as 27 months.

NUMBER OF HEARINGS FOR RECORDING CHILD'S TESTIMONY
(From Start Date to End Date)

No. of Hearings	No. of Cases	Percentage
Single Hearing	86	61%
2 Hearings	25	18%
3 Hearing	15	11%
4-6 Hearings	11	8%
7-10 Hearing	2	1%
10-20 Hearings	1	1%
Total	140	100%

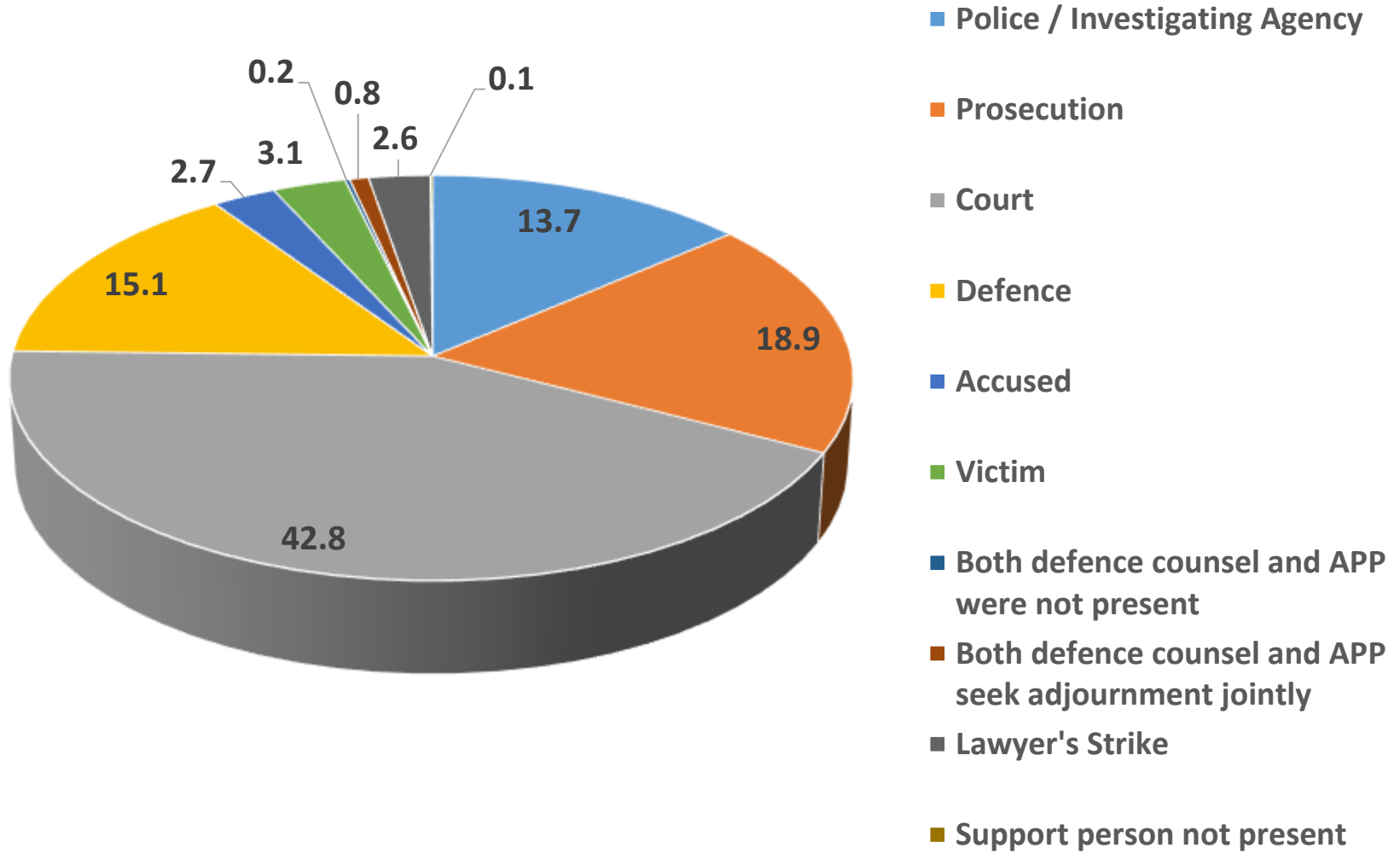
TIME TAKEN FROM COGNIZANCE TO COMPLETION OF CHILD'S TESTIMONY

Time Period (in Months)	No. of Cases	Percentage
Within 1 Month	1	1%
1 to 3 Months	6	4%
3 to 6 Months	30	21%
6 to 9 Months	30	21%
9 to 12 Months	26	19%
12 to 15 Months	12	9%
15 to 8 Months	8	6%
18 to 21 Months	12	9%
21 to 27 Months	10	7%
27 to 30 Months	4	3%
Above 30 Months	1	1%
Total	140	100%

Pendency and Adjournments

- As on 31 July 2015, 509 out of 1344 (38%) cases pending before 5 Special Courts in Delhi had crossed the period of 1 year from the date of cognizance.
- Not much has changed since.
- Out of the 2856 court hearings that took place at different stages of criminal justice procedure in 161 cases supported by HAQ between 2015 – 2018:
 - **1722 (60%) court hearings were effective hearings**
 - **1132 (40%) court hearings were adjourned due to various reasons.**
- In one case, **disposal** by court took approximately **2 years and 1 ½ months** since the date of cognizance. Out of 20 listed hearings in this case, only 7 effective hearings took place, the rest 13 ended up in adjournments.

Adjournments - Reasons



Police / Investigating Agency

Accused could not be produced due to shortage of police personnel	19	1.7
Case property was not produced	2	0.2
ACP/DCP was not present	1	0.1
FSL report not received	35	3.1
IO sought Adjournment	20	1.8
IO was absent	41	3.6
