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Law on Child Sexual Abuse in India

Ready Reckoner for Police Medical Personnel Magistrates, Judges and Child Welfare Committees



**Centre for Child and the Law
National Law School of India University, Bangalore**

November, 2015

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Foreword by Hon'ble Justice Mr. Madan B. Lokur

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FOREWORD

Despite the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 the basic rights of children have not been given much importance. Fortunately, the situation has changed over the last few years thanks to research centres like the Centre for Child and the Law of the National Law School of India University (CCL-NLSIU). Now, there is at least some talk of child rights, but the ground level recognition and acceptance of such rights is still a somewhat distant dream. However, I am hopeful that in the coming years, great strides will be made in this direction.

The basic rights of children are well known and have international recognition through the United Nations Convention on the Rights of the Child, 1989 and the Beijing Rules. What are the other rights that are equally important and how does one recognize them for their enforcement? It is difficult to codify all such rights since interactions with children lead to innumerable situations and possibilities. Through its research projects and interactions in a variety of seminars and discussions, the CCL-NLSIU has successfully brought to our attention the rights that children have under certain circumstances and what can be done towards their enforcement. My experiences with the CCL-NLSIU have been positive and I believe it to be a body of dedicated academics and professionals whose work in this field is meaningful and needs to be taken seriously.

In the course of recognizing the rights of children, our Parliament has enacted some progressive legislation and one of them is the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). Perhaps this legislation was overdue since the Statement of Objects and Reasons refers to a study conducted by the Ministry of Women and Child development of the Government of India in 2007. The delay of about five years in enacting the legislation is inexplicable, but there is no doubt that the legislation was needed. Sexual offences, whether they concern adults or children, are often not reported for a variety of reasons. And if they are reported, they are often not recorded. This is not a peculiarly Indian malaise. In Britain, under-recording of crimes relating to sexual offences is as high as 26%.¹

¹ Crime-Recording: Making the Victim Count. This is the final report of an inspection of crime data integrity in police forces in England and Wales, (November 2014).

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The Statement of Objects and Reasons for enacting the POCSO Act is, *inter alia*, as follows:

“It is therefore, proposed to enact a self-contained comprehensive legislation *inter alia* to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.”

Apart from anything else, child friendly procedures are necessary at every stage of the process of investigation and justice delivery. What is equally important (if not more important) is that Special Courts established under the POCSO Act are required to be created for ‘speedy trial of such offences.’ This involves not only infrastructure being made available, but sensitization of prosecutors and judges apart from a range of other activities. Progressive legislation such as the POCSO Act requires a judicial impact assessment, which has unfortunately not been done. For this reason, Special Courts have not been established in several parts of the country and, in effect, only lip service has been paid to the rights of the child, whether as a victim or as an offender.

Notwithstanding this somewhat dismal scenario, research centres and child rights activists have continued their efforts in bringing issues concerning children to the fore. They must be complimented for their efforts. One of the more painstaking efforts is this Ready Reckoner that has been brought out by the CCL-NLSIU. It discusses a very large number of issues and situations that the stakeholders might have to encounter.

The Ready Reckoner has been divided into six chapters. The first chapter gives a lucid overview of the legal framework while the remaining five chapters are grounded in the duties and responsibilities of State actors such as the Judges in the Special Courts, Magistrates, Child Welfare Committees, the police, medical practitioners and others. The broad format is an interesting FAQ format which should make it relatively easy for those not trained in the law to understand procedural and substantive nuances in dealing with situations of the kind that the POCSO Act addresses. The CCL-NLSIU has drawn on its considerable experience in direct field interventions and its earlier booklet containing Frequently Asked

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Questions on the provisions of the POCSO Act itself as well as its study of the Criminal Law (Amendment) Act, 2013 relevant to child sexual abuse. The Ready Reckoner is not only an expanded version of the booklet but also a seminal foray into a more comprehensive study of the challenges that activists and others are likely to encounter in the effective implementation of the POCSO Act.

I have no doubt that as time passes, more issues will need attention and the answers to some extant issues might need elucidation or perhaps even reconsideration. The CCL-NLSIU has undertaken an enormous task and has carried it out successfully. I only hope that in subsequent editions (of which I am sure there will be many), it will be able to keep up the high quality of expertise that it has demonstrated in this Ready Reckoner.

On my part, I can do no better than to commend this Ready Reckoner to all policy and decision makers, as well as to Judges of Special Courts, Magistrates, Child Welfare Committees, medical practitioners, the police, child rights activists and others. You will find it extremely informative and helpful in your field of activity.

New Delhi
3rd November, 2015

Madan Lokur
(Madan B. Lokur)
Judge
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Message from Prof. (Dr.) R. Venkata Rao



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Message from Prof. (Dr.) R. Venkata Rao, Vice Chancellor

The recent passing of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) by the Parliament has been a landmark move in addressing the rising incidents of child sexual abuse in India. However, the core of combating this problem lies in the ground level implementation and in the hands of the variety of actors in the criminal justice system that are applying this law. This Ready Reckoner is an important step in simplifying and disseminating the laws related to child sexual abuse to these actors.

This Reckoner covers the entire ambit of laws dealing with child sexual abuse, not only in the POCSO Act, but also in other legislations such as the Indian Penal Code, 1869; Information Technology Act, 2000; etc. It serves as a comprehensive manual to the key actors – the Police, Doctors, Magistrates, CWCs and Special Court judges covering their role, responsibilities and powers under the various laws. The Reckoner is further structured in question and answer format covering various scenarios that these actors may encounter while discharging their functions under the law.

The Reckoner can also be used by other actors in the system such as NGOs, advocates, social workers, prosecutors, support persons and anyone else interested in understanding the law around child sexual abuse. In addition the CCL, NLSIU team have also published the second edition of 'Frequently Asked Questions on Protection of Children from Sexual Offences Act and The Criminal Law (Amendment) Act, 2013' in January, 2015, which de-mystifies the law on child sexual abuse in order to make the law accessible by the general public.

We hope that this Reckoner serves as a ready handbook in understanding not only the basics but also the finer aspects of the legal system that are aimed at providing a comprehensive response to victims of sexual abuse and their families.

I would like to congratulate Arlene Manoharan, Swagata Raha, Shruthi Ramakrishnan, Anuroopa Giliyal and all the other individuals and experts for their contribution to this laudable effort.

Prof. (Dr.) R. Venkata Rao
Vice Chancellor

Message from : Prof. (Dr.) V.S. Elizabeth



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V.S. Elizabeth
Professor

10th November, 2015

I would like to congratulate the Juvenile Justice team at the Centre for Child and the Law headed by Ms Arlene Manoharan for the excellent and timely work that they have done by publishing this Ready Reckoner on the POCSO Act. For a long time we denied the prevalence of sexual abuse of children. Thanks to the work of various activists finally in 2012 the POCSO Act was passed by the Indian Parliament. However, the work for justice for rights of the children who have been subjected to sexual abuse is now ahead of us.

The Ready Reckoner, we at the Centre for Child and the Law hope, will enable the creation, strengthening and equipping all those who are working in the implementation of the POCSO Act with the skills required to make the law effective and through this process ensuring justice for all children. This Ready Reckoner is not based on a theoretical approach or understanding. It is based on the findings through interactions with various stake holders carried out over a period of time. Thus, we hope that this Ready Reckoner will be used in the spirit in which it has been prepared.

I once again congratulate the team and wish all the best to those who will make use of this Ready Reckoner in their work.

With best wishes

Sincerely yours

(V.S. Elizabeth)

Professor & Coordinator

Centre for Child and the Law

National Law School of India University

A University for legal Studies and Research sponsored by the Bar Council of India and established under Karnataka Act 22 of 1986

PREFACE

The Centre for Child and the Law, of the National Law School of India (CCL-NLSIU) is a specialized research centre working in the area of child rights, since 1996. The main thrust of the work is on Juvenile Justice and Child Protection, Universalisation of Quality Equitable School Education, Child Labour, Protection of Children from Sexual Offences, Justice to Children through Independent Human Rights Institutions, Right to Food, and Child Marriage. The Juvenile Justice Programme at CCL-NLSIU engages in multi-disciplinary direct field action with children and families in the juvenile justice system, as well as multi-disciplinary research, teaching, training, lobbying and advocacy in order to positively impact policy, law and professional practice on issues concerning children and their families. The team adopts a human rights and multi-disciplinary approach in general and a constructive, yet critical collaborative approach with the state. The mission of CCL-NLSIU is to institutionalize a culture of respect for child rights in India.

Legal researchers in the Juvenile Justice Program at CCL-NLSIU have extensively examined the legal framework surrounding the POCSO Act and have conducted capacity building programs on the issue of child sexual abuse for judges, prosecutors, police, Child Welfare Committees, Commissions for Protection of Child Rights, and for functionaries within the child protection system. They prepared a booklet containing Frequently Asked Questions on the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013, (first edition published on 14 November 2013 and second edition in January 2015).

This Ready Reckoner on the POCSO Act seeks to offer an expanded explanation of the provisions of the POCSO Act and Rules and its application. Work on the reckoner commenced in January 2014. Since then, the team interacted with judges, prosecutors, defence lawyers, Child Welfare Committees, police, NGOs, Support Persons, and child victims as well. The questions identified in the Reckoner are largely based on these interactions in the field, and on specific queries raised by some stakeholders.

The Ready Reckoner consists of six chapters:

1. Overview of the Legal framework relevant to Sexual Offences against Children
2. Duties of the Police and the Special Juvenile Police Unit
3. Medical examination and Emergency Medical Care: Procedures and Responsibilities of Medical Practitioners
4. Role of Magistrates
5. Functions of Child Welfare Committees under the POCSO Act
6. Role of the Special Court under the POCSO Act

Each Chapter details the relevant legal framework and addresses specific questions concerning the application of the law on the ground. Each Chapter has also been reviewed by at least two domain experts, based on which further revisions were made.

The Reckoner refers to children who have been sexually abused as ‘victims’ and not as ‘survivors.’ This is a conscious decision by the team, because, in our view, the transition from a victim to a survivor is a process in which each and every actor within the criminal justice system has a vital role to play. This point is underscored in every Chapter, wherein emphasis is made on the duties of each stakeholder to ensure child sensitive and child rights centric procedures in order to enable justice, to prevent secondary victimization and to pro-actively contribute to the healing and recovery of the child where possible.

We sincerely hope that functionaries under the law and other persons working in this very challenging area of child sexual abuse will find the Ready Reckoner useful in strengthening their hands and informing their endeavours.

We encourage you to write to us at ccl@nls.ac.in if you need clarifications or have a question that has not been addressed adequately in the reckoner. Any errors contained are inadvertent and unintentional. Kindly bring these to our attention, should you find any.

Arlene Manoharan, MSW
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November 2015

ACKNOWLEDGMENTS

We would like to express our sincere appreciation to Ms. Swagata Raha, Senior Legal Researcher with the Centre for Child and the Law, National Law School of India University (CCL NLSIU), who is the primary author and driving force behind this publication. Her sharp legal research skills, passion for excellence and deep concern for child victims of sexual abuse has enabled this work to come to fruition in the manner it has. She has worked in close co-ordination with Ms. Shruthi Ramakrishnan, the co-author of this publication, who also works as a Legal Researcher at CCL NLSIU. Ms. Raha also mentored all the other individuals and interns who contributed to this publication.

Prof. (Dr.) R. Venkata Rao, Vice Chancellor, NLSIU, has always been a source of encouragement for CCL. Prof. (Dr.) V. S. Elizabeth, one of the senior Professors of the National Law School, who has taken charge as Coordinator of CCL NLSIU from 1st October 2015, has enthused the CCL team with her genuine interest and support for the work being undertaken. We thank both of them for their positive messages.

We are deeply honored that Honorable Justice Madan B. Lokur, judge, Supreme Court of India consented to write the foreword to this publication. His pro-active vision, incisive judgments and deep commitment to ensure justice to children in India has already made its impact on children and the child rights arena. We hope that this publication and his inspiring foreword will be used to further this cause.

Adv. Geeta Sajjanshetty, Anuroopa Giliyal, legal researchers in the team, also contributed to chapter 1 of the Ready Reckoner. Further, the initial drafts of the chapter for the Police (chapter 2) and Doctors (chapter 3) were drafted by Ms. Gulika Reddy, an independent legal researcher, under the guidance of Ms. Raha. The chapter for CWCs (chapter 4) was also originally drafted by Adv. Geeta Sajjanashetty, with inputs from Ms. Gulika Reddy. Adv. Sajjanshetty also gave inputs on all the other chapters as well. We express our gratitude to each one of them for these initial contributions, even though all these chapters were subsequently revised by Ms. Raha and Ms. Ramakrishnan.

We acknowledge with appreciation Dr. Preeti Jacob, Assistant Professor, Department of Child and Adolescent Psychiatry, National Institute of Mental Health and Neuro Sciences (NIMHANS), Bangalore, who contributed a section on 'Questioning a Child in Court – Suggested Do's and Don'ts for a Special Court Judge', in the chapter for judges, drawing from her clinical experience of dealing with child victims and their families, and as resource person for CCL NLSIU training programmes conducted for judges of the Special Courts.

Arlene Manoharan, Fellow, who heads the multi-disciplinary Juvenile Justice Program at CCL NLSIU, reviewed and edited the entire Ready Reckoner. She supplemented the inputs from the domain experts listed above by copy editing, proof reading, and identifying gaps in content, drawing from her expertise as a social worker cum researcher engaging with the child protection system. We sincerely thank her for this valuable contribution.

Internally, feedback on all chapters was provided by Anuroopa Giliyal, drawing from her research and experience as a member of the Committee set up by the NCPCR to draft the POCSO Bill, 2010. External experts were also invited to provide feedback drawing from their domain knowledge. Dr. Kaveri Haritas, provided feedback on all the chapters. Dr. S. B. N. Prakash, Adjunct Professor at NLSIU and former District and Sessions judge gave his views on three chapters - i.e. the chapters for Police, the Magistrates as well as for the judges of the Special Courts under the POCSO Act. Ms. Rovina Bastian, Program Manager - Gender Sensitization Police Project, Karnataka State Police, who is involved in capacity building on various issues, gave her inputs on chapter 2 for police. Prof. (Dr.) Shantha Sinha, former Chairperson of the National Commission for Protection of Child Rights (NCPCR) and Ms. Nina Nayak, former Chairperson of the Child Welfare Committee (Bangalore Urban) and former Member of the NCPCR, both gave their views on the chapter for the Child Welfare Committees, drawing from their own field experience of having worked on the issue and with child victims in their respective capacities. Dr. Jagadeesh N., Professor of Forensic Medicine & Toxicology, Vydehi Institute of Medical Sciences & Research Centre, Bangalore and Dr. Sowmya Bhaskaran T. S., MD (Psy), DM (Child and Adolescent Psychiatry from the Department of Child and Adolescent Psychiatry - NIMHANS, reviewed the chapter for doctors and gave insightful feedback, drawn from their practical engagement with child victims of abuse and their families journeying through the justice system. Dr. Mrinal Satish also reviewed the draft of the Reckoner and gave a few inputs on the same. We acknowledge with gratitude the contributions they all have made.

