

NATIONAL JUDICIAL ACADEMY



SE-04

TRAINING OF MASTER TRAINERS FOR SPECIAL PUBLIC PROSECUTORS IN POCSO COURTS

27TH & 28TH DECEMBER, 2021

PROGRAMME REPORT

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OVERVIEW OF THE PROGRAMME

The National Judicial Academy (NJA) organized a two day online Training of Master Trainers for Special Public Prosecutors in POCSO Courts on 27th & 28th December, 2021. The special program was conducted in view of the Apex Court's observation *In re Alarming Rise in the number of Reported Child Rape Incidents* that the Academy endeavors to prepare a team of master trainers who can subsequently work with the State Judicial Academies and impart training to persons appointed as Special Public Prosecutors attached to POCSO courts. The POCSO Act necessitates practices and attitudes to ensure that the proceedings are sensitive to the needs and rights of children; and to adopt measures to prevent exposure of child to the accused while ensuring that the rights of the accused are not jeopardized. The programme provided insights into capacity building through deliberations focused on maintenance of child friendly court procedures; dealing with electronic and forensic evidence in POCSO cases; review of infructuous investigation reports; unsettled principles relating to the concept of reverse burden and law relating to presumption; challenges faced by the prosecution and other related issues. The contemporary transition towards compensatory and rehabilitative jurisprudence, emphasized by the judiciary and legislative duo to sensitize prosecution formed a priority during the discourse.

DAY 1

Session 1 - Professional & Ethical Best Practices for Public Prosecutors

Session 2 - Objective, Nature & Contours of Functioning of POCSO Courts

DAY 2

Session 3 - Concept of Reverse Burden & Law Relating to Presumption in POCSO Trials

Session 4 - Evidence in POCSO Cases: Role of Public Prosecutors

DAY – 1

Session 1

Theme - Professional & Ethical Best Practices for Public Prosecutors

Panel – Dr. Justice G. Jayachandran & Justice Roshan Dalvi

The session at its very outset underscored the paramount importance of the process and the event of accumulation, assimilation and transmission of investigation inputs to the court to form the bedrock of criminal trial jurisprudence. The coordination between the investigation process (often involving some species of police or a specialized domain expert) and the trial judge was emphatically established to be hyphenated by the role of public prosecutors (hereinafter PPs) as the fulcrum. PPs play the role, as fundamental as that of an umbilical cord in a criminal justice delivery system. Its role is akin to a valve regulating a filtered entry of the facts discovered by the skilled executive to the insulated and inert judiciary, enabling seamless functioning of the justice delivery mechanism to operate, eliminating a snag or glitch. A brief account of appointment of a Special PPs under Section 32 of the POCSO Act was discussed. Moreover, the States discretion to fix eligibility criteria for the appointment of PPs for conducting the POCSO cases was emphasized referring to the judgement of Madras High court in *S. Jemesha v. Secretary to Government, Home Department*¹. It was asserted that Section 24 CrPC and 32(2) of POCSO lays down only the minimal extent of eligibility criteria. The same cannot restrict State from considering additional and other suitable criterion. The importance of maintaining high ethical standards by the PPs was underpinned as the hallmark of the criminal justice delivery system. The PPs role to iron out the creases of improper, vexed, inadequate and substandard investigation at every stage was highlighted, to maintain a sanitized dispensation of fact before the court of law enabling an optimal delivery of justice. The responsibilities and the skills of a PP especially in dealing with a victim in a POCSO case were discussed. The role of PPs as discussed in *Zahira Habibullah H. Sheikh v. State of Gujarat*² (*Best Bakery Case*) formed part of discourse. The dynamics and importance of the role of a PP to actively interact with multiple stake-holders viz. victim & his/her family; investigators; and the judiciary, in a typical POCSO case *dehors* complying with the complex and mandatory legal procedures was projected. A set of best practices in the form of “Dos” & “Dont’s”

¹ 2019 SCC OnLine Mad 35185

² (2004) 4 SCC 158

were enlisted during the discourse. *In Re Alarming Rise in the Number of Child Rape Incidents*³ was cited to embolden the directions of the apex court of India on sensitizing the PPs on their role in dealing with the POCSO cases. The importance and distinction in the roles of the PPs while dealing a POCSO case as against a general criminal trial charged under the Indian Penal Code, 1860 (IPC) was established.