Report was not filed by IO/SHO	8	0.7
Report was not received from jail	1	0.1
Summon was not served	28	2.5
Total	155	13.7
Prosecution		0.0
APP sought an adjournment	20	1.8
APP was not prepared	1	0.1
APP was not present	16	1.4
APP was on leave	23	2.0
PW was not present	146	12.9
PW was not in the position to depose	5	0.4
Expert witness was not present	2	0.2
Court did not realise that no witnesses were left for testimony	1	0.1
Total	214	18.9

Court		0.0
Case transferred to another court	3	0.3
Court Computer not working	1	0.1
Court had paucity of time	128	11.3
Court Holiday	6	0.5
Judge has gone for meeting	6	0.5
Judge has gone for training	41	3.6
Judge was on leave	284	25.1
Stenographer was on leave	2	0.2
VWDR was not occupied by another court	4	0.4
No PW was summoned	2	0.2
PE not completed in connected matter	4	0.4
Summon issued to wrong witness	4	0.4
Total	485	42.8
Defence		0.0
Defence counsel has not filed vakalatnama	2	0.2
Defence counsel sought adjournment	76	6.7
Defence counsel was not present	91	8.0
Defence witnesses were not present	1	0.1
Accused and Defence Counsel did not appear	1	0.1
Total	171	15.1

Accused		0.0
Accused was absent	19	1.7
Accused has no legal representation	12	1.1
Total	31	2.7
Victim		0.0
Victim was absent	18	1.6
Victim was not in position to depose	16	1.4
Complainant has not filed the documents	1	0.1
Total	35	3.1
Miscellaneous		0.0
Support person not present	1	0.1
Both defence counsel and APP were not present	2	0.2
Both defence counsel and APP seek adjournment jointly	9	0.8
Lawyer's Strike	29	2.6
Total	41	3.6
GRAND TOTAL	1132	100.0

Virender vs. The State of NCT Delhi [Crl.A.No. 121/2008, Delhi High Court] ...