We appreciate the research inputs provided by two law interns/volunteers - Anshekka Gambhir (University of Petroleum and Energy Studies, Dehradun), for putting together the table of contents, list of abbreviations, and list of cases; Mr. Saahil Dama (National Law University – Jodhpur), on the issue of presumption and Ms. Nandita Menon, (National University of Advanced Legal Studies, Kochi), for inputs on the chapter on CWCs. We also thank Ms. Aneesha Johny, Ms. Anjali Shivanand and Ms. Shruthi Ramakrishnan, legal researchers at CCL NLSIU, for their contribution to the proof reading of the documents.

The Juvenile Justice Program at CCL NLSIU also includes a research that is being undertaken on the functioning of the Special Courts under the POCSO Act 2012 in five states across the country. Data is being collected through interviews with judges, doctors, prosecutors, Child Welfare Committees, Support Persons, advocates, and others. Training programmes are also being designed and conducted for judges of the Special Courts, Child Welfare Committees, Public Prosecutors and Juvenile Justice Boards. These 3 activities have provided opportunities to blend the legal research with the practical insights derived from the stakeholders in the field, all of who work in challenging circumstances, dealing

with an issue that requires a high level of commitment, in depth knowledge and specialized skills. We offer our sincere appreciation to each and every individual who made time to engage with us and share their experiences, challenges and recommendations.

An integral and vital part of the above inter-related activities on the issue of child sexual abuse is the interviews that are conducted with child victims of sexual abuse and members of their families, with assistance from experts who work directly with them. Insights from these endeavours have strongly influenced this publication. It is to these child victims and their loved ones – the brave individuals who have in their own way tried to break the silence that shrouds child sexual abuse, that we offer our heartfelt gratitude for sharing their stories and insights. We stand in solidarity with them as they journey towards recovery.

The Tata Trusts provided the support that enabled this publication and all the other work undertaken through our ongoing project, aimed at strengthening the Child Protection System in India. We are indeed grateful for this support.

LIST OF ABBREVIATIONS

A.P.	: Andhra Pradesh
A.C.	: Appellate Cases
AIR	: All India Reporter
All E R	: All England Reports
CLAA	: Criminal Law Amendment Act
CWC	: Child Welfare Committee
Ch.	: Chapter
Co.	: Company
Cr. PC.	: Criminal Procedure Code
DLT	: Delhi Law Times
Dr.	: Doctor
ECR	: European Case Report
IPC	: Indian Penal Code
IEA	: Indian Evidence Act
KBD.	: King's Bench Division
Mad.	: Madras
MANU	: Manupatra
MTP	: Medical Termination of Pregnancy
NCPCR	: National Commission for the Protection of Child Rights
NCT	: National Capital Territory
Ors.	: Others
PP.	: Page no. or Pages
SC	: Supreme Court
SCC	: Supreme Court Cases
SCPCR	: State Commission for the Protection of Child Rights
SCR	: Supreme Court Reports
SJPU	: Special Juvenile Police Unit
Sd/-	: Signed
v.	: Versus
WLR.	: Weekly Law Reports
UN	: United Nations
POCSO	: Protection Of Child From Sexual Offences

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53.	<i>Ranjit Hazarika v. State of Assam</i> , (1998) 8 SCC 635	111, 172, 217
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55.	<i>Sakshi v. Union of India</i> , AIR 2004 SC 2566.	166, 188
56.	<i>Samira Kohli v. Dr. Prabha Manchanda</i> , (2008) 2 SCC 1	134
57.	<i>Satish Kumar Jayanti Lal Dabgar v. State of Gujarat</i> , (2015) 7 SCC 359	208
58.	<i>Shakkeer v. State of Kerala</i> , AIR 1961 Mad 92	120
59.	<i>Shekara v. State of Karnataka</i> , 2009 (2) SCR 744	9
60.	<i>Shimbhu v. State of Haryana</i> , (2013) 10 SCALE 595	164, 205, 206, 208
61.	<i>Siksha v. State of Himachal Pradesh</i> , 2013 Cri L. J. 2036	80
62.	<i>Sohan Pal v. State</i> , WP (CrI) 1672/2010 decided on 29.05.2014 (Delhi High Court)	162
63.	<i>Solanki Chimanbhai Ukabhai v. State of Gujarat</i> , AIR 1983 SC 484	109

64.	<i>State of Haryana v. Bhajan Lal</i> , AIR 1992 SC 604.	58
65.	<i>State of J & K v. Vinay Nanda</i> , (2001) 2 SCC 504	203
66.	<i>State of Karnataka v. Manjanna</i> , AIR 2000 SC 2231	100
67.	<i>State of Karnataka v. Shivanna</i> , 2014 STPL (Web) 334 SC	56, 64, 69, 116, 117,
68.	<i>State of M.P. v. Dayal Sahu</i> , 2005 CriLJ 4375 SC	110, 217
69.	<i>State of Punjab v. Gurmit Singh</i> , AIR 1996 SC 1393	172, 187
70.	<i>State of Punjab v. Iqbal Singh</i> , AIR 1991 SC 1532	185
71.	<i>State of Punjab v. Ramdev Singh</i> 2004 SCC (Cri) 307	111, 217
72.	<i>State of Rajasthan v. Noore Khan</i> , (2000) 3 SCC 70	111
73.	<i>State of U.P. v. Krishna Master</i> , AIR 2010 SC 3071	171
74.	<i>State of UP v. Ramesh Prasad Misra</i> , (1996) 10 SCC 360	64, 210
75.	<i>State of Uttar Pradesh v. Singhara Singh</i> AIR 1963 SC 358	136, 138
76.	<i>State Through CBI New Delhi v. Jitender Kumar Singh</i> , AIR 2014 SC 1169.	30, 179
77.	<i>Suresh v. State of Haryana</i> , IV (2014) CCR 559 (SC)	211, 216
78.	<i>Surjit Biswas v. State of Assam</i> , Criminal Appeal no. 1323 of 2011	185
79.	<i>Suryanarayana v. State of Karnataka</i> , AIR 2001 SC 482	173
80.	<i>Swati Ram v. State of Rajasthan</i> , (1997) 2 Crimes 148 (Raj)	67
81.	<i>Syad Akbar v. State of Karnataka</i> (1980) 1 SCC 30	204
82.	<i>T. Diwakara v. State of Karnataka</i> , 2006 CriLJ 4813	120
83.	<i>Thaman Kumar v. State of Union Territory of Chandigarh</i> , (2003) 6 SCC 380.	110, 113, 217
84.	<i>V. Krishnan v. I.G. Rajan</i> , 1994 1 LW 89	95
85.	<i>Varkey Joseph v. State of Kerala</i> , AIR 1993 SC 1892	194
86.	<i>Vinay Kumar v. State</i> , CrLA 670 of 2007 decided on 03.07.2012 (Delhi High Court)	75
87.	<i>Vivek Gupta v. CBI</i> , (2003) 8 SCC 628.	30, 180

Chapter 1: Overview of the Legal Framework relevant to Sexual Offences against Children in India¹

1.1. Introduction

The law on Child Sexual Abuse in India is not found in a single instrument but is scattered across several legislations, with the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) being the most significant statute covering the issue. The other important legislations that also contain offences in relation to child sexual abuse are:

1. The Indian Penal Code (IPC), 1860.
2. The Immoral Trafficking Prevention Act (ITPA), 1956.
3. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act (POA Act), 1989.
4. The Information Technology Act (IT Act), 2000.

In addition to the above, the Code of Criminal Procedure (CrPC), 1973, the Juvenile Justice (Care and Protection of Children) Act (JJ Act), 2000 and the Indian Evidence Act (IEA), 1872 also contain relevant provisions in relation to the procedure, evidence and ensuring care and protection of the child. The Criminal Law (Amendment) Act, 2013 is also relevant as it introduced substantial amendments to the IPC, CrPC and IEA relevant to sexual offences. In order to comprehend the legal framework covering the ambit of child sexual abuse in India, it is important to understand these legislations as well. The following sections will cover the relevant portions of each of these laws, as well as the applicable procedures.

1.1.1 Why was the POCSO Act enacted?

The POCSO Act is the first legislation in India to exclusively cover the ambit of child sexual abuse. It was enacted to not only protect children from offences of sexual assault, sexual harassment and pornography, but also to ensure a child-friendly procedure for the trial of these offences. Data from *Study on Child Abuse: India 2007*, an empirical research undertaken by the Ministry of Women and Child Development had revealed that 53.22% of children had faced one or more forms of sexual abuse, of which 52.94% were boys and 47.06% girls.² The data from the National Crime Records Bureau (NCRB) had also indicated an increase in sexual offences against children. The increasing incidence of sexual offences against children therefore had to be addressed

1 This chapter was authored by Swagata Raha, Geeta Sajjanashetty, Shruthi Ramakrishnan and Anuroopa Giliya and reviewed externally by Dr. Kaveri Haritas. It was edited by Arlene Manoharan.

2 Ministry of Women and Child Development, *Study on Child Abuse: India 2007*, p. 74, available at <http://wcd.nic.in/childabuse.pdf>

through a separate legislation, as the IPC did not specifically provide for sexual offences against children, particularly boys. It recognised limited forms of sexual violence against girls, and considered acts other than rape as amounting to “outraging the modesty of women,” which was punishable with a maximum term of two years and/or fine. The controversially worded Section 377, IPC which criminalized voluntary acts of intercourse against the order of nature, was the only provision available to address penetrative sexual assault against boys.

The sanction and push for the POCSO Act also came from Article 15(3) of the Indian Constitution which allows the State to create special laws for children, and the UN Convention on the Rights of the Child (UNCRC), 1989 which required the State to take measures to protect children from unlawful sexual activities, and sexual exploitation through prostitution or pornography.

The need to protect the interests of a child victim and child witness was also recognised. Low rates of conviction and the unsuitability of existing procedures of criminal courts for a child victim were also of major concern. In response to this need, the POCSO Act provides for child-friendly measures at every stage of the legal process and also carves out presumptions of guilt and culpable mental state. The recording of the complaint, recording of evidence, investigation, medical treatment, medical examination, and trial of offences must be done in a child-friendly manner, ensuring that the dignity and autonomy of the child is respected. This Act is also gender neutral; the perpetrator and the victim could be a male or female.

The POCSO Act received the assent of the President on 19 June 2012 and came into force on 14 November 2012, through a Gazette notification dated 9 November 2012. The Act applies to the whole of India, except the State of Jammu and Kashmir. The POCSO Rules were notified by the Central Government on 14 November 2012. Under the POCSO Act, the power to make rules has been vested only with the Central Government. Therefore, the Central Rules will apply to all States.

1.1.2. Why was the Criminal Law (Amendment) Act, 2013 enacted?

While the POCSO Act exclusively covered sexual offences against children, there existed several shortcomings in the criminal laws that addressed sexual offences in general. The 150-year-old IPC was found to be vastly inadequate in addressing the rising incidents of sexual offences and demanded that the law be re-looked and revised to keep with our changed understanding of sexual crimes. The Criminal Law Amendment Act, 2013 (CLAA) exposed these deficiencies in the substantive and procedural criminal law to adequately address sexual crimes. It received the President’s assent on 2 April 2013 and was deemed to have come into force on 3 February 2013. It introduced several changes in the three main criminal law statutes: the IPC, the CrPC,

and the IEA. It also introduced two amendments to the POCSO Act, as per which, if an act or omission constitutes an offence under specified provisions of the IPC as well as the POCSO Act, then on being found guilty the offender will be liable to punishment which is greater in degree.³ Further, in case of inconsistency between the POCSO Act and any other law, the former will override to the extent of the inconsistency.⁴

The CLAA not only introduces new categories of offences against women, but clarifies the procedure to be followed in conducting the investigation, medical examination, trial and appreciation of evidence in relation to these offences as well. Further, the new legislation has not only significantly increased the maximum punishment that may be imposed for existing sexual offences against women; it has also enhanced the minimum mandatory sentences for those offences. The CLAA also allows for the fines collected under these offences to be given to the victim.

Prior to the CLAA, the IPC recognized only the following sexual offences:

- a. Outraging the modesty of a woman, (Section 354).
- b. Kidnapping a woman to compel her marriage, (Section 366).
- c. Selling minor for purposes of prostitution, (Section 372).
- d. Rape, (Section 376).
- e. Unnatural sexual offences, (Section 377).
- f. Intercourse during separation, (Section 376A).
- g. Custodial Rape, (Sections 376B, 376C and 376D).
- h. Punishment for criminal intimidation including imputation of unchastity to a woman, (Section 506).
- i. Word, gesture or act intended to insult the modesty of a woman, (Section 509).

The CLAA has not only expanded the list of offences, it has also redefined some of the sexual offences in the IPC. The new offences however, are not gender neutral and recognize only offences committed by men against women, with the exception of trafficking, thus failing to include offences committed against men. The new offences are:

- a. Acid Attacks, (Sections 326A and 326B).
- b. Sexual Harassment, (Section 354A).
- c. Assault or use of criminal force to woman with intent to disrobe, (Section 354B).
- d. Voyeurism, (Section 354C).
- e. Stalking (Section 354D)
- f. Punishment for causing death or resulting in persistent vegetative state of victim,

³ Section 42, POCSO Act, 2012.

⁴ Section 42A, POCSO Act, 2012.

(Section 376A).

- g. Sexual intercourse by a person in authority, (Section 376C).
- h. Gang rape, (Section 376D).
- i. Punishment for repeat offenders, (Section 376A). The Act makes certain repeat sexual offences punishable with a minimum mandatory period of 20 years or with death.

