

NATIONAL JUDICIAL ACADEMY



[P 1331]

A Decade of POCSO:

Re-Thinking Progress & Possibilities

**A Review Consultation on the Protection of Children from Sexual
Offences Act 2012**

11-12 February, 2023

National Judicial Academy (Bhopal) in collaboration with SAMVAD, NIMAHNS (Bangalore)

Programme Report

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The National Judicial Academy, in collaboration with SAMVAD, a National Initiative & Integrated Resource for Child Protection, Mental Health, & Psychosocial Care, located in the Dept. of Child and Adolescent Psychiatry, National Institute of Mental Health & Neurosciences (NIMHANS) organised a two-day Review Consultation on the POCSO Act from 11th – 12th February 2023.

The core objective of this consultation was to facilitate debate and deliberation on key issues related to the Protection of Children against Sexual Offences (POCSO) Act, 2012 by Judges of the Hon'ble High Courts. The consultation also aimed at achieving to present multiple stakeholder perspectives on key dilemmas and challenges in the conceptualisation and implementation of the POCSO Act, to facilitate discussion and deliberation on varied perspectives on these key dilemmas and challenges, to generate possible solutions and alternative proposals that are critical in addressing gaps and challenges and to deliberate on areas of importance that require further research, based on an assessment of challenges under POCSO i.e., to set a research agenda.

Theme 1: Looking Back on 10 Years of POCSO: Progress & Achievements

Chair: Justice Madan B. Lokur & Prof. Shekhar Seshadri

As a part of the first theme for the review consultation, the Speakers were invited to provide a perspective on some of the key achievements observed since the enactment of the POCSO Act, and, equally importantly, the significant challenges that remain to be addressed today, following a decade of the POCSO Act's implementation

Session 1- What do the Numbers tell us about POCSO Cases?

Speaker: Ms. Apoorva

The speaker provided an overview of the key findings of JALDI's recent report on A Decade of POCSO: Developments, Challenges, and Insights from Judicial Data, beginning with a discussion of the methodology adopted in dealing with data collection, cleaning and organization, analysis, and a sample study of judgments. In this regard, certain methodological issues were discussed in the context of undertaking research on the implementation of the POCSO Act.

One of the key insights reported was that the responsibility of disposing POCSO cases is not of the courts alone. The speaker highlighted that higher incidence of reporting of sexual offences under POCSO is potentially attributable to increased awareness and utilization of the Act, and is not necessarily linked to an overall increase in incidence of crime. In this regard, it was reported that while the total number of POCSO cases has been increasing, the number of disposals was also steadily increasing until the advent of the COVID pandemic. Additionally, in regards to the disposal of cases, the study provided key insights on the average number of days and the average number of hearings taken for disposal of a case.

As the speaker highlighted through the study's findings, the report also found that there are more acquittals than convictions, with convictions comprising just about 14% of all disposed cases, while acquittals were reported to constitute over 43% of cases. In some states, the gap between convictions and acquittals was reported to be alarmingly high.

In the analysis of average time taken for disposal of cases, one of the key questions sought to be answered by this report related to identifying underlying causes of commonly reported delays in trial proceedings. The evidence stage was identified as being the most time-consuming with 40% of the total hearings in disposed cases attributable to this stage. As the speaker noted, one of the possible explanations for this trend relates to the difficulties in securing physical attendance of victim-witnesses, experts etc. on allotted days for hearings.

Key insights from the study in relation to the utilisation of the statutory scheme of offences under the POCSO Act were also discussed.

To address the issues outlined above, several recommendations were made during this session. First, the imperative for data to be made more accessible and standardized was recognized in the context of performance evaluation and data-driven policy-making. Second, integrated capacity building programs were highlighted in the context of facilitating better coordination amongst the myriad stakeholders under the Act. Third, periodic impact assessments were emphasized in the context of the policy imperative for studying legislative performance in the country. Fourth, in the context of the integration of mental health and legal systems, the importance for judicial officers to be oriented to the role of a support person in assisting victims, was also discussed. Finally, as a matter of inclusivity, it was recognized that procedural approaches to children inside and outside the courtroom must necessarily be contextualised to their divergent needs i.e., differently-abled

children, young children, adolescents etc. require different procedural approaches rooted in an ethos of child-friendly justice.

Session 2: New Legislative Developments & Case Law on Child Sexual Abuse and POCSO

Speaker: Justice Mukta Gupta

This session began with an overview of the imperative to adopt a contextual approach in the judicial implementation of the POCSO Act. It was explicated the example of a case of incestual adolescent sexual engagement (involving factual consent) and the impact of the POCSO Act in this regard.

The impact of a lack of awareness and a poor psychosocial environment were factors that could not be discarded. Contrastingly, the severity of the crime is reflected in the stipulated punishments under the law. It was noted that while enacted laws are designed for the majority of cases, conventional laws that give courts discretion in sentencing are still the best approach. It was further noted that the Supreme Court has established that the higher the punishment, the stricter the need for judicial scrutiny at the trial level, further contributing to a higher burden of proof. Indeed, it was pointed out that in most cases of sexual harassment under sections 11 and 12, the accused are acquitted.

Additionally, it was noted that adolescent relationships can be complex, particularly in the context of difficulties in age-determination. It was emphasized that there are significant challenges in dealing with such situations without discretion in the sentencing aspect of the law. It was noted that while personal law does not render marriage between minors null and void; they nonetheless remain voidable. The overriding effect of the POCSO Act was therefore highlighted in view of its status as a special legislation. The Hon'ble Supreme Court's decision was also highlighted in the case of *X v. Chief Secretary Health & Family Welfare*, which established that an unmarried woman has the right to sexual autonomy and is also entitled to abortion services subject to the stipulated statutory requirements.

