

NATIONAL JUDICIAL ACADEMY



REFRESHER COURSE FOR POCSO COURTS [P-1253]

08TH & 09TH MAY, 2021

PROGRAMME REPORT

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OVERVIEW OF THE PROGRAMME

National Judicial Academy organised two day online Refresher Course for POCSO Courts on 08th and 09th May, 2021. The aim of the Refresher Course was to acquaint the participants with international perspectives on sexual offences, victim protection, child friendly court procedures, the best interest of the child and role of the POCSO court judges. The Refresher Course was designed to facilitate discussion on issues related to recording and appreciation of evidence, presumption and burden of proof under the POCSO Act, 2012 age determination and compensation and rehabilitation for child victims of sexual offences. The course also provided a platform for the participants to share experiences, insights and suggestions on issues concerning POCSO adjudication.

DAY 1

Special Session: Presentation by E-Committee of the Supreme Court on eCourt Services

Session 1 – Child Friendly Court Procedures and Judicial Attitudes: Statutory Provisions and Best Practices

Session 2 – Evidence in POCSO cases: Collection, Appreciation and Burden of Proof

DAY 2

Session 3 – Understanding impact of POCSO offences on Victim and Rehabilitation of Victim

Session 4 – Age Determination (of Victim and Offender): Challenges and Solutions

DAY 1

Special Session: Presentation by E-Committee of the Supreme Court on eCourt Services

Speaker – Ms. R. Arulmozhiselvi

In the presentation by e-Committee of the Supreme court on eCourt Services major projects of e-committee and its relevance, various litigant centric services offered by e-committee viz. push messages, case status, mobile applications, NJDG, e-seva Kendra etc. were discussed.

Session 1 – Child Friendly Court Procedures and Judicial Attitudes: Statutory Provisions and Best Practices

Speakers - Dr. Justice S. S. Phansalkar Joshi & Ms. Geeta Ramaseshan

The session began with the assertion that traditional courts of law do not take into account developmental needs of children, and legal proceedings are stressful and time-consuming. Language used in legal proceedings can be difficult for a child to comprehend. Therefore, child-friendly procedures especially the method adopted while carrying out the 'examination in chief' and 'cross examination' can make the legal process less daunting for a child, and also enhance the quality of the child's testimony. It was stated that child friendly justice is one which is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs of the child, respecting the rights of the child including the right to due process, to participate in and to understand the proceedings, to ensure respect for private and family life and to integrity and dignity. Courts are required to apply the principle of 'best interest' by considering how the child's rights and interests are, or will be, affected by their decisions. The best interest of the child demands that children should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Statement of objects and reasons of the POCSO Act, 2012

ensures safeguarding the interest and well-being of child at every stage of judicial process by incorporating child friendly procedures.

The discussion further pertained to a number of statutory provisions in this regard viz. Section 23, 24, 26, 33-38 of POCSO Act, Section 165 of Indian Evidence Act, 1872 and Section 164, 284 and 311 of the Criminal Procedure Code, 1973 (CrPC). The session further explored 'best practices' to be adopted by courts so as to ensure child friendly trial viz. (a) reduce waiting time for the child outside the court; (b) invest in an electronic intimation mechanism that will alert victims and their families at least 24 hours in advance, if the hearing is being rescheduled; (c) the examination-in-chief should be completed on the same day and breaks should be allowed if necessary; (d) examine the child in the chamber or any other room in the court complex, if the courtroom intimidates the child; (e) questions to the child should be posed by the judge and not by the lawyer or prosecutor and ensure that there are no aggressive questions or character assassination of the child; (f) in case the infrastructure of the court does not allow for a separate room for the victim and the accused, then judge may use his chamber for recording the statement of the child; (g) judges holding POCSO courts as well as other courts at the same time can give priority to the recording of evidence of the child victim over other matters. A reference was also made to the 'United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime, 2005' which required that the justice process should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, caste, socio economic conditions, cultural, ethnic, religious, linguistic backgrounds as well as special needs of the child including health, ability and capacities.

Judicial pronouncements on issues relating to the identity of the victim, maintaining the dignity and integrity of the victim, competency of child witness, etc. were discussed in the course of the

session, including *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, *Sakshi v. Union of India and Ors.*, AIR 2004 SC 3566, *Virender v. State of NCT of Delhi*, Criminal Appeal No. 121 of 2008, *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2006) 3 SCC 374, *P. Ramesh v. State Rep by Inspector of Police*, Criminal Appeal No. 1013 of 2019 and *Dr. Manjula Krippendorf v. State of Delhi*, (2017) 15 SCC 133. The session concluded with the remark that 'Best Interest of the child' is of paramount importance in cases of child sexual abuse. Therefore, judges must exercise their discretion to ensure the same to the maximum possible extent.