The CLAA has further redefined the following offences:

- a. Rape (Section 375, IPC): The amendment provides a broader definition of ‘rape’ and is also no longer limited to non-consensual peno-vaginal intercourse, but includes all forms of penetrative sexual assault.
- b. Trafficking (Section 370, IPC): The amendment removes the obsolete provision covering ‘buying or disposing of any person as a slave’ and provides for a detailed definition of the offense of trafficking. The provision also provides for more stringent sentencing, with a mandatory sentence of life imprisonment in certain serious cases.
- c. Aggravated Rape (Section 376(2), IPC): The amendment has added additional offences (such as for accused persons in positions of authority, in case of repeated sexual assaults, in case of grievous injury and rape committed against children with disabilities) under this category, etc., that attract more stringent punishment than the offence of rape.

A detailed explanation of the sexual offences under the IPC is stated in Section 1.2.2., below.

1.2. Legal Framework relevant to Sexual Offences

1.2.1. Sexual offences under the POCSO Act, 2012

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) prescribes seven sexual offences against children - penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, sexual harassment, and using a child for pornographic purposes. Abetment of or an attempt to commit these offences is also an offence under the Act. These offences are gender neutral *vis-à-vis* the perpetrator as well as the victim. A child can also be charged with a sexual offence under the POCSO Act. However, a child alleged to have committed a sexual offence will be dealt with by the Juvenile Justice Board (JJB) as per procedures laid down under the JJ Act.

Table No. 1: Punishment for Sexual Offences under the POCSO Act, 2012

Offence	Minimum Punishment	Maximum Punishment	Fine
Penetrative Sexual Assault	7 years	Life imprisonment	√
Aggravated Penetrative Sexual Assault	10 years (rigorous imprisonment)	Life imprisonment	√
Sexual Assault	3 years	5 years	√
Aggravated Sexual Assault	5 years	7 years	√
Sexual Harassment	-	3 years	√
Use of a child for pornographic purposes	-	5 years	√
		2 nd conviction: 7 years	√
Storage of Pornographic materials involving a child		3 years	and/or
Abetment of an offence	If offence abetted is committed, punishment for abetment is same as that provided for the offence.		
Attempt to commit an offence	1) 1/2 of imprisonment for life, or 2) 1/2 of the longest term of imprisonment provided for that offence, or 3) fine, or 4) fine and imprisonment.		

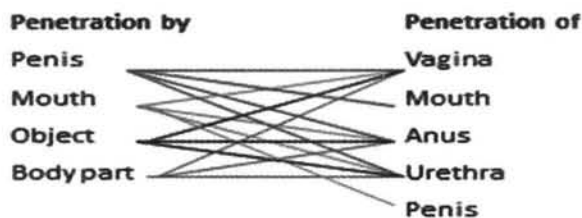
The POCSO Act is a special law and does not prescribe whether or not an offence is cognizable. Classification of cognizable⁵ and bailable⁶ offences is done in Part II (Classification of offences against Other Laws), First Schedule of the CrPC, 1973.⁷ For offences where the punishment is less than 3 years imprisonment, the offence is non-cognizable and bailable. Offences with a higher term of imprisonment are cognizable and non-bailable. The Act also does not specify whether the offences are compoundable or not. On arrest, the police must produce the accused before the Special Court for remand.⁸ The first remand, however, could lie before a Magistrate.⁹ Bail pleas will also be decided by the Special Court.

- 5 Cognizable offences are those offences in which a police officer can arrest without a warrant and these offences are serious offences such as rape, murder, theft etc. For non-cognizable offences, the police officer has to seek permission from the court in form of a warrant before making the arrest. Non-cognizable offences are less serious offences such as bribery during elections, giving false evidence, causing hurt, etc.
- 6 Bailable offences are those in which the accused can seek bail as a matter of right. In non-bailable offences the court has the discretion to grant or deny bail.
- 7 NCPCR, Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders Child Welfare Committees/Support Persons and Health Professionals, p. 13. available at <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=406&lid=843>
- 8 *Kum. Shraddha Meghshyam Velhal v. State of Maharashtra*, Criminal Application No. 354 of 2013 decided by the Bombay High Court on 03.07.2013.
- 9 *Prasad v. State of Kerala*, 2013(2) KLT 942.

If the alleged perpetrator is a child, she/he will be produced before the Juvenile Justice Board (JJB) and be dealt with as per the provisions of the JJ Act. It should be noted that a child alleged to have committed an offence is entitled to bail irrespective of whether the offence is considered bailable or non-bailable under the CrPC unless the release is likely to expose the child to danger or defeat the ends of justice.¹⁰ If the child is not released on bail by the police, he/she must be apprehended by the police and transferred to the Observation Home attached to the Juvenile Justice Board (JJB).¹¹

a. Penetrative Sexual Assault

The key feature of this offence is *penetration*. According to Section 3, POCSO Act, a penetrative sexual assault involves some form of penetration by a body part (penis, finger, etc.,) or an object into the body (vagina, urethra, or anus) of the child. Penetration of the penis, to any extent, into the vagina, mouth, urethra, or anus of a child or making the child penetrate any one is also an offence.



Making a child penetrate the accused, another adult, another child, or even the child himself/herself is also an offence. For instance, a person who makes a child insert her/his finger into the vagina of another child or woman can be charged for having committed penetrative sexual assault. Similarly, insertion of the tongue into the child's vagina, urethra or anus, or making the child do the same with the accused, another adult, or another child is also an offence. While the Act provision does not refer to penetration by use of animals, use of objects to cause penetration is an offence. This clause could be interpreted to apply to a situation where penetration is caused by use of animals.

A plain reading of the provision indicates that slight penetration, insertion, manipulation of body parts etc., is sufficient and whether or not force or coercion was used or the penetration was consensual are not relevant. The presence or absence of sexual intent is also not relevant.

b. Aggravated Penetrative Sexual Assault

Penetration is a necessary ingredient for aggravated penetrative sexual assault as well. The offence under Section 5 (aggravated penetrative sexual assault) is distinguished

¹⁰ Section 12, JJ Act, 2000.

¹¹ CCL-NLSIU, FAQs on POCSO Act, (2nd ed, January 2015) p. 47.

from offences under Section 3 (penetrative sexual assault) based on the status of the offender, his/her relationship with the victim, the status of the victim, the impact on the victim, as well as the context and gravity of the assault. The aggravating factors are classified below.

Status of the offender

The following kinds of penetrative sexual assault amount to ‘aggravated’ penetrative assault when the offender is:

- **Police officer:** This refers to a police officer committing penetrative sexual assault on a child in the police station or the premises of the police station which he/she is appointed, in the course of duty or otherwise. Such an act by a person who is known as, or identified as a police officer would be an aggravating factor. For instance, a police officer on duty can be charged of this offence, even when he/she is outside the jurisdiction of his/her station (Section 5(a)).
- **Member of the armed forces or security forces:** This refers to a member of the armed/security forces committing penetrative sexual assault on a child in the area in which he/she is deployed or in any area that is within the command of the forces or armed forces, or in the course of duty or otherwise. Such an act by a person who is known as, or identified as a member of the forces would be an aggravating factor (Section 5(b)).
- **Public servant:** This refers to a judge, court officer, or government officer, etc., who commits penetrative sexual assault on a child (Section 5(c) read with Section 21, IPC).
- **Management or staff of any custodial institution for children:** This refers to Custodial institutions includes jail, protection home, Observation Home (home for alleged child offenders under the JJ Act) or for children who are in the care and protection of the State in a Children’s Home under the JJ Act, etc. Hence, a superintendent of a Children’s Home can be charged under this offence, if he/she has penetrative sex with a child in the institution (Section 5(d)).
- **Management or staff of a Hospital:** Where a nurse, doctor, or any staff member of a government or private hospital, commits penetrative sexual assault against a child in the hospital, this would be considered aggravated sexual assault (Section 5(e)).
- **Management or staff of an educational/religious institution:** Where a teacher or any person in the management or staff of an educational or religious institution commits penetrative sexual assault on a student in that institution, she/he can be charged with aggravated penetrative sexual assault (Section 5(f)). While the assault may take place *outside* the premises of the institution, this provision can still apply if the alleged perpetrator is on the management or staff of the

educational or religious institution and the child is a student or member of that institution.

- **Relative of the child through blood, adoption, marriage, guardianship, foster care, or having a domestic relationship with parent, or living in the same or shared household with the child:** This refers to a penetrative sexual assault by a parent, uncle, aunt, husband, wife, cousin, etc., of a child, which will constitute aggravated sexual assault (Section 5(n)).
- **Management or staff of an institution providing services to children:** A person working in a music school can be charged under this provision, if she/he commits penetrative sexual assault (Section 5(o)).
- **Person in a position of trust or authority of a child in an institution, home of the child, or any other place:** A tuition teacher would be considered a person who is in a position of trust and authority *vis-à-vis* a child, and can be charged with aggravated sexual assault, if he/she sexually assaults a student (Section 5(p)).
- **Person having been previously convicted of a sexual offence:** A person who was convicted for raping a woman and subsequently commits penetrative sexual assault on a child, will be charged with 'aggravated' penetrative sexual assault (Section 5(t)).

Nature of the assault

The following kinds of penetrative sexual assaults amount to aggravated penetrative sexual assault:

- Penetrative sexual assault by a gang (assault by one or more persons of a group in furtherance of their common intention) (Section 5(g)).
- Penetrative sexual assault using deadly weapons, fire, heated substance or corrosive substance (acid, cigarette, knife, sharp weapons) (Section 5(h)).
- Penetrative sexual assault more than once or repeated penetrative sexual assault (Section 5(l)).
- Penetrative sexual assault and making the child strip or parading the child naked in public (Section 5(u)).
- Penetrative sexual assault, followed by an attempt to murder the child (Section 5(r)).
- Penetrative sexual assault in the course of communal or sectarian violence (Section 5(s)).

Impact on the victim

Penetrative sexual assaults that result in the following situations amount to aggravated penetrative sexual assault:

- Grievous hurt or bodily harm and injury to any part of the body including the sexual organs of the child,(Section 5(i)).
- Physical incapacitation, mental illness, or temporary/permanent impairments because of the assault (Section 5(j)(i))
- Pregnancy (Section 5(j)(ii)).
- HIV or any other dangerous infection or disease which could temporarily/permanently impair the child (Section 5(j)(iii)).

Status of the child victim

Penetrative sexual assault on any of the following persons amounts to ‘aggravated’ penetrative assault:

- A disabled child, by taking advantage of the child’s mental or physical disability (Section 5(k)).
- A child below 12 years of age (Section 5(m)).
- A pregnant child, with the knowledge that such child is pregnant (Section 5(q)).

c. Sexual Assault

‘Sexual assault’ as provided for under Section 7 of the Act, is an offence which does not involve penetration. It is commonly referred to as a *non-penetrative touch based* offence. Presence of sexual intent is a key ingredient of this offence. Doing any of the following *with sexual intent* will constitute sexual assault:

- Touching the vagina, penis, anus, or breast of a child; or
- Making the child touch one or more of these parts of the accused or that of another adult or child; or
- Doing any other act which involves physical contact without penetration.

While this provision does not specify whether making the child touch her own vagina or breast is an offence, such an act will fall under the ambit of doing “any other act with sexual intent which involves physical contact without penetration.”

In order to constitute sexual assault, the act must be done with a sexual intent. For instance, if a child is taken to a doctor with a complaint of burning sensation in her vagina and the doctor examines the vagina, the doctor has not committed an offence. But, if a doctor asks a child complaining only of an ear ache to undress and then touches the child’s private parts, he/she can be charged with sexual assault.

Sexual intent implies intention of a sexual nature behind the commission of the act. There is no clear definition on what constitutes ‘intent’. The facts and circumstances of the case before the court will indicate the presence or absence of sexual intent. Moreover, this will vary depending on the interpretation by courts. In *Shekara v. State*

of *Karnataka*¹², in the context of Section 354, IPC, the Supreme Court observed that “[k]nowledge and intention are essentially things of the mind and cannot be demonstrated like physical objects. The existence of intention or knowledge has to be culled out from various circumstances in which and upon whom the alleged offence is alleged to have been committed.”

d. Aggravated Sexual Assault

The offence of aggravated sexual assault under Section 9 is distinguished from the offence of sexual assault based on the status of the offender, her/his relationship with the victim, the status of the victim, impact on the child and context and the gravity of the assault. Note, that no penetration is required in case of aggravated sexual assault. All aggravating factors listed in (b) above are identical grounds for aggravated sexual assault with the exception of making the child pregnant as a consequence of sexual assault.

e. Sexual Harassment

A person commits an offence of sexual harassment of a child under Section 11 if he/she does any of the following *with a sexual intent*:

- (i) Utters any word or makes a sound or gesture or shows any part of the body or object to the child with the intent that it is heard or seen by the child.
- (ii) Makes the child show her/his body, or part of her/his body to the person, or to any other person.
- (iii) Shows any object in any form for pornographic purposes.
- (iv) Follows the child repeatedly or watches or contacts a child directly or through other electronic, digital or other means.
- (v) Threatens to use a real or fabricated depiction of any part of the child’s body or involvement of the child in a sexual act in any form of media (e.g., a threat to circulate a morphed picture with child’s face and body of another child on the internet).
- (vi) Entices the child for pornographic purposes or gives gratification for such purpose.

Sexual harassment is a *non-penetrative, non-touch based* sexual offence. The distinct feature of this offence is that it does not involve penetration of body parts or insertion of objects or physical contact, but requires a sexual intent while doing any of the acts listed above. E.g., a biology teacher showing a documentary on body parts to explain the human body should not be charged under this provision if the intent was educational and not sexual. But, a teacher who shows pornographic clips to students in his/her cabin or forces them to strip can be charged with sexual harassment.

¹² 2009 (2) SCR 744.

f. Using a Child for Pornographic Purposes

Under Section 13 of the Act, a person may be charged with the offence of ‘using a child for pornographic purposes’ if he/she uses the child in any print media, advertisement, television programme, internet or any other electronic form, for purposes of sexual gratification. It is irrelevant as to whether the programme or advertisement was for personal consumption or distribution. Involving a child for publishing and distributing pornographic material is also an offence. For instance, taking a picture of a naked child with an intention to circulate it on the internet would constitute an offence. Showing the sexual organs of a child, using the child in real or simulated sexual acts, or an obscene or indecent representation of the child are also offences under this provision.

g. Storage of pornographic material involving a child

Storing of pornographic material in any form involving a child for commercial purposes is a punishable offence. The objective of storage should be for commercial use and not personal consumption. However, under Section 67B(b) of the Information Technology Act, 2000 browsing or downloading “any material in any electronic form depicting children in obscene or indecent or sexually explicit manner” is an offence.