Priority be given to cases involving child victims/witnesses

- Prompt recording of statement of the child victim (Ref: Court On Its Own Motion vs. State of N.C.T. Of Delhi)
- Appropriate action be taken to ensure a **speedy trial** to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding.
- **Any adjournment shall be avoided**
- **Where adjournment cannot be avoided, reasons to be recorded in writing.**
- **Repeated appearance of the child witness to be prevented**, unless absolutely imperative.
- **Adverse impact of delay or adjournment or continuance of the trial on the welfare of the child to be taken into account while considering a request for an adjournment.**

Child's Evidence

- The Supreme Court has repeatedly ruled that there is no rule of practice that the evidence of a child witness needs corroboration, and reiterated that conviction can be based on child's evidence.
- It is only as a rule of caution and prudence that the court may require that it would be desirable to have corroboration from other dependable evidence.

Child's Statement & Evidence

The procedures as laid down in POCSO and reiterated in many rulings by the High Courts and Supreme Court broadly are as follows:

- **The statement of the victim shall be recorded verbatim;**
- May permit frequent breaks.[Sec 33 (3)]
- **Child not to be called repeatedly to testify in the court.[Sec 33 (5)]**
- **Dignity of the child to be maintained at all times during the trial. Special Court shall not permit aggressive questioning or character assassination of the child. [Sec 33 (6)]**
- Child not to be exposed to the accused at the time of recording of evidence.[Sec 36]
- The Public Prosecutor/counsel for the accused shall communicate the questions during examination, cross-examination or re-examination via Special court. [Sec 33 (2)]
- **Courts must carefully translate gestures into written record;**
- In-camera proceedings [Sec 37];
- Examine the child at a place other than the court if the child so needs - a place where the child can speak freely [Sec 37];
- Create a child friendly atmosphere by allowing a family member, guardian, friend or relative in whom the child has trust to be present in the court [Sec 33(4)];
- At no point should the child come in contact with the accused - record the statement of the child through video conferencing or by audio-video electronic means or by utilising single visibility mirrors or curtains or any other device [Sec 36];
- Assistance of a translator/interpreter, having qualifications/experience may be taken while recording the statement of the child [Sec. 38];
- Children having a mental or physical disability shall be given assistance of a special educator to record the statement of the child [Sec. 38];
- Identity of the child not to be disclosed at any time [Sec 33 (7)]

Role of POCSO Courts

Virender vs. The State of NCT Delhi

[Crl.A.No. 121/2008, Delhi High Court]

The entire structure of the evidence of the prosecution's stand is the trustworthiness of the testimony of the witness. Therefore, **the manner and the language in which the evidence is recorded is of extreme importance.**

The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence.

The court must ensure that the child is not concealing portions of the evidence for the reason that she is bashful or ashamed of what has happened to her.

If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross examination [Ref: AIR 1997 SC 1023 (para 12) State of Rajasthan vs. Ani alias Hanif & Ors.]

The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying, or be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony. [Also covered in the POCSO Act].

In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken. [Also covered in the POCSO Act].

Virender vs. The State of NCT Delhi [Crl.A.No. 21/2008, Delhi High Court] ...

Questions during Cross Examination of victim/witness of rape and sexual abuse
[Ref : Sakshi vs. UOI]:

- Should not be designed to embarrass or confuse victims
- Must relate directly to the offence
- **Should be given in writing to the presiding officer of the court**
- **Presiding officer of the court to put them to the victim or witnesses in a language which is clear and not embarrassing.**

A child was asked – “Kya Aap Inko Jaanti Hain?” She thought she was asked “Kya Aap Inko Pehchaanti Hain?” and therefore said “YES”. Indeed she knew who the accused was and had even identified him, but did not understand the question and failed to realise that the defence lawyer was trying to establish that the victim and the accused knew each other before the incident and the accused was being falsely implicated.