It was highlighted the challenges posed to the effective implementation of POCSO in the context of difficult socio-economic and cultural realities of familial abuse. In the context of such cases, the importance of providing compensation and aid to the victim and the family to ensure that they can survive without the perpetrator's income. Additionally, in the context of rehabilitation, restoring

the personhood of the victim stands on an equal footing with the imperative for financial compensation. Rehabilitation in this regard necessarily includes mental health and trauma-focused interventions, vocational training and social reintegration through livelihood assistance provided to survivors i.e., state-led efforts to provide job opportunities with dignity.

Session 3- Prosecutorial Delays & High Pendency in POCSO Cases

Speaker: Justice Anand Pathak

The speaker provided an overview of the key factors contributing to prosecutorial delays and high pendency with a particular emphasis on the underlying issues in Madhya Pradesh. Additionally, this session discussed systemic concerns with implications for states across the country. The Supreme Court *In Re, Alarming Rise in the Number of Reported Child Rape Incidents* recorded that 63% of POCSO cases remain pending for more than one year. The substantial increase in the pendency of POCSO cases was also discussed in the context of the non-functioning of the district judiciary during the COVID pandemic. In addition to the pandemic, several structural, and procedural issues were highlighted as contributing to delays in completion of POCSO trials. These delays further impeded the rehabilitation and reintegration of child victims, who are often called to court several years after the abuse to testify. Additionally, owing to the high pendency of cases, courts also find it challenging to complete examination-in-chief and the cross-examination on the same day. From an administrative and case management perspective, the pressure of meeting the target number of judgments to be passed in a month was also discussed as a relevant factor affecting the time available for recording of evidence of child victims.

Furthermore, the following key factors that specifically affected prosecution of cases before the relevant courts in POCSO cases were discussed.

- Slow Investigation and Charge-sheeting
- Lack of support persons
- Delays in receipt of DNA and Forensic Science Laboratory (FSL) reports
- Delay in Age determination process
- Exclusive Special Public Prosecutors (SPPs) for Special Courts
- All POCSO cases not being heard at Fast Track Special Courts (FTSC)
- Delay in Tamili of Summons

- Delay Tactics by the Accused
- Conflict between the practices of customary laws and implementation of POCSO Act
- Romantic/consensual cases consume significant time and resources of the police and judiciary
- Human resource challenge
- Lack of child Friendly methods
- Difficulty in recording witness testimony of children with disability
- Lack of proper infrastructure in special courts causes delay

In light of the issues discussed above, following possible ways forward were recommended. Relevant recommendations, in this regard, include the following:

- Establishing exclusive POCSO Courts in all districts.
- Ensuring availability of exclusive Special Public Prosecutors for POCSO cases.
- The state must take initiatives towards securing registration of all births
 - Timely extension of free legal aid and legal counsel to the victim and their family.
- A Statutory Grid of all child-centric laws can be developed.
- Focus must be on strengthening the system by providing adequate and efficient human resources.
- Fund allocation to ensure child-friendly infrastructure in JJBs, CWCs, and Special Courts
- Capacity building programs need to be developed for lawyers and court staff.
 - A separate unit may be established within the police for service of summons in cases of sexual violence.
- The Police Department needs to ensure that IOs dealing with serious crimes are not drawn into law-and-order related responsibilities.
 - The Health Departments of the respective states should conduct training programs on the formats, provisions, and guidelines.
- District hospitals may assign one doctor to deal with Medico-Legal Case requisitions and report on the number of cases attended to on a daily basis, in order to make sure that there is no delay in facilitation of medical examination.

- Guidelines for Support Persons may be issued to outline their appointment, responsibilities, remuneration, and accountability. The State must ensure appointment of support persons in each POCSO case by CWCs.
- Developing a State-level and Divisional-level Grid of interpreters, translators, experts, special educators Counsellors, Psycho-social experts and support persons
- A real-time comprehensive Management Information System (MIS) on POCSO to enable the State and National level review of the status of POCSO Cases against the time period specified in the legislation.

Theme 2: How Far has POCSO Bridged the Gap in Children's Access to Justice?

Chair: Justice (Dr) Shalini Phansalkar Joshi & Dr K. John Vijay Sagar

Given that one of the essential objectives of the POCSO Act was to ensure that child victims and witnesses were able receive timely redressal in cases of sexual offences, this theme sought to examine some of the grey areas pertaining to implementation of the law and the consequences they have for enabling the dispensation of justice, in the best interest of children.

Session 1- Dilemmas in POCSO's Mandatory Reporting Provisions

Speaker: Mr. Saurabh Shashi Ashok

An overview of the context of child sexual abuse and the subsequent genesis of mandatory reporting provisions in the Indian context was provided. It was highlighted that the topic of child sexual abuse is one that has been largely stigmatized and ignored in many societies around the world. Subsequently, the development of mandatory reporting laws and their context was briefly discussed in other jurisdictions. The speaker highlighted the observable trends in mandatory reporting provisions across different contexts, with some countries adopting a sanctions-based and protectionist legal framework, while others instead opting for a family service orientation to reporting, rooted in an ethos of strengthening family structures through the creation of comprehensive support services.