Session 2 – Evidence in POCSO cases: Collection, Appreciation and Burden of Proof

Speakers - Dr. Justice S. S. Phansalkar Joshi & Ms. Geeta Ramaseshan

It was remarked that ordinarily a witness is overtaken by events. The witness could not have anticipated the occurrence which often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details. Therefore, it was advised that minor discrepancies in deposition can be ignored. While discussing Section 164, CrPC and Section 26, POCSO Act, it was highlighted that statement must be recorded in the language spoken by the child and in the presence of parents or any other person in whom the child has confidence. Further, it was also stated that assistance of a qualified translator or interpreter can be taken, if required. The assistance of a qualified special educator or person familiar with the manner of communication of child with disabilities can also be sought in appropriate cases. Further, it was added that magistrate must try and ensure that statement is recorded by audio-visual means. Copy of documents being relied upon by the prosecution must be provided to the child, his or her parents or representative. While appreciating the evidence of a witness the approach must be to ascertain whether the evidence of the witness, read as a whole appears to have a ring of truth.

The speaker also briefly touched upon Section 357 A of CrPC and Section 27 of POCSO Act read with Rule 5 of POCSO Rules.

Further, the discussion highlighted certain complexities relating to the POCSO Act with reference to the age of consent and envisaged the need to lower it in view of the changing circumstances. It was stressed that there is need to properly address sexual behaviour among adolescents rather than criminalising them. Some of the court pronouncements that were referred in this context are *Sabari v. Inspector of Police*, Criminal Appeal No. 490 of 2018 (Mad HC), *Vijayalaxmi & Anr. v. State Rep by Inspector of Police*, Criminal O.P. No. 232 of 2021 (Mad HC), and *Independent Thought v. Union of India & Ors.*, (2017) 10 SCC 800. It was highlighted that in cases of sexual assault, conviction can be founded on the sole testimony of the victim, unless there are compelling reasons for seeking corroboration. Medico-legal evidence should not be taken just as corroborative evidence. In fact, in cases where the child is of such tender age that oral evidence is not possible, then medical evidence must be relied upon as primary evidence and proceeded upon. The discussion also focussed upon the conditions of granting bail in POCSO cases while elaborately dealing with the decision of the Supreme Court in *Aparna Bhatt & Ors. v. State of M.P.*, Criminal Appeal No. 329 of 2021 (SC).

In criminal jurisprudence, an accused is presumed innocent until proven guilty and the entire burden of proof lies upon the prosecution to prove the guilt of the accused. However, in certain exceptional cases the burden of proof is reversed thereby casting the burden of proof of innocence on the accused himself. The idea is to balance the personal rights of the accused with community's broader interest in law enforcement. The provisions of Section 29 and 30 of the POCSO Act does not imply that the prosecution need not adduce any evidence, and that it will be for the accused to prove that he has not committed an offence. The basic principle remains the

same, that is, the fundamental facts and the evidence would still need to be adduced by the prosecution after which the burden will shift on the accused to prove that he did not commit the act with sexual intent. Also, presumptions are merely rules of evidence and not evidence itself. Therefore, merely on the basis of presumption, an accused cannot be convicted. Some important judgments discussed in this regard are *Kali Ram v. State of Himachal Pradesh*, AIR 1973 SC 2773, *Avtar Singh v. State of Punjab*, (2002) 7 SCC 419, *Babu v. State of Kerala*, (2010) 9 SCC 189, *Noor Agha v. State of Punjab*, (2008) 16 SCC 417, *Subrato Biswas v. State of West Bengal*, Criminal Appeal No. 11 of 2018 (Cal HC), *Amol Dudhram Barsagade v. State of Maharashtra*, Criminal Appeal No. 600 of 2017 (Bom HC) and *Navin Dhaniram Baraiye v. State of Maharashtra*, Criminal Appeal No. 406 of 2017 (Bom HC).