Abetment of offences under POCSO Act

To ‘abet’ means to instigate, intentionally aid, or conspire with another person to commit an offence. Any person who helps or aids the commission of a sexual offence by actively assisting someone directly involved in such an act or even by not preventing the commission of the offence, will be an ‘abettor’ under this Act. For instance, a villager brought his fourteen year old girl with a skin problem to a god man who proclaims to have healing powers. The god man takes her inside the room and sexually assaults her under the guise of treating her, and his wife guards the door during this period knowing that he is assaulting the child. In such a case, the wife will be regarded as an abettor of the offence, as she facilitated its commission by standing guard.

Using threats, force, coercion, abduction, fraud, deception, payments or abusing power or position to secure the consent of a person having control over a child and employing, harbouring, receiving or transporting such a child for the purpose of offences under the Act would amount to aiding the doing of the act.¹³ Pursuant to this explanation, persons involved in trafficking children for sex can be booked for abetment of sexual offences under the POCSO Act. According to Section 17, POCSO Act, if the abetted act is committed, the abettor will be sentenced with a punishment provided for that offence. For instance, if a trafficked child is subjected to penetrative sexual assault, the trafficker can be punished with a minimum of seven years imprisonment under Section 4 read with Explanation III under Section 16, POCSO Act.

¹³ Section 16, Explanation III, POCSO Act, 2012.

Attempt to commit an offence under POCSO Act

An attempt to commit an offence accompanied by any act towards the commission of the offence is punishable with half of the longest term of imprisonment provided for the offence or half of life imprisonment or fine or both. For instance, if a man is found lying naked on top of a child, he can be charged with an attempt to commit penetrative sexual assault and may also be charged with sexual assault. On being found guilty of such attempt, he will be punished with half of the term for life imprisonment.

1.2.2. Sexual offences under the Indian Penal Code

Unlike the POCSO Act, sexual offences under the IPC are not all gender-neutral. Except the offence of trafficking (Section 370, IPC) and unnatural sexual offences (Section 377, IPC), the perpetrator in all sexual offences under the IPC is a male and the victim is a woman. As per Section 10 of the IPC, the word “woman” means “a female human being of any age.”

a. Assault or criminal force with intent to outrage the modesty of a woman

According to Section 354, IPC, ‘whoever assault or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty,’ is punishable with imprisonment of either description for a minimum term of one year that may extend to five years, and will also be liable to fine. The penalty for this offence was enhanced by the CLAA from the previous term of a maximum of two years or fine or both.

In *Shekhara v. State of Karnataka*¹⁴, the Supreme Court explained the ingredients of the offence under Section 354, IPC as follows:

In order to constitute the offence under Section 354 IPC mere knowledge that the modesty of a woman is likely to be outraged is sufficient without any deliberate intention of having such outrage alone for its object. There is no abstract conception of modesty that can apply to all cases. (See *State of Punjab v. Major Singh (AIR 1967 SC 63)*). A careful approach has to be adopted by the court while dealing with a case alleging outrage of modesty. The essential ingredients of the offence under Section 354 IPC are as under:

- (i) that the person assaulted must be a woman;
- (ii) that the accused must have used criminal force on her; and
- (iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

¹⁴ 2009 (2) SCR 744

In *Pappu v. State of Chhattisgarh*¹⁵, the appellant had stopped the victim, a 13-year-old girl, while she was cycling, pulled her towards him, and squeezed her limbs as well as her breast. The appellant had been convicted under Section 354, IPC and sentenced to undergo rigorous imprisonment for one year with a fine of INR 1000. The Chhattisgarh High Court acquitted him under Section 354, IPC but found him guilty of the offence under Section 354A (sexual harassment) and made the following distinction between the elements of Section 354 and Section 354A:

A plain reading of the commentary of the newly incorporated provisions will reveal that the makers of the law lay emphasise[s] on the fact that for attracting the provision of [S]ection 354 use of either assault or criminal force is a necessary element for the offence prescribed in the section whereas for attracting section 354A the said use of either assault or criminal force is not a necessary element.

b. Sexual Harassment

Section 354A, IPC introduces the offence of sexual harassment. Commission of any of the following acts by a man will constitute sexual harassment:

- physical contact and advances involving unwelcome and explicit sexual overtures, or
- demand or request for sexual favours, or
- showing pornography against the will of a woman, or
- making sexually coloured remarks.

c. Voyeurism

The act of watching, or capturing the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the male perpetrator or by any other person at the behest of the perpetrator would constitute voyeurism under Section 354B, IPC. Dissemination of such images is also an offence. The term 'private act' would include watching an act carried out in a place which would reasonably be expected to provide privacy, and where the:

- victim's genitals, posterior or breasts are exposed or covered only in underwear; or
- the victim is using a lavatory, or
- the victim is doing a sexual act that is not of a kind ordinarily done in public.

Watching women undress in a changing room would constitute voyeurism. If the victim consents to the capture of the images or any act, but not to its dissemination to third persons, the dissemination will constitute an offence. Where children are involved, this provision must be read along with the offences of sexual harassment and using a child

¹⁵ 2015 CriLJ 351.

for pornographic purposes under the POCSO Act. Consent of the child is irrelevant to the offences under the POCSO Act. The act of taking a picture of the genitals of a child even with his or her consent, will amount to an offence under the POCSO Act provided there was sexual intent.

d. Stalking

Any man who follows a woman and contacts, or attempts to contact her to foster personal interaction repeatedly despite a clear indication of disinterest by such woman, or monitors her use of the internet, email or any other form of electronic communication, commits the offence of stalking under Section 354D, IPC. It will not amount to stalking if the man can prove that it was undertaken in order to prevent or detect crime and that he had been entrusted with the responsibility of crime prevention and detection by the State, or that it was pursued under a law or in compliance with a law or was reasonable and justified in the particular circumstances. An act will amount to online stalking only if it results in a fear of violence, serious alarm or distress in the mind of the woman, or interferes with her mental peace.

e. Trafficking

Under Section 370, IPC, the following acts are punishable:

The recruitment, transportation, harbouring, transferring or receiving of a person or persons for:

- physical exploitation, or
 - any form of sexual exploitation, or
 - slavery or practices similar to slavery, servitude, or
 - forced removal of organs,
- by
- using threats, or
 - using force, or any other form of coercion, or
 - abduction, or
 - practicing fraud, or deception, or
 - abuse of power, or
 - inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person.

Trafficking is a gender-neutral offence, which means that the perpetrator and victim can be male or female. Trafficking can also be for various purposes and is not confined merely to sexual exploitation. Further, inducements may be given to the trafficked person or their guardians to mislead them into believing that their children will get better employment or educational opportunities.

Trafficking of a minor, or more than one minor, attracts a harsh sentence. A person convicted for trafficking minors on more than one occasion can be sentenced to life imprisonment for the remainder of the person's natural life and also be liable to pay fine. If a public servant or police officer is involved in trafficking, then she or he can also be similarly sentenced.

Sexual exploitation of a minor knowing or having reason to believe that she or he has been trafficked, is also punishable under Section 370A(1), IPC. Clients, pimps or any persons who sexually exploit trafficked minors can be charged under this provision and also for abetment of sexual offences under Section 17 of the POCSO Act.

f. Rape

A man is said to commit 'rape' under Section 375, IPC if he does any of the following acts or makes a woman do so, with him or any other person:

- penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman; or
- inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman; or
- manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman; or
- applies his mouth to the vagina, anus, urethra of a woman, under any of the following seven circumstances:
 - against her will, or
 - without her consent, or
 - with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or hurt, or
 - with her consent, when the man knows that he is not her husband and that her consent is given because she believes she is, or believes herself to be lawfully married to him, or
 - with her consent, when, at the time of giving such consent, because of unsoundness of mind or intoxication or the administration by him or through another of any stupefying substance, she is unable to understand the nature and consequence of what she is consenting to, or
 - *with or without her consent, when she is under 18 years, or* (emphasis added)
 - when she is unable to communicate consent.

The term 'consent' has been defined in Section 375 to mean an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. It is also clarified that absence of physical resistance to the act of penetration will not, by

reason of only that fact, be regarded as consent. The CLAA raised the age of consent from 16 years to 18 years. Consent by a girl below 18 years is irrelevant to a charge of rape and cannot be used as a defence.

The IPC carves out two exceptions to rape:

- (1) a medical procedure or intervention will not amount to rape, and
- (2) sexual intercourse or sexual acts by a man with his wife, not below the age of 15 years, will not constitute rape.

g. Aggravated Rape

Section 376(2) of the IPC lists out various circumstances in which the offence of rape would amount to aggravated rape. Aggravated rape carries a minimum mandatory sentence of 10 years which may extend to imprisonment for life, which means the remainder of a person's natural life. Aggravated rape is distinguished from rape based on the status of the offender, his/her relationship with the victim, the status of the victim, the impact on the victim, as well as the context and gravity of the assault. The aggravating factors are classified below and the distinction between the aggravating factors under the POCSO Act and the IPC are highlighted.

Status of the offender

- **A Police Officer** who commits rape within the limits of the police station to which he is appointed, or in the premises of any station house, or upon a woman in his custody or in the custody of a police officer subordinate to him (Section 376(2)(a)). In contrast, Section 5(a), POCSO Act is much wider as it does not prescribe any territorial limitation and makes it possible for a police officer to be tried for aggravated penetrative sexual assault if he or she commits the assault in the course of his duties or otherwise, or where he or she is known as, or is identified as a police officer.
- **A Public Servant** who commits rape on woman in his custody or in the custody of a public servant subordinate to him (Section 376(2)(b)). Section 5(c), POCSO Act is wider as it does not require the child to be under the custody of the public servant for the provision on aggravated penetrative sexual assault to apply.
- **A member of the armed forces** who commits rape in an area in which he has been deployed by the Central or State Government (Section 376(2)(c)). Section 5(b), POCSO Act is much wider as it does not prescribe any territorial limitation and makes it possible for a member of the armed forces or security forces to be tried for aggravated penetrative sexual assault if he or she commits the assault in the course of his duties or otherwise, or where he or she is known as, or is identified as a member of the security or armed forces.
- **Staff of member of the management** of a jail, remand home, or any other

place of custody established by or under any law, or of a women's or children's institution who commits rape on an inmate of such jail, remand home, place or institution (Section 376(2)(d)).

- **Staff or a member of the management of a hospital** who commits rape of a woman in that hospital (Section 376(2)(e)).
- **A relative, guardian or teacher or a person in position of trust or authority** towards a woman who commits rape on such woman (Section 376(2)(f)).
- **Person in position of control or dominance** over a woman and commits rape on such woman (Section 376(2)(k)).

Status of victim

- A woman known to be **pregnant** (Section 376(2)(h)).
- A woman who is **under 16 years of age** (Section 376(2)(i)). In contrast, under Section 5(m), POCSO Act, penetrative sexual assault on a child below 12 years of age constitutes aggravated penetrative sexual assault.
- A woman who is **incapable of giving consent** (Section 376(2)(j)).
- A woman suffering from **physical or mental disability** (Section 376(2)(l)).

Nature or context of the offence

- Commission of rape during **communal or sectarian violence** (Section 376(2)(g)).
- Causes **grievous bodily harm** or maims or disfigures or endangers the life of a woman (Section 376(2)(m)).
- Commission of rape **repeatedly** on the same woman (Section 376(2)(n)).

h. Punishment for causing death or resulting in persistent vegetative state of victim

In the course of rape or aggravated rape, if the accused inflicts injury that causes the death of the woman or results in her being in a 'persistent vegetative state', he can be charged under Section 376A, IPC.

i. Sexual intercourse by a person in authority

Under Section 376C, IPC, abuse of a position of authority or a fiduciary relationship to induce or seduce a woman under his charge, custody or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to rape, is an offence. Public servants, management or staff of hospitals, superintendents, managers or staff of a jail, remand home, custodial institutions, or institutions for the reception and care of women and children can be held liable under this provision. The term 'fiduciary relationship' implies a relationship that is based on trust. Abuse of such trust to induce a woman to have sexual intercourse is an offence.

j. Gang Rape

Rape by one or more persons constituting a group, or acting in furtherance of a common intention, will amount to gang rape under Section 376D. Each of the persons in the group will be deemed to have committed the offence of rape. Gang rape is punishable with fine and rigorous imprisonment for a minimum term of 20 years, which can extend to life imprisonment i.e., till the remainder of the person's natural life. The fine imposed should be just and reasonable so as to meet the medical expenses and rehabilitation of the victim.

k. Unnatural Offences

The act of carnal intercourse against the order of nature with any man, woman or animal is deemed to be an unnatural offence under Section 377, IPC. An unnatural offence is punishable with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, in addition to fine.

l. Word, gesture or act intended to insult the modesty of woman

Uttering of any word, making any sound or gesture, or exhibiting any object, with the intention of insulting the modesty of women with the intention that it be heard or seen by the woman, or by intruding into the privacy of such woman, is an offence under Section 509, IPC.