It would be gross injustice if the defence counsel is allowed to cast aspersions on the victim's character simply because the victim is familiar with the word 'rape'. Access to television and other forms of media have exposed children to the vocabulary of crime and hence any such attempts by the defence counsel must be objected to. *[State vs. Sujeet Kumar (Crl A 1190/2014, Delhi High Court)]*

Evaluation of Competency of the child witness

Virender vs. The State of NCT Delhi

[Crl.A.No. 121/2008, Delhi High Court]

Trial Court to satisfy itself on the following aspects before proceeding to record a deposition :

- The child witness understands the obligation to speak the truth in the witness box.
- The mental capacity of the child at the time of the occurrence as well as an ability to receive an accurate impression thereof.
- The child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express the same in words or otherwise.
- The child witness has the capacity to understand simple questions which are put to it about the occurrence.
- **The court has to ascertain not only the comprehension of the child witness but also the extent of the child's vocabulary.**
- **The trial court ought to record its satisfaction of all of the above as part of record of the evidence of the child witness.**

See the Difference?

“Q. : What is your name?”

Ans. : My name is N.

Q. How old are you?

Ans. Six years

Q. : What is your father’s name?

Ans. : Munna.

Q. : What is your mother’s name?

Ans. : Tunia.

Q. : Which school do you go to?

Ans. : School in which children study

Q. : What standard are you in?

Ans. : _____

Q. : What is the meaning of “Truth”?

Ans. : _____

*Q. : What is the difference between
“Truth” and “Lie”?*

Ans. : _____

“Q. : What is your name?”

Ans. : My name is N.

Q. How old are you?

Ans. Six years

Q. : What is your father’s name?

Ans. : Munna.

Q. : What is your mother’s name?

Ans. : Tunia.

Q. : What is your brother’s name?

Ans. : Noor-e-Nabi.

Q. : Do you go to school?

Ans. : No.

Q. : How do you spend your day?

*Ans. : I play with my brother during the
day.*

Q. : Does your brother go to school?

Ans. : No. He also does not go to school.

Parameters assessed and questions asked for evaluating competency of child witness

State vs. Sujeet Kumar

[Crl A 1190/2014, Delhi High Court]

- **Adequate intelligence and memory to store information** – about family, school, counting and knowledge of alphabet and colours would help. For older children, more difficult intellectual skills determining Questions their literacy level would help.
- **The ability to observe, recall and communicate information** – Questions on recent experiences such as ‘what the child ate’ or ‘who he/she saw on the day of the incident’. Questions on distant past such as what happened on the child’s birthday or a holiday or a celebration in the family.

- **An awareness of the difference between truth and a lie** – Ask developmentally appropriate questions such as, "What does it mean to tell the truth?" and "What does it mean to tell a lie?" To answer, "What is the difference between the truth and a lie?" is difficult for younger children.

Very young children often may not be able to answer even the easier questions in a narrative form due to underdeveloped language skills.

Alternative multiple-choice questions can be used, e.g. "If I said my hair is brown, is that the truth or a lie?"

In addition, more situationally relevant questions should be asked, such as:

- *If I told your mom that you just yelled at me, would that be the truth or a lie?*
- *If you told your mom that I hit you, would that be the truth or a lie?*
- *If you told your teacher that something bad happened to you, but it really didn't happen-you were making it up-would you be telling the truth or a lie?*

- **An appreciation of the meaning of an oath to tell the truth –** Children have a better familiarity with the term ‘promise’ rather than the term ‘oath’. Use of ‘promise’ yields a better result in the child’s answer.
 - *To ascertain if the child understands what it means to make a promise, follow-up questions can be asked, such as:*
 - *If you promise your mom that you are going to eat your lunch, what should you do? And Why?*
 - *If you promise to tell the truth today, what should you do? And Why?*
 - *To ascertain if the child understands the potential consequences of not telling the truth, questions that suggest consequences of lying with reference to the child’s daily or regular activities can be asked. For example...*
 - *When you get caught telling a lie, what usually happens to you?*
 - *If you said that your classmate hit you and it was not true-you were making it up-what could happen to you for lying?*
 - *If you said that your sister hit you and it really didn't happen, but your dad believed you, what could happen to your sister?*

A child should be allowed to use her/his own vocabulary, language and expressions to explain the circumstances of offence and the incident. For example, some children may refer to rape as 'rape', while some others may call it 'ganda kaam'.

Different children will have different ways of expressing themselves

Here is what one child said ...
“ He took off my clothes and also took off his own clothes and put his 'Haddi' into my 'Susu'.