Following an overview of reporting provisions in other countries, the speaker highlighted key differences in India's reporting framework that has essentially emerged out of a protectionist framework rooted in a sanctions-based approach to failures in reporting. These key differences

include: i) Blanket Reporting Obligation i.e., No mandated reporters; ii) No civil penalties for non-reporting i.e., sanctions are primarily criminal; iii) No specifications as to confidentiality for reporters or process of reporting and registration of the offence. In essence, owing to a criminal approach to reporting, it is policed more than encouraged.

The speaker subsequently discussed the key barriers to reporting of sexual offences against children that have emerged over the decade of POCSO's implementation and the existing dilemmas in its implementation for children and service providers. It was highlighted that parents/caregivers are often reluctant to report child sexual abuse owing to: i) stigma and discrimination; ii) fear of legal procedures and systems; iii) children's issues relating to fear of perpetrator reprisal; iv) self-blaming and misconceptions surrounding the abuse; v) children's internalization of the abuse in the context of grooming; vi) mutually-consenting relationships amongst adolescents.

Given that mental health professionals are oftentimes recipients of sexual abuse disclosures during the course of therapeutic engagements, certain key dilemmas faced in reporting were highlighted by the speaker.

In order to balance the criminal justice system's imperatives with the child's perspective, NIMHANS' Practise Guidelines for Service Providers on Mandatory Reporting was highlighted. The following 8-steps of the guidelines were briefly discussed during this session:

- Step 1: Prioritizing Mental Health Assessments and Plan for Psychosocial & Therapeutic Interventions Directed at Healing and Recovery of the Child
- Step 2: Educating children on abuse.
- Step 3: Providing Children with Information on the POCSO Law
- Step 4: Elicit and Respond to Child's Fears and Worries about Reporting
- Step 5: Negotiate with the Child
- Step 6: Explain Legal Processes that Follow Reporting
- Step 7: Explain How Confidentiality Works in Case of Reporting
- Step 8: Obtain the Child's Consent or Parental Assent

Furthermore, additional guidance was provided on cases where children may still be unwilling to report and considerations that need to be factored in decisionmaking of service providers. The following factors were highlighted in decision-making on overriding children's consent:

i) Assessment of the risk for (re)abuse & Responding to Children's Refusal to Mandatory Reporting; ii) Feasibility of Modifying the child's Physical Environment. Following the risk assessment, as discussed above, if the offence is not reported immediately, the imperative for careful maintenance of official files of the child, containing detailed formal documentation on the discussions on mandatory reporting that were conducted (at various points of the treatment and intervention) with the child and family, was also highlighted.

This session also provided a comparative perspective on possible good practices in the context of reporting in relation to the designation of mandated reporters and stipulation of guidelines. To ensure that cases of child sexual abuse are properly reported, the importance of reporting obligations tied to institutions that have some interface with the child, such as mental health professionals, pediatricians, and other such professionals, was discussed.

While reporting abuse is common in many countries, some countries require reporting only in certain cases, while others have no reporting obligations at all. It is important to ensure that reporting is encouraged, but not policed as both under and over reporting can have negative consequences. Additionally, the possibility of introducing non-criminal penalties for individuals who do not report abuse was also discussed. Keeping in mind concerns raised by child-related professionals over the years, the imperative for confidentiality in reporting laws was discussed, in the context of protecting the privacy and safety of the child who is reporting the abuse. Additionally, the imperative to have trained professionals who can handle these cases effectively was also outlined.

Lastly, from a research perspective, considerable gaps in research were identified, pertaining to statistics on compliance with mandatory reporting, hindrances and processes of mandatory reporting, training for professionals on reporting, and the relationship between training, reporting and child outcomes—all of which could potentially guide the development of best practices in clinical CSA interventions. Overall, the reporting and prevention of child sexual abuse require a multi-faceted approach that involves various professionals, institutions, and a society that is committed to creating a safe environment for children.

Session 2: The ‘Notoriously Dangerous Child Witness’: Evaluating Child Witness Competencies

Speaker: Dr Shekhar Seshadri

During this session the complex nature of the adversarial criminal justice system, and challenges faced by children who are victims or witnesses of a crime during court proceedings was discussed. In the context of child interviewing, it was also emphasized that the issue is not what to ask, but how to ask. The way evidence is presented in court can significantly impact the credibility of the witness, and in an adversarial justice system, children are viewed as either reliable or incompetent. However, the orientation of the adversarial system (designed to resolve disputes), as opposed to discovering the truth, was discussed in the context of several dilemmas, particularly in the context of the Indian Evidence Act (IEA) and POCSO.

The speaker outlined two types of child witness competency from a legal perspective i.e., basic competency (memory, language etc.) and truth-lie competency. It was reiterated that contextual inquiry makes a significant difference, and it is not enough to merely ask questions. From a psychosocial perspective, it was posited that in addition to age, developmental ability is also determinative of children’s competency to testify. The speaker provided a developmental perspective on children’s competencies and stipulated the scientific and practical difficulties with soliciting evidence from children under the age of 3-3.5 years. In such cases, the imperative to seek the assistance of a mental health professional was also highlighted.

In judicial efforts to determine children’s competencies for testimony, the speaker provided a comprehensive perspective on the necessity to understand children’s cognitive capacities and communication abilities from a developmental and environmental perspective. In this regard, ascertaining child witness competency exists as a contingent rather than a fixed evaluation i.e., it is not sufficient to simply ask if a child satisfies certain threshold abilities (like language, memory etc.). It is equally important to enquire whether the environment and approach of the interview is developmentally appropriate. While providing a developmental perspective, the speaker outlined children’s competencies across various normative age-groups and developmental stages.