Table No. 2: Punishment for Sexual Offences under the Indian Penal Code

Offence	Minimum	Maximum	Fine
Section 354: Assault or criminal force to woman with intent to outrage her modesty	1 year	5 years	√
Section 354A(2): Sexual harassment (physical contact and advance, sexual overtures, demand for sexual favours, showing pornography against will)	-	Rigorous imprisonment (RI) for 3 years	and/or
Section 354A(3): Sexual harassment (making sexually coloured remarks)	-	1 year	and/or
Section 354B: Assault or use of criminal force to woman with intent to disrobe (abetment included)	3 years	7 years	√
Section 354C: Voyeurism (watching or capturing image of a woman engaging in a private act or disseminating such images)	1st conviction [CV]: 1 year 2nd CV: 3 years	1 st CV: 3 years 2nd CV: 7 years	√ √

Offence	Minimum	Maximum	Fine
Section 354D: Stalking (physical/ electronic)	-	1 st CV: 3 years 2 nd CV: 5 years	√ √
Section 370(4): Trafficking of minor	RI 10 years	Life imprisonment	√
Section 370(5): Trafficking of more than one minor	RI 14 years	Life imprisonment	√
Section 370(6): Repeat trafficker of minors	Imprisonment for remainder of one's natural life		√
Section 370A(1): Sexual exploitation of a trafficked manner	RI for 5 years	RI for 7 years	√
Section 376(1): Rape	RI 7 years	Life imprisonment	√
Section 376(2): Aggravated rape (includes rape of a girl below 16 years of age)	RI 10 years	Life imprisonment for remainder of life	√
Section 376A: Rape causing death or resulting in vegetative state of victim	RI 20 years	Life imprisonment for remainder of life or death	
Section 376B: Sexual intercourse by husband upon his wife during separation	2 years	7 years	√
Section 376C: Sexual intercourse by a person in authority (includes superintendent or manager of children's institutions)	RI 5 years	RI 10 years	√
Section 376D: Gang rape	RI 20 years	Life imprisonment for remainder of life	√
Section 376E: Repeat offenders under sections 376, 376A, 376D	Imprisonment for remainder of life or death		
Section 377: Unnatural offences against the order of nature	-	Imprisonment for life/ imprisonment which may extend to ten years	√
Section 509: Word, gesture or act intended to insult the modesty of a woman		Simple imprisonment of 3 years	√

1.2.3. Sexual offences under the Information Technology Act, 2000

Section 66E of the Information Technology Act, 2000 (IT Act) criminalizes the intentional capture, publication or transmission of the image of a private area of any person without her or his consent. This is punishable with imprisonment that may extend to three years or with fine not exceeding Rupees two lakhs, or with both. "Private area" has been defined to mean "the naked or undergarment clad genitals, pubic area, buttocks or female breast".¹⁶

Section 67B of the Information Technology Act, 2000 criminalizes the publication or transmission of materials depicting children in a sexual explicit act or conduct in electronic form. The term "children" signifies persons who have not completed the age of 18 years.

Creating text or digital images, collecting, seeking, browsing, downloading, advertising, promoting, exchanging or distributing material in any electronic form depicting children in obscene or indecent or sexually explicit manner is an offence. Cultivating, enticing, or inducing children to enter into online relationships for any sexually explicit act, facilitating the abuse of children, or recording in electronic form one's own abuse or that of others pertaining to sexually explicit act with children is also an offence.

These acts are punishable on first conviction with imprisonment of either description, for a term which may extend to five years and with a fine which may extend to 10 lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to 10 lakh rupees. However, this penalty will not be attracted to any publication in electronic form which is proved to be justified as being for the public good on the ground that it is in the interest of science, literature, art or learning or other objects of general concern, or is kept or used for *bonafide* heritage or religious purposes.

1.2.4. Sexual offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

A person not being a member of a Scheduled Caste (SC) or Scheduled Tribe (ST) can be charged under the POA Act, if he or she:

- forcibly remove clothes from the person of a member of a Scheduled Caste or a Scheduled Tribe or parades him naked, or with painted face or body, or commits any similar act which is derogatory to human dignity (Section 3(1)(iii),
- assaults or uses force to any woman belonging to a SC or ST with the intent to dishonor or outrage her modesty, (Section 3(1)(xi),
- being in a position to dominate the will of a woman belonging to a SC or ST and uses that position to exploit her sexually, to which she would not have otherwise

¹⁶ Explanation to Section 66E, IT Act, 2000.

agreed, (Section 3(1)(xii).

The above acts are punishable with fine and imprisonment for a minimum term of six months which may extend to five years. These offences are gender neutral vis-à-vis the perpetrator.

Additionally Section 3(2)(v) of the Act provides that commission of any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine.

Thus, where an aggravated rape under section 376(2) of the IPC is committed upon a girl child who is a member of Scheduled Caste or Scheduled Tribe, the POA Act can be invoked against the accused and on being found guilty, he can be punished with life imprisonment.

1.2.5. Sexual offences under the Immoral Traffic (Prevention) Act, 1956

The ITPA criminalizes the following offences involving children¹⁷ and minors¹⁸ and stipulates a higher punishment to accused involved in offences against children or minors. The offences are gender neutral vis-à-vis the perpetrator and the victim:

- Any adult knowingly living on the earnings of prostitution shall be punished for a term extending to two years or fine extending upto INR 1000. When the same offence is committed involving a child or a minor, the accused can be punished with a minimum of seven years and maximum of ten years imprisonment (Section 4).
- If a person procures, induces or takes a child for the purpose of prostitution, the punishment shall be a minimum of seven years rigorous imprisonment and can extend to life imprisonment. If the person is a minor, the rigorous imprisonment will be a minimum of seven years and a maximum of fourteen years (Section 5).
- In the instances when a child is found in a brothel, it will be presumed that the child has been detained in the brothel, unless the contrary is proved (Section 6(2)). If a child or a minor is found in a brothel and there is medical evidence to prove sexual abuse and no evidence to prove the contrary is available, it will be presumed that the child or minor was detained for the purpose of prostitution, or that she has been sexually exploited for commercial purposes (Section 6(2A)). The punishment for detention of a person is minimum of seven years of imprisonment or for ten years or life imprisonment with fine. The court can

17 Section 2(aa) of the Immoral Traffic (Prevention) Act, 1956 defines “child” to mean a person who has not completed the age of sixteen years.

18 Section 2(cb) of the Immoral Traffic (Prevention) Act, 1956 defines “minor” to mean a person who has completed the age of sixteen years, but has not completed the age of eighteen years.

impose a sentence less than seven years after recording adequate and special reasons in the judgment (Section 6(1)).

- If any person carries on prostitution in a public place or in the vicinity of a public place involving a child or minor, the person committing the offence shall be punished with a minimum of seven years imprisonment, which may extend to life imprisonment or imprisonment for ten years with fine (Section 7(1A)). The court can impose a sentence for a term less than seven years after recording adequate and special reasons in the judgment. The license of the hotel will be cancelled if prostitution involving children or minors is knowingly permitted by the owner, lessor or landlord within the premises, (Section 7(2), proviso).

1.3. Legal Framework of other relevant offences

In addition to provisions that define and punish sexual offences, several other offences connected to the reporting and recording of sexual offences, protection of identity of the victim are also provided for. Some of the important offences in this regard are as follows:

a. Failure to report the commission of an offence

Under Section 19 of the POCSO Act, all persons are under an obligation to report cases of child sexual abuse or suspected child sexual abuse to the Special Juvenile Police Unit (SJPU), or the local police. Section 21 of the Act provides that failure to report the commission of an offence is punishable with imprisonment for upto six months and / or fine. Section 21(2) of the POCSO Act prescribes that any person in-charge of a company or institution who fails to report an offence committed by a subordinate under his control shall be punished with imprisonment for a term upto 1 year and with fine. For instance, if school authorities are informed about a case of sexual assault of a student by any teacher or instructor or even by another student, they are under an obligation to report. Failure to do so will constitute an offence, if evidence suggests that information about the offence was available to the Principal or head of the institution. The only exception made with regard to the obligation to report is in favour of children below the age of 18 who will not incur any liability if they fail to report an offence under the Act.¹⁹

In addition to the POCSO Act, a mandatory obligation to report sexual offences has been cast upon hospitals under Section 357C of the CrPC, and failure to do so will attract imprisonment for upto one year or fine or both under Section 166B of the IPC.

b. Failure to record a case

The police or SJPU can be held liable under the POCSO Act as well as the IPC for
19 Section 21(3) of the POCSO Act.

failure to record information about the commission of an offence. Under the POCSO Act, this is punishable with imprisonment which may extend to six months or fine or both. In accordance with the amendments brought in by the CLAA, a public servant can be punished with rigorous imprisonment for a minimum term of six months which may extend to two years and also be liable to fine if she/he fails to record any information given under Section 154(1), CrPC in relation to any cognizable sexual offences under the IPC or the offence of acid attack, (Section 166A(c), IPC).

c. False complaints

Section 22 of the POCSO Act prescribes penalty for filing false complaints or providing false information with the intention of humiliating, extorting, defaming, or threatening a person. This is with respect to false complaints or information pertaining to the offences of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, and aggravated sexual assault. The maker of false complaints can be punished with imprisonment for a maximum term of six months and/or fine. A child cannot, however, be punished for filing a false complaint or giving false information.

Making a false complaint or providing false information against a child, knowing it to be false, thereby victimizing such child with regard to any of the offences under the Act, is punishable with imprisonment upto 1 year or with fine or both. No person will, however, incur any liability, whether civil or criminal, for giving information in good faith about the commission of an offence.

d. Disclosure of identity

Making incorrect or inauthentic reports or comments about any child victim through media which may have the effect of lowering the reputation or infringing the privacy of the child is a punishable offence under Section 23(4), POCSO Act. Disclosure of the identity of a child without the permission of the Special Court is also an offence. Identity of a child includes his/her name, address, photograph, family details, school, neighbourhood, or any other details that may lead to disclosure of identity. Both are punishable with imprisonment for a minimum term of six months which may extend to one year or fine or with both.

e. Failure to provide free first-aid

A person in charge of a hospital, public or private, whether run by the Central Government, State Government, local bodies or any other person can be punished with imprisonment for a term which may extend to one year or with fine or both for failure to provide immediate first-aid or medical treatment, free of cost, to victims of sexual offences under the IPC and to immediately inform the police about the incident (Section 166B, IPC).

f. Disobedience of a direction of law

A public servant can be punished with rigorous imprisonment for a minimum term of six months which may extend to two years and also be liable to fine if she/he knowingly disobeys any direction of the law which prohibits him or her from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or knowingly disobeys, to the prejudice of any person, any other direction regulating the manner in which she or he should conduct the investigation (Section 166A(a) and (b), IPC). For instance, a police officer could be charged under this provision for summoning a child victim to the police station for recording her statement in violation of Sections 160, CrPC and Section 24(1), POCSO Act.

Table No. 3: List of Other Offences and Penalties under the POCSO Act

Sl. No.	Offence	Minimum Punishment	Maximum Punishment	Fine
1.	Failure to report an offence that has been committed		Six months	and/or
2.	Failure of media, hotel, hospital, club, studio or photographic facility to report about pornographic or sexually exploitative object involving a child		Six months	and/or
3.	Failure of the police to record information relating to the commission of an offence or an apprehension that an offence is likely to be committed		Six months	and/or
4.	Failure of the head of a company or institution to report an offence allegedly committed by his/her subordinate		1 year	√
5.	False complaint about specific offences against an adult		Six months	and/or
6.	False complaint against a child		1 year	and/or
7.	Making report or comments on any child victim from any form of media or studio or photographic facilities without having complete and authentic information	6 months	1 year	and/or
8.	Disclosure of the identity of a child victim in the media	6 months	1 year	and/or

1.4. Procedures relevant to the investigation and trial of sexual offences against children

1.4.1. POCSO Act, 2012

The child-friendly provisions of law that must be adhered to during different stages of the legal process are as follows:

Recording of Offence

- Cases reported by a child must be recorded by the police/SJPU in simple language so that the child understands what is being recorded.
- If it is recorded in a language other than the preferred language of the child, a qualified translator or interpreter must be provided to the child.

Medical Examination

- Before any medical examination is conducted, consent by or on behalf of the child must be obtained.
- Medical examination can be conducted irrespective of whether a FIR/complaint has been filed.
- The privacy of the child must be respected, and medical examination must be conducted in the presence of parent/ guardian/ person the child trusts. If such a person is not available, then the examination must be conducted in the presence of a woman nominated by the head of the medical institution.
- Where the victim is a girl, medical examination must be done by a woman doctor.

Recording of Statement by the Police/SJPU

- While recording the statement of a child, the police officer investigating the case must ensure that the child does not come in contact with the accused at any point.
- A child's statement must be recorded at her/his residence, at a place where she/he normally resides, or at a place of her/his choice.
- Under no circumstances must a child be detained in the police station in the night.
- The statement must be recorded in the presence of the parent/s or any other person in whom the child trusts or has confidence.
- The statement of the child must as far as is practical, be recorded by a woman police officer not below the rank of a sub-inspector.
- The identity of the child must be protected from the media, unless the Special Court allows it in the interest of the child after giving reasons for the same in writing.
- While recording the statement of a child with mental or physical disability, the

police must seek the assistance of a qualified special educator, or a person familiar with the manner of communication of the child, or an expert in that field.

- Wherever possible, the statement given by the child must be recorded by audio-video electronic means.

Recording of Statement by the Magistrate

- The statement under Section 164 CrPC must be recorded as spoken by the child and in the presence of parent/s or any other person the child trusts or has confidence in. While recording the statement of a child with mental or physical disability, the Magistrate must seek the assistance of a qualified special educator, or a person familiar with the manner of communication of the child, or an expert in that field.
- Wherever possible, the statement given by the child must be recorded by audio-video electronic means.

Establishment of a Special Court

- State Governments must, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act. This is with a view to facilitate speedy trial.
- If a Sessions Court has been notified as a Children's Court under the Commissions for Protection of Child Rights Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act.

Trial

- All questions by the Special Public Prosecutor or the lawyer of the accused must be posed to the child through the judge.
- Though the child must not be exposed to the accused at any point during the legal process, the accused does have a right to hear the testimony of the victim. Video-conferencing, one-way mirrors or curtains should be used to ensure this.
- Frequent breaks must be allowed to the child during the trial.
- The child should not be called repeatedly to testify in court.
- Aggressive questioning or character assassination of the child is prohibited and should not be permitted by the Special Court.
- The Special Court must create a child-friendly atmosphere by allowing a family member, guardian, friend or relative, in whom the child has trust or confidence, to be present in the court.
- The identity of the child should not be disclosed at any time during the course of investigation or trial, unless the Special Court allows it in the interest of the child

after giving reasons in writing.

- The evidence of the child must be recorded within 30 days and the trial must be completed within one year from the date on which the Special Court takes up the matter.