In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

Tutoring vs. Preparing the victim for Testimony

Q. Does victim preparation imply tutoring the child?

Ans. NO. It simply means training the child in a manner that the child is confident to face a court environment and is able to express herself/himself to explain the incident. For example, **one or two prior visits to the court** may help **familiarize the child with the court environment** and shed her/his fear.

Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.

- Trial should be a search for the truth and not a bout over technicalities
- Trial must be conducted under such rules as will protect the innocent, and punish the guilty.

“The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”

- Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, **the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process.**

United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005

- Ensure dignity and physical, mental and moral integrity of the child witness
- The justice process should be sensitive to the child’s age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socioeconomic condition as well as special needs of the child including health, ability and capacities

Q&A

Q. When does a POCSO Court take cognizance of a case?

A. Upon receiving a complaint of commission of an offence under the POCSO Act
Upon filing of police report [**Section 33 (1) of the Act**]

Q. Is there a role for a Committal Court in POCSO cases?

A. No. A POCSO Court is a Special Court like the NDPS Court or CBI Court.
Committal of accused for trial by a Court of Judicial Magistrate of First Class is not required [**Section 33 (1) of the Act**]

Q. Who is to monitor police investigation and seek an action taken report from the police in POCSO cases?

A. Special Court constituted/designated as the POCSO Court since there is no role for a committal court in these cases

Q. Can the POCSO Court accept the vakalatnama signed by the head of a child care institution where the victim is placed?

A. Yes, it can if the child's parent(s)/guardian(s) are unfit or not available. This will ensure the child the right to be legally represented by a lawyer of her/his choice [**Smt. Lavanya Anirudh Verma vs. State of NCT of Delhi, CRL.M.C. 301/2017**]

Other Issues for Discussion

- Section 25 (2) – Magisterial Court recording the statement of the victim child under Section 164 Cr.PC to provide the child victim and her/his parents or representative, a copy of the following documents specified under Section 207 of the Cr.PC after the police files its final report:
 - police report
 - FIR recorded under section 154 CrPC
 - statements recorded under section Section 161 (3) CrPC
 - statements recorded under Section 164 CrPC
 - any other document or relevant extract of such document forwarded to the Court by the police along with the police report
- Does this imply the victim has a right to only get a copy of her statement under Section 164 of CrPC?
- How will her/his lawyer represent her/him in Special Court if the lawyer has no access to the charge sheet?
- Do victims of POCSO offences committed by children in conflict with the law have a right to receive a copy of the orders of the JJB? [***Bharat Rattan Shah vs. State & Anr (CRL.REV.P.362/2012, Delhi High Court) and Section 99 (2) of JJ Act, 2015***].

Child's Right to be informed and updated

- A child has the right to be informed about the developments in her/his case.
- This responsibility is cast on the following persons:
 - **Police:** to keep the child or child's parents/guardians/ person trusted by the child / support person informed about the developments in the case, including arrest, bail application filed by the accused and other court proceedings [Rule 4 (11)]
 - **Support Person:** to keep the child or child's parents/guardians/ person trusted by the child about proceedings in the case, the child's right to receive legal assistance, witness protection, victim compensation and such other reliefs [Rule 4 (8)]
 - **Special Court / JJB / Children's Court:** to provide the child or child's parents/guardians/representative a copy of the final report (charge sheet) [Section 25]

Reality Check...

- Bail hearings are conducted in the absence of the child's lawyer or without ensuring that the police has informed the child/child's family about bail hearing
- Accused are released on bail without ascertaining child's protection needs. This is because:
 - Special Courts have no interaction with the Support Person or the CWC.
 - Even where CWC appoints a Support person, the Police does not inform the Special Court about it, though they have a duty to do so within 24 hours of such order by the CWC [Rule 4 (9)]
- Bail is granted on 'no objection' from the child's mother even where the child is otherwise seen as a competent witness

Right to legal representation by a Lawyer of one's choice

- In none of the cases examined by HAQ and FACSE in Delhi or Mumbai, was the child legally represented by a lawyer before the Special Court.
- It appears that neither the police nor the Special Courts inform the child and / or family or guardian about the child's right to legal representation.
- In Delhi, over the years, child's lawyer has gained acceptance but the name does not figure in the daily orders even when the lawyer is present for the hearing.
- Presence of child's lawyer still not seen as necessary for bail hearings.