On the basis of this explication, certain developmentally-informed recommendations were made for recording of evidence:

- At a minimum, a child must be about 3.5 years of age, to even attempt taking a statement. • Even then, some children will have language delays and be unable to report.
- Children with intellectual disability will need to be assessed to understand what their abilities and deficits are...and if they can report.
- Narration is a function not only of speech & language abilities but also of social and cognitive skills of the child. As a result, a child development/ mental health professional should be requested to assist, through the use of play and other creative methods to elicit narratives from young children and/or children with intellectual disability.

The abilities of a child become critical in determining not just their competence but the subsequent reliability of their testimony. It was also reiterated that mental health professionals can assist the courts by providing expert opinions on children's competencies across these skill domains, ensuring that the determinations of competency and credibility are scientifically informed.

Session 3: The Abuse-Consent Conundrum: Adolescent Sexual Consent and the POCSO Act

Speaker: Justice N. Anand Venkatesh

The speaker briefly discussed a case which highlights the issue of underage consenting relationships and the potentiality of legal complications. It was highlighted that this case raises the importance of being aware of the rigidity of statutory age limits and understanding the consequences of underage relationships from a socio-cultural and legal perspective.

One of the problems with the act is the criminalization of consensual sexual relationships between individuals under the age of 18. While the act targets beneficiaries who are children, there is a need to differentiate between underage relationships that transcend platonic relationships and those that become sexual. Additionally, the proportionality of criminalization as a response to adolescent sexual relationships necessarily also has to be discussed. In regards to this point, the speaker cited the 240th Report of the Law Commission of India which has recommended that persons of age 16 to 18 should not be criminalized for consensual relationships. As a result of these developmental considerations, it was stated that criminalizing adolescent consensual sexual acts is currently a problem in the statutory conception of the POCSO Act.

Adolescents have a constitutional right to make decisions about their lives and live with a person of their choice. Criminalizing such acts violates their right to dignity, bodily integrity, and privacy. It was reiterated, in this regard, that statutory provisions that punish forms of sexual engagement that are developmentally normal cannot claim to be in the interest of propriety.

It was also highlighted that the paternalistic approach is another problem with the implementation of POCSO. This approach assumes that the state knows what is best for individuals, including adolescents. This is not always the case, and the best interest principle (codified under the juvenile justice framework) should be the guiding principle. The motive behind POCSO is also the best interest of the child, and this principle should be keenly considered when statutory provisions are against the best interest of children.

In light of the points discussed above, it was recommended that proposals may be legislatively considered for lowering the age of consent (possibly to 16 years) with relevant legal provisions pertaining to abusive sexual engagement applicable to adolescents aged 16-18. It was also highlighted the possibility of considering close-in age exceptions to the statutory age of consent to avoid rigidity in the application of age limits under the POCSO Act. Close-in age exceptions would ensure that if both parties are close in age, and the act is consensual, then the act is not criminalized. In this regard, the importance of judicial discretion was highlighted when it comes to consensual relationships between adolescents.

In conclusion, it was stated that the implementation of POCSO needs to be reviewed to ensure that it is applied to the people for whom it was meant. The criminalization of consensual sexual relationships between individuals under the age of 18 is certainly a problem, and poses a challenge to the application of the best interest principle. It was reiterated that considering some of these recommendations, we can ensure that children are protected from sexual exploitation and abuse, whilst also ensuring that their constitutional rights are not encroached upon.

Theme 3: The Imperative to Strengthen Investigative & Prosecutorial Processes in POCSO Cases

Chair: Justice S. Vimala

Given that POCSO cases are rendered complex by the secluded nature of the offence, wherein child victims are often the only witnesses, the investigations necessitate child centered methods

and processes for eliciting credible statements of the child victim. Therefore, while some of POCSO's most significant legislative changes have been in the domain of courtroom processes, the robustness of investigations in POCSO cases, and the gaps thereof, have been identified as crucial determinants of the outcome of the case, as was discussed under this theme.

Session 1: Gaps & Challenges in Child Sexual Abuse Investigative Processes: Areas for Capacitating Stakeholders

Speaker: Shikha Goel

The speaker provided an overview of the context of BHAROSA's establishment and outlined various facets of the model and the status of its current operations.

The speaker recalled that the adage that the "victim wins the battle but loses the war" has unfortunately become a common reality for many victims of child sexual abuse. In this regard, it was highlighted that the trauma of abuse can be life-changing and it is essential that victims receive the necessary support and services to help them heal and recover.

Recognizing the need for specialized services for victims of sexual abuse, the Telangana government established the BHAROSA centers. These centers provide integrated services to victims of child sexual abuse, including medical, legal, and mental health support. They are run by trained civilian staff and professionals who are equipped to handle the specific requirements of child victims. The centers are also recognized as hospitals with medical teams, and police officers are present to ensure that evidence collection is done in a sensitive and professional manner. It was also highlighted that one of the biggest challenges in prosecuting cases of child sexual abuse is the underreporting of the crime. In this context, it was discussed that BHAROSA centers aim to provide a safe and supportive environment for victims to seek help and support.

It was highlighted that there remain many challenges that still need to be addressed, such as the issue of shelter homes, infrastructural issues, and the remoteness of location. In regards to certain good practices, it was also highlighted that the victim compensation process has been delinked from treasury control in Telangana, which has contributed to expediting the processing of compensation claims significantly. Despite these measures, many challenges were highlighted.

In conclusion, it was stated that the BHAROSA centers in Telangana are a significant step towards providing support to victims of child sexual abuse. The centers provide integrated services that are critical to the healing and recovery of victims, and they are a crucial confidence-building measure. However, many challenges remain, and concerted efforts are needed from all stakeholders to address these challenges.