1.4.2. Code of Criminal Procedure, 1973

The CrPC contains several provisions with a view to ensuring that procedures and proceedings are sensitive to the needs of victims of sexual offences. The CLAA bolstered some of the procedural protections. The relevant provisions are as follows:

1. Information given by a woman against whom any sexual offence under the IPC is allegedly committed or attempted must be recorded by a woman police officer or any woman officer. Further, if the woman is temporarily or permanently mentally or physically disabled, then such information must be recorded by a police officer, at her residence or at a convenient place of her choice, in the presence of an interpreter or special educator. The recording of such information must be video graphed and the police officer must facilitate the recording of the woman's statement by a Judicial Magistrate as soon as possible (provisos to Section 154(1), CrPC).
2. No male person below the age of 15 years or above the age of 65 years or a woman or a person with mental or physical disabilities will be required to come to the police station for questioning. Instead, they will be questioned in the place in which they reside (proviso to Section 160(1), CrPC).
3. The statement of a girl against whom any sexual offence under the IPC is allegedly committed or attempted must be recorded by a woman police officer or woman officer (proviso to Section 161(3), CrPC).
4. The Judicial Magistrate must record the statement of a victim of any sexual offence as soon as the commission of the offence is brought to the notice of the police (Section 164(5A)(a)).
5. If the victim is temporarily or permanently mentally or physically disabled, the Magistrate must take the assistance of an interpreter or a special educator while recording her statement and such statement should be video graphed (provisos to Section 164(5A)(a), CrPC). Such statement will also be considered *in lieu* of examination-in-chief, and the woman can be cross-examined on such statement without the need for recording it at the time of trial (Section 164(5A)(b), CrPC).
6. No sanction is required for prosecuting a public servant charged with any sexual offence under the IPC (explanation to Section 197, CrPC).
7. The court must take appropriate measures to ensure that a victim of sexual offence is not confronted by the accused at the time of recording the evidence, while also

ensuring the right of cross-examination of the accused (proviso to Section 273, CrPC).

8. When the inquiry or trial relates to rape, causing injury in the course of rape which causes the death of a woman or causes her to be in a persistent vegetative state, sexual intercourse by husband upon his wife during separation, sexual intercourse by a person in authority or gang rape, the trial must be completed within a period of two months from the date of filing the charge-sheet (proviso to Section 309(1), CrPC).
9. Rape trials and trials of other sexual offences under Sections 376, 376A, 376B, 376D, or Section 376E of the IPC should be conducted *in-camera*. The presiding Judge can allow any particular person to have access to, or be in the room. An *in-camera* trial should be conducted as far as practicable by a woman Judge or Magistrate (Section 327(2), CrPC).
10. Proceedings of *in-camera* trials cannot be printed or published without the previous permission of the Court (Section 327(3), CrPC).
11. The trial court can make a recommendation for compensation for the rehabilitation of the victim even if the case had ended in acquittal or discharge (Section 357A(3), CrPC).
12. A victim or her/his dependent can make an application to the State or District Legal Service Authority for award of compensation if the offender is not traced or identified and no trial has taken place (Section 357A(4), CrPC).
13. All public or private hospitals, whether run by the Central/State Government, local bodies or any other persons, are under an obligation to provide immediate first-aid or medical treatment to victims of sexual offences free of cost (Section 357C, CrPC).
14. Test identification of an arrested person by a person with mental or physical disabilities should take place under the supervision of a Judicial Magistrate who must ensure that the person with disability is comfortable with the methods used to identify the arrested person. The identification process should also be video graphed (provisos to Section 54A, CrPC).

1.4.3. Indian Evidence Act, 1872

The IEA contains several provisions with a view to ensure that the proceedings do not cause secondary victimization. The CLAA has bolstered some of the safeguards. The relevant provisions are as follows:

1. Evidence of the character of the victim or previous sexual experience is irrelevant where consent is an issue, in respect of sexual offences under the IPC (Section 53A, IEA).

2. Where sexual intercourse by the accused under Section 376(2) is proved and the question is whether or not the woman consented, the court shall presume that the woman did not consent if she states in her evidence that she did not (Section 114A, IEA).
3. It is mandatory for the court to take assistance of an interpreter or a special educator in recording the statement of a witness who is unable to communicate verbally. The statement should also be video graphed (proviso to Section 119, IEA).
4. Questioning of a victim of sexual offences in a manner that calls into question the general immoral character or the previous sexual experience of the victim for proving consent or the quality of consent is prohibited (Proviso to Section 146, IEA). In 2003, Section 155(4) of the IEA which stated that in rape prosecutions the generally immoral character of the prosecutrix can be shown was deleted.

1.5. Trial

1.5.1. Trial by Special Court under POCSO Act

Trial of sexual offences under the POCSO Act must be conducted by a Special Court. The accused must be produced before a Special Court for remand and bail. The Special Court has been provided for under the POCSO Act with a view to ensure speedy trial of sexual offences against children.

A Magistrate cannot try offences under the POCSO Act. The power to try offences under the POCSO Act has been vested only with a Special Court, irrespective of the severity of the crime or the punishment. The Magistrate's role is confined to recording of statements of the victims under Section 164, CrPC read with Section 25, POCSO Act.

1.5.2. No committal required

While generally cases cannot lie directly before the Sessions Court and require a Magistrate to commit the case to the Sessions Court, no committal proceedings are required under the POCSO Act. Section 33(1) of the POCSO Act expressly empowers the Special Court to take cognizance of an offence based on a complaint or upon a police report, without the accused being committed to it for trial. Therefore, the police must bring the matter directly before the Special Court instead of initiating committal proceedings before the Magistrate. This is in furtherance of the objective of facilitating speedy trial of sexual offences against children, as committal proceedings will only delay trial.

1.5.3. Trial by Special Court of offences other than those under the POCSO Act

The Special Court has the power to hear cases where offences have been committed under the POCSO Act and the accused in the same case is alleged of offences under some other Act. Hence, the matter will lie before the Special Court even if the case entails offences under other laws. Section 209, CrPC requires the Magistrate to commit the case to the Court of Session if the offence is triable exclusively by the latter. An accused can be charged under the CrPC for an offence under the IPC. For instance, an accused may be charged with offences under Section 376, IPC as well as Section 4, POCSO Act, 2012.

Two questions arise - first, will the Special Court have the jurisdiction to try offences under the IPC and second, if they do, should the case under the IPC be committed to it by a Magistrate? The first is addressed by Section 28(2), POCSO Act, which authorizes the Special Court to “also try an offence...with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.” The Special Court can try other offences only “while trying an offence under” the POCSO Act. The Special Court cannot try other offences if no charges are framed under the POCSO Act against the accused.²⁰ If the accused has been charge sheeted under the POCSO Act as well as the IPC or any other law, committal proceedings are not warranted. In the case of *P. Shanmugavel v. State*²¹, the Madras HC (Madurai Bench) held that the Special Court under POCSO Act can take cognizance of IPC offences along with the POCSO offences, if the offence has been committed in the course of the same transaction.

The Special Court can also try offences under Section 67B of the IT Act, 2000, which relates to publication or transmission of sexually explicit materials depicting children or facilitating the abuse of children online. A Children’s Court designated as a Special Court under the POCSO Act can, however, also try offences other than sexual offences against children.

²⁰ *State Through CBI New Delhi v. Jitender Kumar Singh*, AIR 2014 SC 1169. This case involved an interpretation of provisions concerning the jurisdiction of the Special Courts under the Prevention of Corruption Act, 1989 (PC Act). Section 4(3) of the Act states: “When trying any case, a special judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the code of criminal procedure, 1973, be charged at the same trial.” The apex court held: “under sub-section (3) of section 4, the special judge could try non-PC offences only when “trying any case” relating to pc offences. In the instant case, no PC offence has been committed by any of the non-public servants so as to fall under section 3(1) of the PC Act... the trying of any case under the PC Act against a public servant or a non-public servant, as already indicated, is a sine-qua non for exercising powers under sub-section (3) of section 4 of PC Act.” See also, *Vivek Gupta v. CBI*, (2003) 8 SCC 628.

²¹ *P. Shanmugavel v. State*, 2015(1) Crimes 536 (Madras High Court, Madurai Bench), available at <http://indiankanoon.org/doc/172191438/> (accessed on 3.12.14).

1.5.4. Forum of trial where more than one Special Court exists

The Scheduled Castes and the Scheduled Tribes (Prevention Of Atrocities) Act, 1989 (POA Act) also provides for Sessions Court in a district to be a Special Court for the purpose of trying offences under the Act. A case involving penetrative sexual assault of girl belonging to a Scheduled Caste will constitute an offence under Section 4, POCSO Act, as well as Section 3(1)(xii), POA Act. In such a case, the trial will be conducted by the Special Court under the POCSO Act only.

On 24 September 2013, the Rajasthan High Court (Jodhpur Bench) decided a reference under Section 395, CrPC on this issue - "Where two special courts constituted under two different Acts, have jurisdiction, to try the offender, who in one transaction had committed offences, pertaining to two Acts, which court should try the offender?"²²

It held that the Special Courts under the POCSO Act would have the jurisdiction based on Section 28(2) of the Act which authorizes the courts to try offences for which the accused may have been charged under the CrPC:

"Sweep of Section 28(2) of the Protection of Children from Sexual Offences Act, 2012, is too wide and comprehensive. Legislature in its wisdom has intentionally used words under section 28(2) of the Act or 2012 "with which the accused may under the Code of Criminal Procedure, 1973 be charged at the same trial" to vest jurisdiction in courts notified under the Act of 2012, otherwise, legislature would have limited by saying charges to be framed qua offences under Indian Penal Code or offences committed under any other Act."

1.5.5. Punishment for offences under POCSO Act and other laws

At times, certain acts may be offences under more than one law. When such a situation arises, the court decides the punishment based on the mandate of each law. According to the POCSO Act, in such a situation the person will be awarded punishment that is higher in quantum. For instance, following the CLAA, 2013, gang rape is punishable with a minimum of twenty years rigorous imprisonment under the IPC. The punishment for penetrative sexual assault by a gang under the POCSO Act is a minimum of ten years imprisonment. Hence, where a girl is subjected to penetrative sexual assault by a gang, charges can be framed under the IPC as well as the POCSO Act and on conviction, the accused persons must be sentenced to a minimum of twenty years rigorous imprisonment.

²² *In Re: A Ref U/S 395(2) CrPC By S.J V. Unknown*, S.B. Criminal Reference Petition No. 1/2013, High Court Of Judicature For Rajasthan At Jodhpur, decided by Justice Kanwaljit Singh Ahluwalia on 24.09.2013.

Table No. 4: Comparison of Punishment for Offences under the POCSO Act and the IPC

Sl. No.	Offence	Provision under the IPC	Provision under the POCSO Act
1.	Failure to record a sexual offence	<p>Section 166A(c): regarding public servant disobeying directions under law (failing to record any information given to him in respect of certain sexual offences)</p> <p>Punishment Minimum - 6 months RI Maximum - 2 years and fine</p>	<p>Section 21(1): Punishment for failure to report or record a case.</p> <p>Punishment Imprisonment (SI/RI) upto six months and/or fine</p>
2.	Sexual harassment	<p>Section 354A: – This section covers both touch and non-touch based sexual offences</p> <p>Punishment For the offence of: making physical contact and advances including unwelcome and explicit sexual overtures</p> <ul style="list-style-type: none"> • Demanding sexual favours • Showing pornography against the will of the woman <p>RI upto 3 years and/or fine For the offence of making sexually colored remarks: Imprisonment (SI/RI) Upto 1 year and/or fine</p>	<p>Section 11: This section includes only non-touch based sexual offences. Those involving physical contact are much more serious offences covered under section 7 (Sexual Assault)</p> <p>Punishment Imprisonment (SI/RI) upto 3 years and fine</p>
3.	Stripping a child	<p>Section 354B: Assault or use of criminal force to woman with intent to disrobe is an offence.</p> <p>Punishment Min - 3 years (SI/RI) Max - 7 years (SI/RI) and fine</p>	<p>Section 11 (Sexual Harassment) includes the offence of making a child show his body or any part of his body.</p> <p>Punishment Upto 3 years SI/RI and fine</p> <p>Sections 5(u) and 9(u): These provisions cover offences here the stripping of a child is in public and accompanied by penetrative sexual assault or non-penetrative sexual assault.</p>

			<p>Punishment Stripping a child in public accompanied by penetrative sexual assault: Min: 10 years RI Max: Imprisonment for life and fine Stripping a child in public accompanied by sexual assault (non-penetrative): Min – 5 years RI Max – 7 years RI and fine</p>
4.	Stalking a child	<p>Section 354D: covers the offence of stalking. Punishment First conviction: Up to 3 years SI/RI and Fine Subsequent conviction: Up to 5 years SI/RI and fine</p>	<p>Section 11: the offence of sexual harassment covers the offence of stalking. Punishment Imprisonment (SI/RI) upto 3 years and fine</p>
5.	Rape of a child	<p>Section 376(1): Punishment Min: 7 years imprisonment Max: Imprisonment for life and fine Aggravated Rape under Section 376(2): Punishment Min: 10 years RI Max: Imprisonment for the remainder of the person's natural life and fine</p>	<p>Sections 3 and 5 deal with penetrative sexual assault and aggravated penetrative sexual assault respectively Punishment Penetrative Sexual Assault: Min: 7 years SI/RI Max: Imprisonment for Life and Fine Aggravated Penetrative Sexual Assault: Min: 10 years RI Max: Imprisonment for life and fine</p>
6.	Rape of a child by a person in authority	<p>Section 376C: deals with Sexual intercourse by a person in authority. Punishment Min: 5 years imprisonment Max: 10 years and fine</p>	<p>Section 5(p): deals with the offence of penetrative sexual assault upon a child by a person in a position of trust or authority Punishment Min: 10 years RI Max: Imprisonment for life and fine</p>

7.	Gang rape	<p>Section 376D: deals with Gang Rape</p> <p>Punishment Min: 20 years RI Max: Imprisonment for the remainder of that person's natural life and fine</p>	<p>Section 5(g) deals with gang penetrative sexual assault</p> <p>Punishment Min: 10 years RI Max: Imprisonment for life and fine</p>
8.	Repeat sexual offenders	<p>Section 376E deals with repeat offenders of the offence of rape.</p> <p>Punishment Min: Imprisonment for the remainder of that person's natural life Max: Death</p> <p>Section 354D contains provisions for the repeat offence of stalking and it is punishable with upto 5 years SI/RI and fine</p>	<p>POCSO contains provisions of repeat offenders in:</p> <ul style="list-style-type: none"> • Section 5(t): commission of penetrative sexual assault by a person who has previously been convicted of a sexual offence under any law • Section 9(t): commission of sexual assault by a person who has previously been convicted of a sexual offence under any law <p>Section 14(1): Subsequent offence of using a child for pornographic purposes</p> <p>Punishment Repetition of sexual offence while committing penetrative sexual assault: Min: 10 years RI Max: Imprisonment for life and fine Repetition of sexual offence while committing sexual assault (non-penetrative) Min: 5 years SI/RI Max: 7 years and fine Repetition of the offence of using a child for pornographic offence: Up to 7 years SI/RI and fine</p>
9.	Insulting the modesty of a woman	<p>Section 509 deals with insulting the modesty of a woman</p> <p>Punishment SI up to 3 years and fine</p>	<p>Section 11 dealing with sexual harassment covers this offence.</p> <p>Punishment Imprisonment (SI/RI) upto 3 years and fine.</p>

1.6. Duties of Key Authorities under the POCSO Act

The key authorities and their duties are as follows:

Table No. 5: Key Authorities under the POCSO Act and their duties

Authority under the POCSO Act and Central Rules	Duties
<p>Police/Special Juvenile Police Unit²³ (SJPU)</p>	<ul style="list-style-type: none"> • Recording information pertaining to the commission of an offence, or apprehension that it is likely to be committed. • Making a preliminary assessment as to whether the child is in need of care and protection and if so, taking immediate steps to ensure protection. • Reporting the case to the Special Court and the Child Welfare Committee (CWC) within 24 hours of receiving the report about the commission of the crime. • Producing the child before the CWC within 24 hours if the child has been abused or faces the risk of further abuse in the place where the child is residing, or if the child is without parental support. • Taking the child for medical examination to a medical practitioner in a government hospital or to a private hospital in the event that a registered medical practitioner is not available at the government hospital. • Ensuring that if required, the child receives emergency medical care at the nearest hospital. • Recording the statement of the child at a place of his or her choice. • Ensuring that the child is not exposed to the accused during investigation. • Providing information about the procedures, developments in the case, and services to the child, parent/guardian, support person, etc. • Ensuring that the statement of the child is recorded by the nearest lady Magistrate, and within 24 hours.