Witness Protection Scheme, 2018

**“Witnesses are the eyes and ears of justice.” -
Jeremy Bentham**

- The aim and objective of the scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal retribution. [Mahender Chawla & Ors. Vs. Union of India & Ors. WP(Crl) No. 156 of 2016]

Clause 12 - WITNESSES TO BE APPRISED OF THE SCHEME:

- It shall be mandatory for Investigating Officer/Court to inform each and every witness about the existence of "Witness Protection Scheme" and its salient features.

Essential features

- Identifying categories of threat perceptions
- Preparation of Threat Analysis Report by the head of police
- Confidentiality and preservation of records, recovery of expenses, etc.
- Types of protection measures like ensuring that witness and accused do not come face to face during investigation etc. protection of identity, change of identity, relocation of witness.

PROTECTION MEASURES

- Ensuring that witness and accused do not come face-to-face during investigation or trial
- Monitoring of mail and telephone calls
- Change witness's telephone number or assign him an unlisted number



**Installation
of security devices
in witness's home
such as security
doors, CCTV,
alarms, fencing
etc**

- Concealment of identity of witness by referring to him with the changed name/ alphabet
- Close protection, regular patrolling around witness's house
- Escort to and from court
- Holding in-camera trials

Three types of witnesses categorised...

- Threat extends to life of witness or his family members during investigation, trial or thereafter.
- Threat extends to safety, reputation or property of witness or his family members, during investigation, trial.
- Threat is moderate and extends to harassment of witness or his family member's, reputation or property during investigation, trial or thereafter.

- Witness can file application for seeking protection order before competent authority of concerned district where offence is committed.
- Secretary, District Legal Services Authority (DLSA) and he/she alone can pass witness protection order for the witness protection under this Scheme and who may issue orders for protection of identity/change of identity/relocation of a witness, categorisation of threat, duration and types of protection
- For the purpose of orders passed Part IV (change of identity) & V (relocation of witness), the Competent Authority will be Chairperson, DLSAs

- In cases of incest, very little attempt is made to reach the truth when the child and/or the child's mother turn hostile.
- Cases involving digital evidence such as MMS, SMS, pornography, email chats etc. end in acquittal due to lapses on the part of police to collect necessary evidence and present it as per requirements of the IT Act.
- Key witnesses remain missing from the list of witnesses and little attempt is made to bring them on board.
- Adjournments and delays remains an area of concern.
- Linkage between the Special Courts and the JJ system is missing.

Age Determination of the Prosecutrix

Jarnail Singh Vs. State of Haryana

The Supreme Court made the reference to the Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules, 2007 and stated...

“Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix”.

Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015

- In obvious cases, age to be declared on the basis of physical appearance, stating the age as nearly as possible.
- Only in case of having “reasonable” ground for doubt, inquiry for age determination to be followed.
- Age to be determined by “seeking evidence” by obtaining (i) the date of birth certificate from the School or the matriculation or equivalent certificate from the concerned examination Board; (ii) birth certificate given by a corporation or municipal authority, or panchayat
- In case of no documents, medical age determination by an ossification test or any other latest medical age determination test.

Section 94 applicable only to the Board or Committee. Does this mean the Special Courts are not bound by Section 94 (1)?

The answer is YES.