The PPs were sensitized on the statutory right of victim under Section 40 of POCSO Act, 2012 to be represented by an advocate of their choice, which often is parked having firm faith over the capabilities and sensitivities of the PP handling the case in hand. This voluntary choice on the part of the victim or his/her family could be an implied exposition of public trust on the criminal justice system through the confidence reposed on the PPs. The PPs are raised to the popularity of being “*Minister of Justice*”, per Delhi High Court in *Jitendera Kumar v. State (NCT of Delhi)*⁴ wherein the Court observed that “PP plays important role in maintaining purity and impartiality in the field of administration of Criminal Justice on behalf of the State. So they are also known as “Minister of Justice”. The essence of the victim centric nature of the special legislation, it was reiterated that unlike generic criminal prosecution duties wherein the typical role of a PP is reactive subsequent to the submission of the investigation reports, the role in the case of POCSO demands a prospective kinetics. The PPs while dealing a POCSO case must instead lead the investigations by keeping a diligent supervisory and leadership approach, navigating the process to facilitate timely, effective and complete justice. The Supreme Court in *S.B. Shahane v. State of Maharashtra*⁵ has observed that “irrespective of the executive or judicial nature of the office of the public prosecutor, it is certain that one expects impartiality and fairness from it in criminal prosecution”.

Session 2

Theme - Objective, Nature & Contours of Functioning of POCSO Courts

Panel - Dr. Justice G. Jayachandran & Justice Roshan Dalvi

The core problem of abundance leading to reduce the focus/attention was narrated to be a factor leading to sub-optimal performance of a system, including operation of a special POCSO court. The impact of re-victimization or secondary victimization was discussed with reference to specific

³ (2020) 7 SCC 87

⁴ 1999 SCC OnLine Del 910

⁵ 1995 Supp (3) SCC 37

directions and provisions under the POCSO Act and CrPC. The PPs were urged to internalize and take time to assimilate such procedural mandates especially while dealing with evidence. The sensitivity of a child who is a victim under the myriad conditions gets challenged whether it being during the CrPC 164 statements, the medical examination, the *in camera* trial, or at the time of re-examination. The concept and psychological delusion of “*child v. adults*” wherein the victim-child is juxtaposed in an all-adult environment was examined to severely ameliorate his/her confidence and is left bereft of trust. It is therefore necessary to have child friendly ecosystem including a courtroom. The innovative ideas to facilitate creating a child friendly ecosystem while dealing with POCSO matter were shared amongst participants, especially under the prevalent systemic crisis and make-shift arrangements over the desperate “*dedicated v. designated*” special courts infrastructural dichotomy.

Apex court’s directions in *In Re Alarming Rise in the Number of Child Rape Incidents*⁶ on “salutary reason[s] for appointing Public Prosecutors exclusively for POCSO cases” was accentuated. It was categorically insisted that in order to create a child-friendly atmosphere anything which is not barred by the CrPC could be done in bona fide. Supreme Court had on occasions has also opined the same. A trial court may do all that is necessary to accommodate a victim-child in an all-adult atmosphere just as one would normally react or do in a homely or out-side court non-professional set-up, unless there is either a bar to such procedure or the same is *prima facie* prejudicial. An issue relating to verification of age was discussed and birth certification was asserted to be considered the best evidence. This is because it being issued by the Government is a public document and there is a presumption of its validity under Section(s) 78, 79 of the Indian Evidence Act, 1872 (IEA). Moreover, since the document is generated immediately after the birth of a child the chances of its veracity are high. However, the school leaving certificate being a private document needs to be proved by the author of the document (school authority). Maladies of tutored, fabricated and false cases were discussed. The menace of adjournment was discussed, wherein PPs were advised to assert opposition of frivolous adjournments or insist them with cost. The difficulties of assessing a statutory rape and fabrication in the case of a typical teen age love affair formed part of discussion. The statutory mandate to report, its contours and ramifications were traced. The session engaged sharing of

⁶ (2020) 7 SCC 87, 130

experiences, procedural bottlenecks faced by the PPs and many good practices adopted by them, concurrent to the object of the POCSO Act.