Session 2: The Role of the Prosecutor in POCSO Cases

Speaker: Tara Narula

There is a need for a different role to be carved out for Special Public Prosecutors (SPPs) from that of Public Prosecutors (PPs) and for fresh training to be provided to SPPs. Furthermore, it was identified that there exists a very real gap between the underlying vision of principles of criminal justice system enshrining the right to fair trial and the ground reality. Public Prosecutors, in this regard, are duty bound to assist the Court in the administration of justice and are entrusted with powers to unravel the facts of the matter by way of evidence and at the same time protect the interest of society.

The role of an SPP should be to secure the free, fair, and accurate testimony of the victim. Therefore, the duty of the SPP to ensure that the child is handled in a special manner to secure his/her testimony, was outlined, given the centrality of their testimony to the case, despite the reversal of the burden of proof. Additionally, it was noted that in POCSO cases, often, families cannot be relied upon to support the survivor. Therefore, the system must necessarily be skewed towards ensuring the safety and comfort of the victim, and be hypervigilant against undue influence and evidence tampering. In the peculiar context of incest cases, it was reiterated that this point assumes further significance as the state is required to assume a *parens patriae* role entirely to protect the interests of the state's 'star witness' i.e., the child.

A brief historical context of the administrative superintendence of public prosecutors was provided. It was noted that the absence of such a prosecutorial system, wherein effective guidelines are put in place to outline the role of the prosecutor at the investigation stage is keenly felt in POCSO cases. It was also observed that there seems to over-reliance on the fact that the clear, cogent testimony of the victim is sufficient to lead to a conviction. It was also noted that when chargesheets are sent to the SPPs for review, that review must be more than perfunctory. One of

the basic responsibilities noted, in this regard, was that the SPP must check if requisite searches and seizures have been conducted, statements of material witnesses' recorded, adequate age proof submitted, and, if the child has any special needs.

It was noted that the intersectionality of various factors makes a child vulnerable, and the family may not be relied upon to support the survivor. Therefore, the SPP should have a duty to protect and rehabilitate the victim. Generally, one of the problems discussed in this session is the lack of opportunity afforded for the SPP to meet the child before Victim's Testimony (VT). It was noted that this ought to change, wherein opportunity is provided for a meeting between the SPP and the child at a time prior to filing the charge sheet. Additionally, it was noted that SPPs must have an opportunity to familiarize the child with the court and the basic sequence of proceedings

In regards to framing of charges by the court, it was noted that the SPP bears a responsibility to argue on charge independently, and not just rely on the chargesheet prepared by the police.

During the trial stage, before commencement of prosecution evidence, steps must be taken to ensure that the child has all the necessary assistance required for proper deposition. Section 38 of POCSO was highlighted, in this context, as it provides ample discretion to the court to provide all required assistance while recording of evidence of child "whenever necessary". Additionally, a point was raised that SPPs must first ensure ability of the child to communicate. The Hon'ble High Court of Allahabad's judgment in *Vikas Singh v State of UP (2019) SCC OnLine All 4064*, was highlighted wherein significant observations were made about the ability of child to communicate and when requisite assistance may be provided.

The dynamics and role of a SPP requires active interaction with multiple stakeholders. In this regard, it was reiterated that SPPs must ensure that they are aware of any threats being extended to the child or their family. *State of Bihar v Rajballav Prasad (2017) 2 SCC 178* was cited, wherein it was noted that prime consideration for a fair trial is that witnesses must feel protected for free, frank, and fearless deposition.

SPPs must oppose applications by the accused for re-examination or re-calling of child witnesses. *Vinod Kumar v. State of Punjab (2015) 3 SCC 220* was also highlighted wherein it was held that "It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial". One of the suggestions made in regards to

preparation of charge sheet was also the possibility of making a checklist which may prove to be useful for both the police and prosecution.

Theme 4: Legal Implications of Child Psychosocial & Mental Health Issues: From Intent to Action

Chair: Justice Madan B. Lokur & Prof. Shekhar Seshadri

This theme focused on bringing to the fore initiatives and best practices in assisting sexually abused children, suggesting that transdisciplinary approaches which integrate knowledge of law and child mental health are most likely to enable the child protection and well-being mandate of the POCSO law.

Session 1: Re-imagining the Courtroom: India's First Vulnerable Witness Deposition Complex)

Speaker: Justice Gita Mittal

The session commenced with an overview of the rationale for setting up of special procedures for recording of evidence of a certain group of witnesses i.e., vulnerable witnesses. In this context, it was pointed out that vulnerable witnesses can exist in criminal cases other than those relating to child sexual abuse and even in civil actions.

Linguistic barriers were also discussed in the context of persons with disability and the necessary accommodations required to be made therein. A question was posed as to whether an identification by a mentally incapacitated person should be disbelieved when they are able to identify their mother and other persons, and therefore possess the capability to distinguish between persons. Also, whether corroboration would be required in such cases, and, if yes, to what extent?

An overview of the various issues in recording of evidence in the adversarial courtroom, given the critical concerns in regards to secondary traumatization was laid out. In this regard, the model for vulnerable witness courtrooms was also conceptualized in keeping with existing court infrastructure and resource constraints. On 12th September 2012, the first vulnerable witness complex was setup in the Karkardooma courts complex. In the context of the ecology of the court, it was pointed out the role played by the physical environment in intimidating and alienating vulnerable witnesses.