DAY 2

Session 3 – Understanding impact of POCSO offences on Victim and Rehabilitation of Victim

Speakers - Justice Anjana Prakash, Justice S. Vimala & Ms. Bharti Ali

The impact of sexual abuse on children can be mitigated to some extent by victim compensation, right to legal representation, judicious use of powers bestowed upon the courts, witness protection, right to be heard during bail and support services. Section 33(8) POCSO Act gives wide discretion to special courts in providing compensation to the victim. In fact, there are three types of compensation under the scheme i.e. immediate compensation (Rule 8, POCSO Rules, 2020), interim compensation (Rule 9(1), POCSO Rules, 2020) and final compensation (Rule 9(2), POCSO Rules, 2020 and Section 33 (8), POCSO Act, 2012). The provisions relating to final compensation must be read with Section 357 A (2) and (3) of the CrPC. It was highlighted that at any stage after receiving the copy of the FIR, interim compensation can be provided by order of the court in appropriate cases. It was remarked that final compensation is not being granted by special courts in cases which result in acquittal or where the accused cannot be traced or identified. In this regard, it was advised that any compensation granted is independent of conviction or acquittal in the case and that compensation can be granted merely on the basis of the fact of sexual assault being established. The object is to alleviate the sufferings and challenges faced by the victim and the family at that time. Also, the question of recovery of compensation should not arise in such cases for the reason that even if the case results in acquittal of the accused it does not necessarily imply that the case was a false one. Rule 9(3) of the POCSO Rules, 2020 which deals with the relevant factors while granting compensation to the victim was discussed in detail. The session also remarked upon the mental health concerns

and challenges in matters involving child sexual abuse such as anxiety, depression, memory lapses, insomnia, flashbacks, etc. Healing in such cases is extremely vital but is seldom considered a part of the rehabilitation plan. The discussion stressed upon the need to facilitate the appointment of a support person by the Child Welfare Committee in order to provide the required assistance to the victim (Rule 4, POCSO Rules, 2020). Special Courts need to engage with the support persons to understand the impact of abuse on the victim and the needs of the victim. Further, a reference was made to 'Form A' of POCSO Rules, 2020 which deals with entitlement of children who have suffered sexual abuse to receive information and services.

Some judicial pronouncements pertinent to the theme of the session were discussed, such as *Delhi Domestic Working Women Forum v. Union of India*, (1995) 1 SCC 14, *Ankush Shivaji Gaikwad v. State of Maharashtra*, AIR 2013 SC 2454, *Bijoy v. State of West Bengal*, 2017 CriLJ 3893, *Nipun Saxena v. Union of India*, W.P. (C) No. 565 of 2012, *Delhi High Court in The Minor Through Guardian Zareen v. State of NCT of Delhi*, W.P. (Cri.) 798 of 2015 etc. The session concluded with the advice to the participant judges that they must not delay or deprive child victim in need of interim compensation; proactively consider compensation application and not hesitate from exercising *suo-motu* powers in this regard.

Session 4 – Age Determination (of Victim and Offender): Challenges and Solutions

Speakers - Justice Anjana Prakash, Justice S. Vimala & Dr. Arneet Arora

The session commenced with the discussion on Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which deals with the presumption and determination of age of the child in conflict with law. Rule 12 of the Juvenile Justice (Care & Protection of Children) Rules, 2007 details the procedure to be followed in determination of the age. Rule 12(3) provides

that 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, the Committee 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; and only in the absence of either above mentioned documents, the medical opinion may be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. The provision laid down therein can be imported to POCSO cases as well. Medical opinion could be looked into only when the documents or certificates are found to be fabricated or manipulated or in the absence of documents referred to under Rule 12. In cases where medical opinion is sought, determination of age is done by physical examination, dental examination and/or radiological examination of bones and teeth. However, experts are of the opinion that determination/assessment of age is more accurate at an early age and loses accuracy with increasing age.

A number of important judicial pronouncements on the subject matter were discussed at length during the course of discussion. In one of the earlier judgments of the Supreme Court *Biradmmal Singhvi v. Anand Purohit*, AIR 1988 SC 1796. It was opined that formal proof of document and probative value thereof are not the same. Probative value of a document depends upon the source of information, on the basis of which entry of proof of birth was made by public servant in the public record. With respect to determination of age and plea of juvenility the decision in *Jarnail Singh v. State of Haryana*, (2013) 7 SCC 263, *State of Madhya Pradesh v. Anoop Singh*, (2015) 7 SCC 773, *Ashwini Kumar Saxena v. State of Madhya Pradesh*, AIR 2013 SC 553, *Raju v. State of Haryana*, (2010) 3 SCC 235, *Om Prakash v. State of Rajasthan*, (2012) 4 SCALE 348, *Sunil*

v. State of Haryana, (2010) 1 SCC 742, *Mahadeo v. State of Maharashtra*, (2013) 14 SCC 637 and *Mukarrab v. State of U.P.*, 2016 SCC OnLine SC 1413 were highlighted.