DAY – 2

Session 3

Theme - Concept of Reverse Burden & Law Relating to Presumption in POCSO Trials

Panel - Dr. Justice S. Vimala & Ms. Geeta Ramaseshan

The session dealt with scope and limits of standard of proof regarding presumption of culpable mental state and the doctrine of “reverse burden” as expressly provided under the POCSO Act. The PPs were applauded and regarded as the State sponsored protectors of the victim children and the guard them through to seek justice against sexual assault. The session critically analysed the text of Section(s) 29 & 30 of the POCSO Act. The significance of the words “prosecuted” and “shall presume” under Section 29 was elaborated to clarify the nature and scope of the provision. It was clarified that the POCSO Act, clearly expresses under Section 30(2) the standard of proof to be considered needs to be “beyond reasonable doubt” and not merely...is [to] be established by “preponderance of probabilities”. The discussion included the interpretation of Section(s) 101, 102 & 105 of the IEA. The basis of (not) having “reverse burden” under the POCSO Act was debated. The importance, contours, scope, and role of Directorate of PPs as a statutorily qualified and accountable stakeholder (governed by Section 25A(7) of CrPC) were reiterated including advisory role of the PPs starting a “possible prosecution”, reviewing cases and evidences submitted by police, framing and filing charges thereafter, preparation and presentation of a case for trial before the court of law, establishes an express supervisory control mechanism to enable effective prosecution of a POCSO case. In *Azeez v. State of Kerala*⁷ the importance of, and expectation out of PPs to represent the State, the society and the victim was underscored wherein, it held that, “every counsel appearing in a case before the court is expected to be fair and truthful. He must, of course, be champion of the cause of his client as efficiently and effectively as possible, but fairly truthfully”. The fearlessness to secure and advance the best evidence was asserted citing *Vineet Narain v. Union of India*⁸, wherein, the apex court the need to ensure that “there are no arbitrary restrictions to the initiation of Investigations or launching of prosecutions”. Raising the bar on expectation from the PPs, the Supreme Court in *Mukul Dalal v.*

⁷ 1984 SCC OnLine Ker 46

⁸ (1996) 2 SCC 199

*Union of India*⁹ categorically held that “the office of the public prosecutor is a public office and the primacy given to him under the scheme of the Code has a social purpose. But the malpractice of some public prosecutors has eroded this value and purpose”. It was clarified that in a contest on constitutionality of Section(s) 29 & 30 of POCSO Act, the High Court of Kerala in *Justin @ Renjith v. Union of India*¹⁰ rejected the arguments that these provisions violated fundamental rights under Articles 14, 20(3) and 21 of the Constitution of India. It was accentuated that various High Courts have held that, though the presumption under Section 29 of the POCSO Act was a rebuttable presumption, it does not absolve the prosecution of its duty to establish the foundational facts. However, the statutory burden on accused should only be partial and should not thereby shift the primary duty of prosecution to establish the foundational facts constituting the case, to the accused. In *Sahid Hossain Biswas v. State of West Bengal*¹¹, the Calcutta High Court held as under:

[I]n a prosecution under the POCSO Act an accused is to prove ‘the contrary’, that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see *Sait Tarajee Khimchand v. Yelamarti Satyam*¹², Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence ... However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, e.g. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to

⁹ (1988) 3 SCC 144

¹⁰ WP (C) No. 15564 of 2017 (U)

¹¹ 2017 SCC OnLine Cal 5023

¹² (1972) 4 SCC 562

mechanically accept the mere *ipse dixit* of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be.