The key aspects of the victim's experience with trial proceedings were also highlighted. Some of the key observations from the victim's experience included:

i) Multiplicity of lawyers given that there were multiple accused; ii) no person in the courtroom supporting the victim apart from the prosecutor. In addition to the presence of a support person in court, it was reiterated that multiple visits to the court needs to be circumscribed, unless necessary in a given case, wherein the child may provide piecemeal information over the course of multiple hearings. In regards to the recording of evidence, the importance of the use of age-appropriate language with vulnerable child witnesses was highlighted. Additionally, it was also reiterated that hearings must not be scheduled in such a way as to disrupt the child's schedule (relating to school time, exams etc.), nor should presence in court cause loss of livelihood to the child's family as this may greatly dissuade the child from providing clear and cogent evidence.

In accordance with the guidelines laid down in *Smruti Tukaram Badade v. State of Maharashtra, 2022 SCC Online SC 78*, the significance of pretrial visits by the child to the court during which the SPP or Judge can familiarize the child with the court environment was highlighted. It was stressed here that there is no question of tutoring which can arise in just taking the child through the VWC structure and physical environment.

Following the above, Justice Mittal provided some key information on the important elements of the VWDC in terms of physical infrastructure. These points were also highlighted in the context of the suitability of the Delhi High Court Guidelines in regards to adapting existing courtroom infrastructure.

Session 2: Integrating Mental Health and Law: Practice Methods in PreTrial and Trial Assistance to Vulnerable Child Witnesses

Speaker: Sheila Ramaswamy

The session consisted of case study based on NIMHANS Dept. of Child Psychiatry's Support to Child Witnesses: The Muzaffarpur Shelter Home Case.

To begin with, in the Muzaffarpur shelter case, it was highlighted that odd behaviors were observed amongst children (including children observed to be roaming around the shelter home

without clothes). Following a social audit of the institutions, many concerning issues came to light following which the trafficking operation was unearthed. In terms of the context of the abuse, it was also highlighted that the children in the shelter home were mostly runaways and rescues. The children were not provided opportunities for education, development, or recreation. As was pointed out, these children were also not permitted to maintain contact with their families, nor were they permitted to be restored back to their families by the Child Welfare Committees. As a result, it was observed that many children had not stepped out of the institution for 3- 4 years.

Following transfer of the Muzaffarpur Shelter Home Case from Bihar Police to the Central Bureau of Investigation (CBI) vide orders of the Hon'ble Supreme Court in the case of *Nivedita Jha v. State of Bihar (2018)*, the NIMHANS Team was brought on board with the investigation to assist the CBI in gathering evidence, provide mental health and psychosocial support and provide further recommendations for their rehabilitation. To facilitate the same, it was highlighted that the NIMHANS Team developed comprehensive developmental and mental health assessment reports (to ascertain the psychological impact of the sexual abuse), and consequently, to ascertain their capacity to provide testimony in court. Following these assessments, SAMVAD categorised children into three categories to develop a plan for implementation of court preparation interventions.

The following is an overview of the key court preparation interventions implemented with child witnesses (as discussed during this session):

- Mental health and trauma-focused interventions
- Information on court geography, facilities and personnel
- Techniques for Refreshing Children's Memory
- Techniques for Skilling Children to Respond to Court Interrogation

In addition to the various pre-trial interventions discussed above, this session also highlighted the in-trial support provided to children by the NIMHANS Team. The fact that the trial took place in a Vulnerable Witness Deposition Complex also greatly assisted children in terms of mitigating some of the harsher impacts of the adversarial courtroom. It was highlighted herein that the children were prepared until the evening before they had to go to court. This was done also to evaluate their readiness to depose. Depending on mental status and ability, the court was also

advised on the order of appearance of children and the requirement for necessary accommodations such as breaks/length of depositions etc. The NIMHANS Support Persons also accompanied children through the trial (including during travel to and from the courtroom and during wait times)

With reference to the post-trial stage, it was highlighted that SAMVAD helped in assessing which institutions are suitable for children (in line with their assessment profile and documented needs), and furthermore provided recommendations on whether they should be repatriated, or placed in a different shelter home. Recommendations pertaining to medium-to-long term mental health assistance and rehabilitation was also provided. The NIMHANS Team also coordinated with the relevant state tertiary mental health institutions to facilitate the provision of long-term assistance (where required).

Session 3 - Re-thinking Appreciation of Evidence in Child Sexual Abuse Cases

Speaker: Dr Mrinal Satish

The session began by highlighting the key types of evidence available in sexual offences with specific reference to POCSO i.e., testimony of the victim, other witness statements, medical and forensic evidence, and other corroboratory evidence. Further, this session highlighted the salient differences in appreciation of key forms of evidence, like witness statements, in adult vis-à-vis child contexts. These differing standards are partly owed to jurisprudential concerns regarding the credibility of children's evidence.

In the POCSO context, while sole testimony of a child witness is sufficient for conviction (provided that it is credible and without material inconsistency), there is also a jurisprudential preference for corroboration as a 'rule of practical wisdom'. Additionally, while the absence of medical evidence is not a ground for disbelieving the victim's testimony or acquittal, the factual circumstances of children's testimony (plagued by concerns of credibility) nonetheless pose a significant challenge. It was discussed that the 2013 amendments to the CrPC, based on the Verma Committee Report, wherein section 164 statements were made mandatory in cases involving any physical and mentally challenged individuals, given their evidentiary importance and the challenges posed by courtroom examination in such cases.

It was also highlighted that the Vulnerable Witness Guidelines in relation to chief and cross examination via live link, and emphasised the importance of evidentiary standards accommodating

such relaxations, so as to ensure that utilisation of a live link does not work to the detriment of the child.