²³ Under Section 63 of the Juvenile Justice (Care and Protection of Children) Act, 2000, Special Juvenile Police Units (SJPU) may be created by State Governments in every district or group of districts to co-ordinate and upgrade the police treatment of juveniles and children.

Child Welfare Committee (CWC)	<ul style="list-style-type: none"> • Determining a suitable placement for a child who has been abused or is facing a threat of abuse in her/his place of residence, within three days. • Providing a support person to a child for assistance (medical, psychological, sponsorship, etc.,) during the investigation and trial with the consent of the child and her/his parent, guardian, or person whom the child trusts.
District Child Protection Unit (DCPU)	<ul style="list-style-type: none"> • Maintaining a register with names, addresses and contact details of interpreters, translators, and special educators. • Making the register available to the SJPU, local police, magistrate, or Special Court. • Making payments for services to the above experts, from funds at their disposal.
Magistrate	<ul style="list-style-type: none"> • Recording the statement of the child in a child friendly manner and by audio-video electronic means, with the assistance of experts, special educators, translators, or interpreters, if necessary. • Recording such statement within 24 hours of the police receiving information about the alleged commission of a sexual offence. • Facilitating a copy of documents on which the prosecution proposes to rely upon for the child and his/her parent or representative.
Special Court and judge	<ul style="list-style-type: none"> • Conducting <i>in camera</i> trials of offences under the POCSO Act. • Ensuring that a child-friendly atmosphere is maintained in the court and that the dignity, interests, and identity of the child are respected and protected during trial. • Recording the evidence of the child within 30 days and completing the trial within 1 year of taking up the matter, as far as possible. • Ordering payment of compensation in appropriate cases.
Special Public Prosecutor	<ul style="list-style-type: none"> • Prosecution of cases exclusively under the POCSO Act.
Support Person	<ul style="list-style-type: none"> • Maintaining confidentiality of all information pertaining to the child, to which she/he has access. • Keeping the child, parent/guardian, or other person in whom the child has trust and confidence informed about the proceedings in the case, including available assistance, judicial procedures, and potential outcomes.

	<ul style="list-style-type: none"> • Informing the child of the role she/he may play in the judicial process. • Ensuring that any concerns the child may have, regarding safety in relation to the accused and the manner in which testimony is provided, are conveyed to the relevant authorities.
Central Government	<ul style="list-style-type: none"> • Giving wide publicity to the provisions of the POCSO Act at regular intervals through the media including television, radio and print media. • Imparting periodic training to government officers, police, and others on matters related to the implementation of the Act. • Framing Rules to give effect to the provisions of the Act. • Passing orders to remove difficulties that may arise in giving effect to the provisions of the Act, within two years from the commencement of the Act, <i>i.e.</i>, from 13 November 2014.
State Government	<ul style="list-style-type: none"> • Designating a Court of Sessions to be a Special Court under this Act in every district. • Appointing a Special Public Prosecutor for every such Special Court. • Promoting wide publicity of the provisions of the Act through media at regular intervals to spread awareness among the public, particularly children, their parents and guardians. • Training police and other officers of the State Government on matters relating to the implementation of the provisions of the Act. • Framing guidelines for use by all persons who are to be associated with the pre-trial and trial stage to assist the child. These include NGOs, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development. • Paying compensation from the Victims Compensation Fund or other schemes for the purpose of compensation and rehabilitating victims, within 30 days from the order of the Special Court. • Providing of support persons to the child victims for assistance during the trial.
National Commission for Protection of Child Rights (NCPCR) and State Commissions for Protection of Child Rights (SCPCR)	<ul style="list-style-type: none"> • Monitoring the implementation of the POCSO Act by the Central and State Governments. • Calling for reports from the CWC on specific cases. • Reporting on the implementation of the Act by way of a separate chapter in its Annual Report.

1.7. Reliefs available to child victims of sexual offences under the POCSO Act

The POCSO Act offers several procedural and substantive reliefs to a child victim. They are as follows:

- o **Child-friendly processes:** The POCSO Act requires respect for privacy, dignity and autonomy of the child at every stage of the legal process. It provides for child-friendly procedures for medical examination, recording the statement of the child by the police and the Magistrate, as well as during the trial in court. A child must be accompanied by a parent, guardian, or any other person whom the child trusts or has confidence in, during procedures involving medical examination, recording of statements, or giving testimonies in court. Also, the child must not be brought face to face with the accused while giving her/his statement to the police or the Magistrate, or while testifying in court. If necessary, a support person must also be provided to a child to assist him/her during the investigation and trial.
- o **Emergency medical care:** Children who are victims of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, and aggravated sexual assault; or who are found to be in need of urgent medical attention are entitled to receive emergency medical care within 24 hours of the police/SJPU receiving information about the crime.
- o **Care and protection:** If the police/SJPU has reasonable grounds to believe that the child is in need of care and protection, they must immediately make arrangements to provide the child such care and protection and also alert the Child Welfare Committee (CWC), the statutory authority vested with this responsibility. The CWC can take steps to ensure that care and protection is extended to the child. For instance, it can provide the child with a support person to render assistance during the investigation and trial. It can also order that the child be taken out of the custody of her/his family if she/he has been or is likely to be sexually abused there.
- o **Speedy Procedure:** The Act specifically requires that the evidence of the child must be recorded by a Special Court within 30 days of taking cognizance of the offence. Reasons for delay have to be recorded in writing. Further, the trial must be completed within a year's time, as far as possible.
- o **Compensation:** A child victim may receive interim compensation for immediate needs, for relief or rehabilitation and final compensation for the loss or injury caused to her/him.
- o **Punishment:** The Act prescribes punishment for offenders who commit sexual offences against children.

1.8. Rights of Children

All actors within the criminal justice system and the juvenile justice system are required to respect and protect the rights of children recognized under the Indian Constitution and the UNCRC. Key rights of children relevant to procedures and processes under the POCSO Act are as follows:

1. Right to be heard

Article 12(1) of the UNCRC requires that a child “capable of forming his or her own views” be assured “the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” Article 12(2) stipulates that the child should in particular “be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The POCSO Act and Rules recognizes this right in several places. For instance, Rule 4(5), POCSO Rules, mandate the CWC to take into account the opinion of the child while deciding on her/his placement or removal from the family home. However, the CWC’s obligations do not end with hearing the preference of the child. It must also give feedback to the child about how the child’s views were considered while arriving at the final decision.²⁴ Principle III, Rule 3 of the JJ Model Rules, 2007 also expressly recognizes this right. The JJBs and CWCs must respect this right in all proceedings before them.

The Committee on the Rights of the Child, the treaty body vested with the monitoring of States Parties compliance with the UNCRC, has clarified that States must assume that all children are capable of expressing their views and since no age limit has been imposed in the Convention, steps must be taken to hear very young children as well.²⁵ This would entail recognizing and respecting non-verbal forms of communication such as gestures, body language, drawing and painting, etc. For instance, the police and the Special Court may have to use non-verbal means to gather information from very young children. The right to be heard also requires that arrangements be made for children with disabilities, migrant children, or children with any form of communication difficulties to ensure that they can express their views.²⁶ The POCSO Act recognizes this by requiring that whenever required, interpreters, translators, and special educators are involved by the police, Magistrate, and Special Court.²⁷

24 UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para 45.

25 *ibid*, paras 20-21.

26 *ibid*, para 21.

27 Sections 26(2), 26(3), and 38, POCSO Act, 2012.

The Special Court must also ensure that the child is expressing her/his views “freely” and that the child has been unduly pressurized or influenced.²⁸ This requires creating an environment which is such that the child is not intimidated, traumatized, or re-victimized. The Committee on the Rights of the Child has categorically stated that “a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both child-appropriate and accessible.”²⁹

This right of a child victim to be heard is also connected to the right to be informed about various support services available and relevant information about the trial and evidence process.³⁰ POCSO Rules 4(2)(e-f), 4(8) and 4(12) recognize this right and require the SJPU, police, and support person to provide information about support services, legal aid, victim compensation, investigation status, detention status of the offender, and the judicial procedure.

2. Best interests to be taken as a primary consideration

Article 3(1) of the UNCRC requires that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” One of the reasons the POCSO Act was enacted was the need to protect the “interests of a child, both as a victim as well as a witness.”³¹ This right is also expressly recognized in Principle IV, Rule 3 of the JJ Model Rules, 2007.

The Committee on the Rights of the Child has explained that the best interest of a child is a substantive right, a fundamental, interpretative legal principle, and a legal procedure.³² As a substantive right, it requires that this right be applied when different interests are being considered. For instance, the importance of retaining a child within the family is recognized in the UNCRC as well as the JJ Act and Rules.³³ However, this interest may collide with the child’s right to be protected from sexual abuse when the perpetrator is a family member. In such cases, the CWC must decide on the placement

28 UN Committee on the Rights of the Child (CRC), General Comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, para 22.

29 *ibid*, para 34.

30 *ibid*, para 64.

31 Statement of Objects and Reasons, POCSO Act, para 3.

32 UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para 6.

33 Principle XII of the JJ Rules recognize the ‘Principle of Last Resort’ which provides that Institutionalization of a child shall be a step in of the last resort and only after a reasonable inquiry. Even in cases where institutionalization is necessary, it shall be for the minimum duration period. This principle in consonance with Principle V of the JJ Rules recognizing the ‘Principle of family responsibility’ which provides that the primary responsibility of bringing up children, providing care, support and protection shall be with the biological parents.

of the child based on the best interest principle on a case-by-case basis.

The Committee has listed seven elements that must be taken into account while determining the best interest of a child depending on the context.³⁴ These are as follows:

- (a) the child's views,
- (b) the child's identity – this includes sex, sexual orientation, religion, cultural identity and personality,³⁵
- (c) preservation of the family environment and maintaining relations,
- (d) care, protection and safety of the child,
- (e) situation of vulnerability,
- (f) the child's right to health, and
- (g) the child's right to education.

These are elements that the CWC must consider while arriving at a decision under Rule 4(4), of the POCSO Rules, on whether a child should be removed from the custody of her/his family or shared household and placed in a Children's Home or Shelter Home. Importantly, the CWC must consider the long-term implications of the decision on the child and not just in the immediate short-term. Further, the principle of last resort, (Principle XII, Rule 3, JJ Model Rules, 2007) must also be borne in mind while deciding on placements in the context of the POCSO Act.

As an interpretive principle, if multiple interpretations of a legal provision are possible, "the interpretation which most effectively serves the child's best interests should be chosen."³⁶ This must be borne in mind by the High Courts and the Supreme Court while interpreting provisions of the POCSO Act. As a rule of procedure, the impact of a decision on the best interests of a child or a group of children likely to be affected must be evaluated.³⁷ This dimension of the best interests principle must be particularly borne in mind by the government and the legislature while framing amendments or policy reforms.

The principle of best interest cannot override or undermine other legal rights and safeguards available to children. In General Comment No. 14, on the right of the child to have his or her best interests taken as a primary consideration³⁸, the Committee on Rights of the Child has stated that "In the assessment and determination of the child's best interests, the State must ensure full respect for his or her inherent right to life, survival and development". For instance, under the plea of preserving the best interests

34 *ibid*, paras 52 -79.

35 *ibid*, paras 55

36 *ibid*, para 6(b).

37 *ibid*, para 6(c).

38 29 May 2013, p. 11 at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

of a child, she cannot be detained in a Children's Home against her will if it is feared that she will change her statement in court if she is allowed to go back to her family.

The best interest principle would require Special Courts to ensure that the evidence is recorded in a developmentally appropriate manner and that the atmosphere within the courtroom is supportive and not hostile. The procedures prescribed under Sections 33 and 36, POCSO Act, must be adhered to. For instance, in recognition of the best interests of children, Section 33(2) prohibits the Prosecutor and the defence lawyer from directly questioning the child. All questions have to be put to the child by the judge, as children will naturally be intimidated if they are questioned by lawyers. Similarly, Section 36(1) requires the Special Court to ensure that the child is not exposed to the accused during the evidence recording stage. Such exposure could traumatize the child and make it exceedingly difficult for the child to open up and participate meaningfully in the judicial proceedings.

3. Right to physical and psychological recovery and social reintegration

Article 39, UNCRC requires the States Parties to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

The POCSO Act partially recognizes this right by empowering the Special Courts to order the State Government to pay compensation to the child for physical or mental trauma caused by the sexual offence or for immediate rehabilitation.³⁹ The POCSO Rules also vest the police and the CWC with the obligation to ensure the care and protection of children who have been subjected to sexual offences. Refer to Chapters 2 and 5 for further explanations.

4. Right to privacy

The right to privacy of children is recognized under Articles 8 and 16 of the UNCRC. Although the Constitution of India does not expressly recognize the right to privacy, the Supreme Court has in several cases⁴⁰ recognized the right to privacy ingrained in the right to life (Article 21). This right is however only a limited right and there is no absolute unconditional right to privacy available to any individual.