Session 4

Theme - Evidence in POCSO Cases: Role of Public Prosecutors

Panel - Justice P. N. Prakash & Dr. Justice S. Vimala

The session rolled out with a brief quanta of what should be the personality of a PP in the public canvas, unravelling his/her priced duties in the service of enabling justice. The discourse pitched-in to prime the participants, to drive-in a few fundamental attributes including: to insulate their extremely responsible and sensitive job from external *stimuli viz.* considering favors from police or Parties to the case. As the same is a potent reagent to disintegrate the object of the legislation, and contaminate and blunt the operating scalpel. As a second piece of professional advice, the PPs were suggested to abstain from hobnobbing and fraternizing with the judges dealing with the POCSO cases. Thirdly, the PPs were called upon to realize self-esteem as not merely an office of a court, but as a responsible representative of the State and the civil society who spearheads them in a *lis*.

The session thereafter stayed put on examining the role of PPs in leading with evidence in POCSO cases. A caution was belled to the PPs to a common syndrome of registration of late FIRs in POCSO cases (owing to several cases including prolonged and continuous sexual abuse). It was asserted to the PPs that what is of much more importance is to ensure that once the FIR has been lodged, the charges should be promptly framed and the trial or court action should be initiated forthwith. It was suggested that the PP must make sure that the date & time seal entry of the transit of the said FIR from police station to the Magistrate or Court must be made to truncate a regular and mundane practice of defense objection. Yet another loophole through which an accused gets out of the judicial custody owing to infirmity of procedural non-compliance was discussed when the accused is arrested in yet another crime in some other jurisdiction other than POCSO court. It was advised to the PPs to meticulously visit the prison holding the accused, serve him formally with the arrest warrant in presence and cognition of the holding authority and the court having such jurisdiction, thereafter arrange for a transit warrant under Section 267 of the CrPC to make the accused simultaneously appear before the POCSO Court having jurisdiction and thereafter get him served with the concurrent or judicial custody under the special Act with a distinct remand warrant. Hence,

even if the accused is enlarged on bail on the parallel case, (s)he will be held under the POCSO Act. The PPs were requested to consider the Rules made by the Madras High Court to have a firsthand understanding of the above desirable procedure. It was advised to the PPs to aggressively apply for victim compensation immediately after the remand is done to enable the victim and his/her family as a prompt interim State relief. It was suggested to the PPs that in case of recovery of an e-gadget (*viz.* mobile phone etc.) from the person or via confession of accused, the PP should ensure that the confession or the recovery report must mention the mobile number and the machine number along with the operating password. It was clarified that even if the action gets hit by Section 25 of IEA, the same would become relevant under Section 27 of the IEA. The importance of establishing the chain of custody in adducing electronic evidence was emphasized with meticulously followed entries. The law relating to CCTV footage was discussed in consonance with the judicial pronouncements. Meticulousness and procedural accuracy in collection, preservation and production of electronic evidence was gravitated in the discourse by citing *Tomaso Bruno v. State of U.P*¹³. The apex court held:

non-collection of CCTV footage, ..., non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence.

The session, elucidated the importance of Section 65B typical to the IEA. The chronicle of unsettled, fluid and tumultuous journey of Section 65B of the IEA from *NCT of Delhi v. Navjot Sandhu*¹⁴; *Anvar PV v P.K. Basheer*¹⁵; *Tomaso Bruno v. State of UP*¹⁶; *Sonu @ Amar v State of Haryana*¹⁷; *Shafhi Mohammad v. State of HP*¹⁸; through *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantayal*¹⁹, wherein the issues were finally rested formed part of the discussion.

¹³ (2015) 7 SCC 178

¹⁴ (2005) 11 SCC 600

¹⁵ (2014) 10 SCC 473

¹⁶ Supra Note 13

¹⁷ 2017 SCC OnLine SC 765

¹⁸ (2018) 2 SCC 801

¹⁹ (2020) 7 SCC 1