Regarding victims turning hostile, it was stated that there are significant variations across cases, where the trial ranges from a few months to a few years. During this time, the witnesses are subject to multiple pressures, especially when a family member is involved in the case i.e., a case of intra-familial abuse. In such instances, the child is separated and kept in a children's home, away from their familiar home environment. Yet, such institutionalisation does not necessarily preclude people from contacting children and persuading them to turn hostile. Additionally, trial delays and long-running trials were also discussed in the context of out-of-court settlements that currently frustrate the implementation of POCSO.

The speaker provided a comparative perspective and observed that in the context of UK and New Zealand legislations, one of the questions considered was whether evidence can be recorded through a live link. The legislations have said that police's interview of the child if recorded can be considered as the child's examination in chief, if child is available for the prosecution to ask further questions to them. The principle behind such a provision was to avoid multiple interviews for the same occurrences. In the Indian context too, Section 164 (5A) (b) read with Section 137 of the Indian Evidence Act provides a similar accommodation wherein the statement recorded by the magistrate can be considered in lieu of examination in chief, subject to cross-examination in-person. Given that this provision has been extended to those who are 'temporarily or permanently mentally or physically disabled', this session raised question of utilisation of such provisions and considered whether it was necessary to extend this facility to other child witnesses as well.

While looking at the exception to the exclusion of hearsay, the speaker provided an overview of Sections 6 and 157 of the Indian Evidence Act, 1872 and outlined the key requirements for admissibility of certain kinds of hearsay (covering children's disclosure of sexual abuse to parents/caregivers). Further, this session also delved into some of the criticism to the hearsay rule in jurisdictions like the US, where the Wigmore excited utterance assumption is applied, given that arbitrary time limits to evaluate 'genuine' disclosures have been debunked in studies on child sexual abuse disclosure. The following cases were discussed in relation to the hearsay rule:

- ***Tamil Nadu v. Suresh 1988 2 SCC 372*** – laid down the rule regarding contemporaneity i.e., “at or about same time when the fact took place” and held that this is to be broadly interpreted.

- *Sukhar v. UP 1999 9 SCC 507* – stated that hearsay must be contemporaneous. Wigmore’s effusion of excitement standard is mentioned.

- *Jitendar v. NCT 2017 SCC Online Del 8723* –Statement of the child victim made to the mother moments after the incident, held to be admissible as res gestae evidence.

- *Manish v. 2019 SCC Online Bom HC 1154* - Narration by child victim to two other witnesses contemporaneously, held to be admissible as evidence.

The speaker highlighted the use of judicial discretion in the US (in states like Minnesota) where the exception to hearsay is based on the judge’s estimation of the time, content, and circumstances of the statement, on one hand, and the reliability of the person to whom it was made, on the other. It was further discussed the *R v. Khan* (Canadian Supreme Court case) wherein it was held that hearsay evidence can be admitted when it is necessary (in the absence of other admissible evidence) provided it is reliable. Necessity was interpreted in the context of preventing trauma to the child. Citing Wharton’s Criminal Evidence, this case held that res gestae should be applied liberally in cases of CSA especially when the victim is too young (necessity). While discussing the above, it was also highlighted the importance of considering whether, in the presence of sections 29 and 30 under POCSO (wherein the burden of proof is lower), exceptions to rules of evidence are in consonance with the requirements of a fair trial.

Regarding medical evidence, it was also highlighted how it has been a struggle in India to stop practise of the 2-finger test despite Hon’ble Supreme Court and Hon’ble High Court judgements proscribing the same. This was discussed in the context of the stereotypes that continue to govern the implementation of the POCSO Act. It was also addressed the practical challenges in appreciation of medical evidence. In 2016, a revised edition of Modi’s Medical Jurisprudence (edited by Justice Kannan) had done away with the part on virginity testing. Yet, it was noted that the practise continues because the judicial practitioners still refer to older editions.

It was stated that in analysis of cases from 1984-2009 (25 years), no case was found wherein the minimum sentence was given when the sexual act was consensual. The courts ordered that the time already served is sufficient. It was highlighted that the assumption that the UNCRC requires the 67 age of consent to be 18 is erroneous and has been recognised as a misinterpretation in the Justice Verma Committee report as well. While discussing the fluid theory of discretion, it was

reiterated that if you take away discretion in one domain, it goes in another part of the system. For example, if you take away judicial discretion to decide on sentencing, the police's discretion will assume greater significance in regards to decision-making on sections under which the chargesheet is to be filed. Therefore, it was noted that judicial discretion needs to be brought back in sentencing. It was also outlined the role played by the mandatory minimum sentencing requirement in facilitating higher number of acquittals. The case of *Aparna Bhatt v. State of MP Live Law 2021 SC 168* was highlighted in light of the Supreme Court's guidance on exercise of judicial discretion.

Theme 5: Trial Procedure in Child Sexual Abuse Cases: Are there Imperatives for a Paradigm Shift?

This session facilitated debates on the current trial procedure in child sexual abuse cases, and whether there are imperatives for a paradigm shift in the structure of legal and judicial proceedings, in order to move towards a more inclusive, rights-based model of criminal justice, with possible adaptations of adversarial and inquisitorial approaches in child sexual abuse cases i.e., to re-think the relationship between the victim, the accused and the State, enabling victims not only to tell their story but also to protect the integrity of the criminal justice system's endeavour for the truth.