Corroborative Value of Medical and Scientific Evidence

Dayal Singh Vs. State of Uttaranchal (AIR 2012 SC 3046)

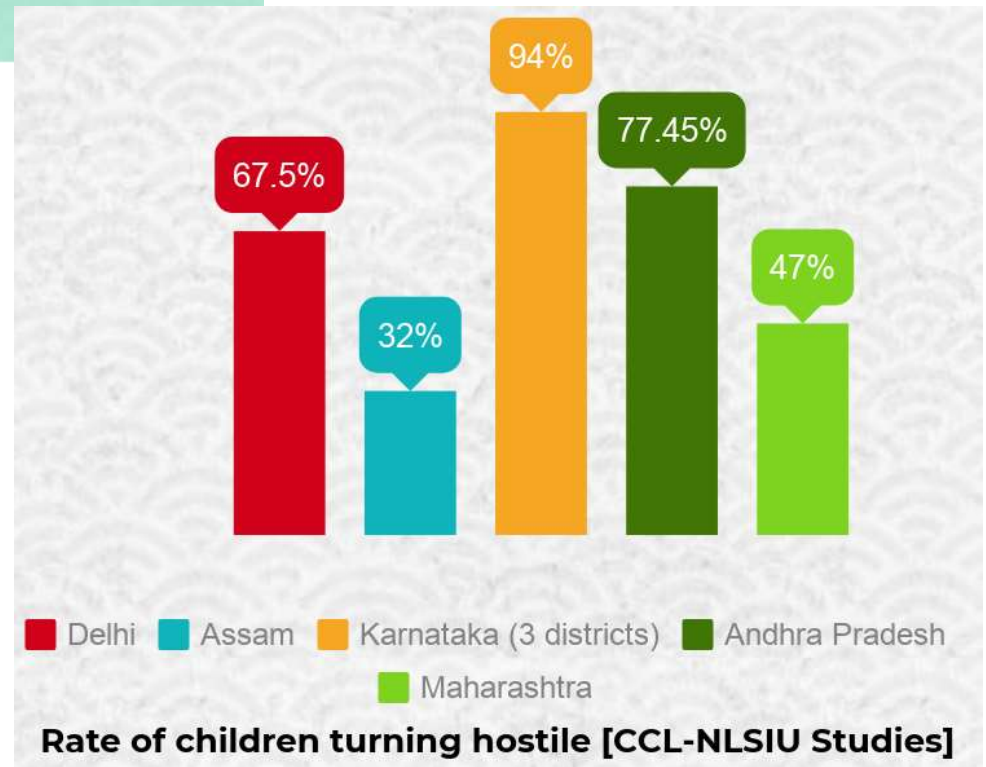
- The Hon'ble Supreme Court observed...

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

**State vs. Dayal Sahu, MANU/SC/0965/2005 : AIR
2005 SCC 2471**

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

A significant factor contributing to the high number of acquittals in POCSO cases are due to children and their families refusing to testify against the accused person. **On an average, six out of every ten children reporting sexual abuse turns hostile in court.** Where the perpetrator is known to the victim, children were found to be more likely to retract their statement. [CCL-NLSIU]



REASONS FOR ACQUITTAL BY RELATION BETWEEN VICTIM AND ACCUSED

REASONS FOR ACQUITTAL	Known	Stranger	Both known and stranger	ANY OTHER (proximity not known)	Total cases
Material witnesses turned hostile	162	13	4	5	184
No incriminating evidence found	24	6	0	3	33
Present accused not identified as the offender	5	5	0	0	10
Victim and family untraceable	3	1	0	0	4
TOTAL CASES	194	25	4	8	231

Source: Implementation of the POCSO Act: Goals, Gaps and Challenges, A Study of Cases from Special Courts in Delhi and Mumbai (2012-2015), HAQ and FACSE, November 2017.

An example of how the system defeats the purpose of justice...

- “Perusal of the file reveals that PW3 prosecutrix 'D' is the only star witness of this case but she has turned hostile and has not supported the prosecution case”.
- The hesitation of the child to initiate action against her father is reflected in the deposition of the trainee teacher (PW2) - “Prosecutrix 'D' was too reluctant to take any legal action against her father at that time as she was worried about the family and thought that such an action would bring a bad name to the family.” **PW2’s evidence was not considered as she was not brought to court for cross-examination.**
- The Court has ample powers under Section 165 of the Indian Evidence Act to put any question to the witness to elicit the truth. How often is this power brought to use?
- Why was the teacher not brought to court for cross-examination in this case?
- Why is it that most critical witnesses are either not found in the list of witnesses or not followed-up? Is it not the responsibility of the Prosecution to ensure this? Why then is the Prosecution silent almost always when it comes to the list of witnesses and their follow-up? Is the Prosecution there to serve the police and its lack of capacity or is it to represent the state as a body that failed to protect a child in the first place?

When both system and law fail children

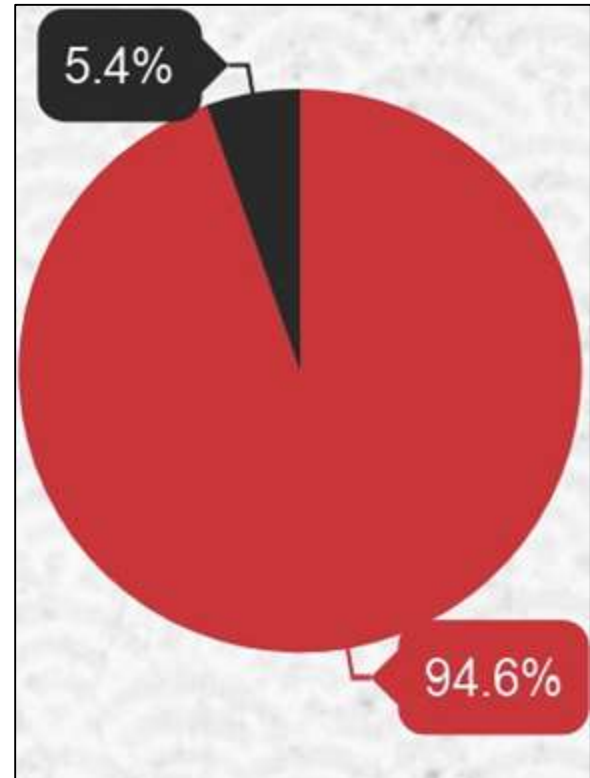
– Dilemmas in Law and Practice

- **Mandatory Reporting, Age of Sexual Consent and Mandatory Sentences...** All brought in law in the name of Child Protection, but do they really help in meeting the purpose???
- The MTP Act requires them to maintain confidentiality and POCSO mandates them to report all pregnancies to the appropriate authorities as it treats all sex under 18 years of age as non-consensual.
- The implications are serious as family honour is always more important to people than the child or the law. Girls are forced to try unsafe and illegal means of abortion.



Who are the perpetrators?

94.6% of offenders in rape cases are known to their victims [NCRB 2016].



- **Known**
- **Stranger**

- Most children are in the 3 to 12 age group
- More girls than boys are in the higher age groups
- Maximum abusers are known to the child (80 to 90 per cent as per different studies)
- Maximum number of accused/offenders are in the 18 to 35 years age group
- Most cases in the 16 to 18 age group are cases of romantic relationship
- Incest cuts across all age groups and is the most difficult to sustain legally as children turn hostile
- In Delhi, 97% cases of 16 to 18 year olds that ended in acquittal were cases of romantic relationship.

On compromise in rape cases...

Shimbu and Anr. v. State of Haryana [(2014) 13 SCC 318]

"22. Further, a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. **Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle.** Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma under gone by her all the years might have compelled her to opt for a compromise. **In fact, accepting this proposition will put an additional burden on the victim.** The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) of IPC."

- Similar views have been expressed in –
 - *Mayank Pandey v. State and ors (Crl.MC 220612013 dt. 16.12.2013)*
 - *Purushottam v. The State of Madhya Pradesh, AIR 1980 SC 1872*
 - *Anil Kumar and others v. State of NCT of Delhi, MANUIDE/120312012.*

Compromise or No Compromise
– Whither Child's Best Interest???

Structural and Procedural Compliances cannot ignore Children's Realities

Time to wake up and think which way we want to go ...

Certainty of Conviction or introducing stricter sentences?

Victim support or children turning hostile?

Delay or swift justice?

Let the Special Laws be treated as
Special

Its time to start thinking out of
the box

Thank You for a Patient Hearing!