Speakers: Justice Aniruddha Bose, Justice Madan B. Lokur & Justice S. Vimala

Regarding the debate as to whether adversarial or inquisitorial system is better in cases of child sexual offences, it was stated that we need further research. In the context of procedural justice, it was stated that children's communication abilities are vastly distinct from courtroom legalese. It was further stated that child friendliness in this context includes the courtroom environment, the attitude towards children, behaviour towards children and relaxation of procedure to accommodate children's needs. It was also highlighted the imperative of secondary victimisation and the need for further research to explore alternatives to the adversarial system and procedures that can help address this issue.

In regards to the high number of acquittals, the following points were raised:

- Although special courts have been constituted, they are also told to take other matters. The situation prevails where in the morning the court in other matters orients itself towards upholding the rights of the accused. Then in the afternoon, they are expected to shift their mindset and uphold

the interest of the victim child. It was highlighted this as a concern as presiding officers should not be expected to shift their orientation in such a manner.

- Another reason is that many times the higher courts realise that a chargesheet is not officially taken on file in the trial courts. If there is an enquiry as to what is the date of the chargesheet, this is not mentioned on the file. The police says that the chargesheet is there but the same is not reflected on the file. To mitigate this, there is now a mechanism in place to ensure that police receive a receipt once the chargesheet is submitted.

In the context of trial delays, it was stated that time bound adjudication should not cause mechanical adjudication. The case of *Alakh Alok Srivastava Writ Petition (c) no.76 of 2018* was discussed in this context.

It was also discussed that factors in the current trials of POCSO cases that contribute to issues in prosecution, especially when witnesses turn hostile. The issue of compensation was specifically highlighted as a critical factor affecting victim's sustained involvement in trial proceedings

Furthermore, it was that discussed the imperative for training initiatives aimed at addressing current gaps in judicial understanding, particularly from the perspective of child mental health. It was stated that notwithstanding the question of whether we should have inquisitorial or adversarial procedures, the bottom-line still remains that the judiciary requires more intensive training on other disciplines like child mental health.

It was also highlighted that, typically, judges have been taught about the presumption of innocence with respect to the accused. In certain disadvantaged sections, such as the SC/ST, women and children, it was noted that the adversarial system was not the best. In this context, it was highlighted that legislative frameworks like POCSO have moved away from traditional adversarial approaches. It was further stated that while questions were earlier directed at child witness credibility, POCSO has proved to be a comprehensive statute addressing various dilemmas that the court faced.

It was further highlighted that, previously, the accused could get acquitted because of delay in filing of the complaint. Subsequently, however, the context of cases of sexual offences revealed that delays could be caused because of social stigma against such instances, dilemmas that the

child faces in regards to disclosure, and dilemmas that the parents can face while considering approaching the police.

It was also emphasised that specially trained judges are needed to shift this adversarial paradigm towards upholding the child's interests. But this paradigm shift is a second level step. First, it was posited that research must be conducted to understand the implementation of the Act better. Following this, it is necessary to analyse whether reporting is happening sufficiently; what hesitations are being faced in registering a complaint; what are the victim's feelings towards a trial, whether there is a hostile climate or not?

In light of concerns regarding registration of false cases, it was reiterated that further research is necessary to identify contexts of misuse of the statute and possible safeguards that can be instituted to address the same.

While there were various aspects of the adversarial system discussed in the context of POCSO, it was highlighted that some key questions and dilemmas to consider as this topic is taken up for discussion. The following are summarised excerpts of a few critical points raised:

- A debate had arisen in the 1950s which has also revived in the recent past - talking about special courts for particular offences. For example, regarding cases against politicians. In 2003, to deal with pendency, fast track courts were set up. Then came fast track special courts. In the context of the debate regarding adversarial or inquisitorial systems, the basic and ultimate objective is to deliver quick justice and closure. But a mere change in nomenclatures is not useful. For example, the JJB conducts inquiries, but actually these inquiries are conducted in trial-like fashion.

In the context of the Juvenile Justice Board holding inquiries like trials, there is no new procedure that has been created for these inquiries. Is it necessary to file a chargesheet? Is it necessary for evidence to be led? These questions have been left unaddressed, since we do not know about the procedure. Therefore, even when we seek to adopt inquisitorial procedures, we end up following the adversarial ones. Instead, what we must consider are frameworks like in the Commissions of Inquiry Act, 1952, wherein a 6 months deadline has been prescribed, within which the adjudicating authority is empowered to create its own procedure.

Additionally, we do not even know how the inquisitorial system is supposed to work. In the Juvenile Justice Board, social workers are involved as Members of the Board. Yet, whatever the

magistrate says, is typically agreed on. We need empirical data, to see the results of these experiments also in other countries. Did they lead to any prejudice? Did they expedite the process? Was justice given to the victim? We do not even know if the adoption of such procedures will impact the constitutional rights of accused.

- One of the suggestions during this consultation was to conduct a judicial impact assessment after new legislations are enacted. For example, under the Negotiable Instruments Act, 1881, lakhs of cases were being filed, which led to pendency of cases. Even with respect to the Narcotics, Drugs and Psychotropic Substances Act, 1985, it was not studied what the impact on the judiciary will be. A report was filed but to no outcome.
- Certain case management rules were adopted by the Supreme Court in 2004-05. These have yet to be implemented in letter and spirit. It was pointed out ⁷² that while there have been many experiments to expedite trials, these have not succeeded. One of the reasons for this is that we do not have any Standard Operating Procedures in place.
- In the Motor Vehicles Act, 1988, Section 140 casts a no-fault liability. Right at the start compensation is supposed to be paid to the affected party. Thereafter, an inquiry is conducted rather than a trial. The aspect of the no fault liability may be considered in POCSO cases, in an inquisitorial manner, given the issues in processing of compensation claims.