The Preamble of the POCSO Act emphasizes that “it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected

³⁹ Section 33(8), POCSO Act and Rule 7, POCSO Rules.

⁴⁰ *R. Rajagopal v. State of TN*, (1994) 6 SCC 632 ; *PUCI v. UOI*, AIR 1997 SC 568

and respected by every person by all means and through all stages of a judicial process involving the child.” Principle XI, Rule 3 of the JJ Model Rules, 2007 also recognizes this right. Further, in recognition of this right, the JJ Act in section 21 prohibits the publication of name and identity of any child involved in any proceeding under the JJ Act and provides a punishment for the same.

Several provisions of the POCSO Act require the media, police, and the Special Court to protect the identity of the child.⁴¹ In fact, disclosure is possible only if the Special Court permits it, and that only if it is of the opinion that such disclosure is in the interest of the child.⁴² The duty to ensure protection of the identity of the child would require all authorities to ensure that identifying information is suppressed in orders and judgments that are in the public domain.

5. Protection from sexual abuse and sexual exploitation

Article 19(1) of the UNCRC imposes an obligation on States Parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, *including sexual abuse*, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” Further, Article 34, UNCRC expressly requires States to take appropriate national measures “to protect the child from all forms of sexual exploitation and sexual abuse” and “to prevent:

- (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) the exploitative use of children in prostitution or other unlawful sexual practices; and
- (c) the exploitative use of children in pornographic performances and materials.”

The Constitution has also awarded a special status to children and permits the legislature to make special laws for women and children under Article 15(3).

The Statement of Objects and Reasons as well as the Preamble of the POCSO Act cite Article 34 as one of the primary reasons for the enactment of this law. However, the POCSO Act criminalizes sexual abuse and exploitation, but does not adequately address prevention or identification of sexual abuse. It does, however, require the Central Government and the State Governments to create public awareness about the Act and conduct periodic training for all concerned persons including police officers.⁴³ This right requires all stakeholders to be trained to identify signs of sexual abuse and to respond in an effective and child-sensitive manner.

⁴¹ Sections 23, 24(5), and 33(7), POCSO Act.

⁴² Proviso to Section 33(7), POCSO Act.

⁴³ Section 43, POCSO Act, 2012.

According to the Committee on the Rights of the Child, the State should develop a reporting mechanism that is “safe, well-publicized, confidential”, and a support mechanism that is accessible.⁴⁴ State Governments have an important role in ensuring this. The local police and the SJPU must also take the responsibility of ensuring that reporting process is smooth and non-traumatic.

The Special Court and the JJB must ensure that requisite information has been given to the child and her/his family or guardian and that the child is treated in a sensitive manner throughout the judicial proceedings.⁴⁵ Further, the Special Court must comply with the “celerity principle” and dispose cases in a speedy manner.⁴⁶ Compensation must also be ordered to promote recovery and reintegration of the child. The Special Court should also ensure that the child is kept informed about when the accused is released on bail. Bail orders should contain no-contact clauses where the possibility of threats is high. An atmosphere must be created to enable the child and the child’s family or guardian to report threats or inducements freely.

6. Right to legal representation

While the right of accused persons to legal aid and legal representation is well entrenched, the right of victims to legal representation is far more recent. In *Delhi Domestic Working Women’s Forum v. Union of India*⁴⁷, the Supreme Court recognized the right of victims to legal assistance and stated:

- (1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well- acquainted with the criminal justice system. The role of the victim’s advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant’s interests in the police station represent her till the end of the case.
- (2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.
- (3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that

44 UN Committee on the Rights of the Child (CRC), General Comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, para 49.

45 *ibid*, para 54.

46 *ibid*, para 54.

47 (1995) 1 SCC 14.

the victim was so informed.

- (4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.
- (5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

Section 40 of the POCSO Act recognizes the right of a child to take assistance of a legal practitioner. If the family or guardian of the child is unable to afford a legal counsel, the Legal Services Authority should provide a lawyer to them. Under Section 12(c) of the Legal Services Authorities Act, 1987, all children are entitled to the services of a free legal aid lawyer.

Special Courts should bear in mind that children have a right to be represented by a legal counsel of their choice and should therefore allow private lawyers on behalf of the child to participate in the trial.

Chapter 2: Duties of the Police and the Special Juvenile Police Unit¹

The POCSO Act requires all actors within the criminal justice system to respect the dignity and autonomy of the child victim at every stage of the legal process. The Act mandates that child-friendly procedures be followed during medical examination, recording the statement of the child by the police and the Magistrate, as well as during the examination of the child in court. Adherence to these mandatory procedures can make a world of difference to child victims and their families, who have to face not only the trauma associated with the crime, but also the exigencies of the criminal justice system. In essence, this will enable not only justice, but more importantly healing for such children and their families, and a strengthening of the faith in the justice system itself.

A child must be accompanied by a parent, guardian, or any other person whom the child trusts or has confidence in, during all these processes. The child must also not be brought face to face with the accused while giving her/his statement to the police or the Magistrate, or while testifying in court. If necessary, a Support Person must also be provided to a child to assist him/ her during the investigation and trial.

The police and the SJPU must abide by the child-friendly procedures and safeguards prescribed under the POCSO Act as well as the Code of Criminal Procedure (CrPC), while dealing with and investigating sexual offences against children. Non-compliance with the procedural safeguards will attract criminal liability,² and is punishable with fine and rigorous imprisonment for a minimum term of six month which can extend to two years.

2.1. Duties of the police to respect and protect the rights of child victims of sexual offences

2.1.1. What are the rights of children that should be respected and protected by the police and SJPU?

Child victims have the following rights under the POCSO Act, which the police and SJPU must respect and protect:

- Right to have their statement recorded in their residence or a place of their choice and in their own words.

1 This chapter was authored by Swagata Raha, Gulika Reddy, and Shruthi Ramakrishnan. Feedback was given by Anuroopa Giliyal internally. It was reviewed externally by Dr. S. B. N. Prakash, Rovina Bastian and Dr. Kaveri Haritas and edited by Arlene Manoharan.

2 Section 166A, IPC.

- Right not to be detained in the police station in the night time.
- Right to be protected from coming into contact with the accused in any way during police investigation.
- Right to give the statement to the police in the presence of non-offending parent/s or any person whom the child trusts.
- Right to the assistance of a translator, interpreter, special educator or expert while recording the statement.
- Right to emergency medical care, irrespective of whether an FIR or complaint has been registered.
- Right of a girl child to be medically examined by a woman doctor.
- Right to medical examination in the presence of a parent or a person whom the child trusts. Where they are not present, medical examination should be conducted in the presence of a woman nominated by the head of the medical institution. While the POCSO Act does not specify this, it is obvious that if the allegation lies against a parent, he/she cannot be present during the medical examination.
- Right not to be medically examined without consent.
- Right to emergency medical care within 24 hours, if penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, or aggravated sexual assault have been committed, or if the child is in need of urgent medical care as well as protection.
- Right to information about the following:
 - o Name, designation, and contact details of the police officer receiving the report and that of his or her supervisor,
 - o Right to legal aid and legal representation,
 - o Availability of support services such as counselling,
 - o Availability of public and private emergency and crisis services,
 - o Procedural steps involved in a criminal prosecution,
 - o Availability of victims' compensation benefits,
 - o Status of the investigation to the extent that it will not interfere with the same,
 - o Arrest of the suspected offender/s,
 - o Filing of charge sheet,
 - o Schedule of court proceedings that the child is required/entitled to attend,
 - o Bail, release, or detention status of an offender, and
 - o Judgment of the court and sentence imposed on an offender.
- Right to privacy and protection of identity from the media.
- Right to a Support Person to assist the child during the pre-trial and trial processes.
- Right to legal aid and legal representation.
- Right to the presence of a family member, guardian, friend, relative, or trusted

person during interactions with the police, Magistrate and Special Court.

Refer to Section 1.8 on Rights of Children, Chapter 1: Overview of the Legal Framework relevant to Sexual Offences against Children in India for a detailed explanation of rights and the corresponding duties of actors within the criminal justice system.

2.1.2. What are the main duties of the police and SJPU under the POCSO Act?

Under the POCSO, the police and SJPU are duty-bound to:

- Record information pertaining to the commission of an offence, or an apprehension that it is likely to be committed.
- Make a preliminary assessment as to whether the child is in need of care and protection and if so, take immediate steps to ensure protection.
- Report the case to the Special Court and the Child Welfare Committee (CWC) within 24 hours of receiving the report about the commission of the crime.
- Produce the child before the CWC within 24 hours if the child has been abused or faces the risk of further abuse in the place where the child is residing, or if the child is without parental support.
- Take the child for medical examination to a medical practitioner in a government hospital or to a private hospital in the event that a registered medical practitioner is not available at the government hospital.
- Ensure that if required, the child receives emergency medical care at the nearest hospital.
- Record the statement of the child at a place of his or her choice.
- Ensure that the child is not exposed to the accused during investigation.
- Provide information listed above about the procedures, developments in the case, and services to the child, parent/guardian, support person, etc.
- Ensure that the statement of the child is recorded by the nearest lady Magistrate, and within 24 hours.

Each of these above duties have been explained below.

2.1.3. What guidelines should the police bear in mind while interviewing children?

The police are often the first official entity with whom child victims or survivors and their families interact. Their attitude and behaviour has a critical bearing on the experience of children as they journey through the system. A victim of child sexual abuse may have undergone physical and mental trauma and requires sensitive handling. Chapter 3 of the Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act, 2012 issued by the Ministry of Women and Child Development

contains comprehensive guidelines on interviewing a child. The guidelines address the purpose of the interview, the setting, aspects to be borne in mind while selecting the location of the interview, and do's and don'ts. They also offer guidance on interviewing children with special needs. Box No. 1 below contains select excerpts from these Model Guidelines.

While taking into account the Model Guidelines, the following must also be borne in mind, while conducting a forensic interview:

- (1) **Background of the child** - The officer should get to know the child – his / her specific family, cultural, intellectual, mental, personal background as this will help in communicating with the child and establishing a rapport with the child. Such information can be obtained by speaking with the child's parents / caregivers.
- (2) **Sensitive interviewing** - While interviewing a child victim to gather evidence, the interviewer must have an understanding of child development, and age appropriate language and concept formation. In the absence of training on child development, the police must take the assistance of experts "trained in mental health, medicine, child development or other related discipline...to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability."³ It is preferable that the experts have knowledge about the impact of child sexual abuse and the ability to communicate well with children and adolescents and make them feel comfortable. While engaging an expert, care will have to be taken to ensure that there is no conflict of interest as per Rule 3(8), POCSO Rules. For instance, where the accused is a family member, it may not be appropriate for another family member to serve as an interpreter, as bias cannot be completely ruled out.
- (3) **Children's memory** - The ability to recall incidents of abuse, (particularly when there have been multiple incidents of sexual abuse), is very difficult for any person, leave alone a young child/adolescent. For this reason, the statement of a child must not be treated as inaccurate, merely because there are a few errors during recall.
- (4) **Patience and the avoidance of coercion** - A child should never be forced to speak. The child should be affirmed and appreciated for his / her patience and cooperation at appropriate times, recognizing the effort being made and the challenges faced while reliving incidents of abuse.⁴
- (5) **Avoid repeated questioning** - While there is no requirement pertaining to the specific number of meetings or interviews the police should have with the child

³ Rule 2(1)(c), POCSO Rules, 2012.

⁴ J Clare Wilson & Martine Powell, *A Guide to Interviewing Children*, (2001) p. 67.

victim prior to recording the statement, steps must be taken to ensure that the child is comfortable. The child should not be subjected to multiple interviews and repeated questioning. The assistance of the social worker attached to the SJPU or an independent expert can be sought while recording the statement.

Box No. 1: Excerpts from POCSO Model Guidelines issued by the Ministry of Women and Child Development relevant to forensic interviews

- i) All children should be approached with extreme sensitivity and their vulnerability recognized and understood.
- ii) Try to establish a neutral environment and rapport with the child before beginning the interview. For example, if the interview must be conducted in the child's home, select a private location away from parents or siblings that appears to be the most neutral spot.
- iii) Try to select locations that are away from traffic, noise, or other disruptions. Items such as telephones, cell phones, televisions, and other potential distractions should be temporarily turned off.
- iv) The interview location should be as simple and uncluttered as possible, containing a table and chairs. Avoid playrooms or other locations with visible toys and books that will distract children.
- v) Always identify yourself as a helping person and try to build a rapport with the child.
- vi) Make the child comfortable with the interview setting. Gather preliminary information about the child's verbal skills and cognitive maturity. Convey that the goal of the interview is for the child to talk and ask questions that invite the child to talk (e.g., "tell me about your family").
- vii) Ask the child if he/she knows why they have come to see you. Children are often confused about the purpose of the interview or worried that they are in trouble.
- viii) Convey and maintain a relaxed, friendly atmosphere. Do not express surprise, disgust, disbelief, or other emotional reactions to descriptions of the abuse.
- ix) Avoid touching the child and respect the child's personal space. Do not stare at the child or sit uncomfortably close.
- x) Do not suggest feelings or responses to the child. For example, do not say, "I know how difficult this must be for you."
- xi) Do not make false promises. For example, do not say, "Everything will be okay" or "You will never have to talk about this again."
- xii) Establish ground rules for the interview, including permission for the child to say he/she doesn't know and permission to correct the interviewer.
- xiii) Ask the child to describe what happened, or is happening, to them in their own

words. The interviewer should, as far as possible, follow the child's lead; however, he may have to delicately introduce the topics of the abuse.

- xiv) Always begin with open-ended questions. Avoid asking the child a direct question, such as "Did somebody touch your privates last week?" Instead, try "I understand something has been bothering you. Tell me about it."
- xv) After initially starting like this, move on to allow the child to use free narrative. For example, you can say, "I want to understand everything about [refer back to child's statement]. Start with the first thing that happened and tell me everything you can, even things you don't think are very important."
- xvi) Avoid the use of leading questions that imply an answer or assume facts that might be in dispute and use direct questioning only when open-ended questioning/free narrative has been exhausted.
- xvii) The interviewer should clarify the following:
 - a) Descriptions of events.
 - b) The identity of the perpetrator(s).
 - c) Whether allegations involve a single event or multiple events.
 - d) The presence and identities of other witnesses.
 - e) Whether similar events have happened to other children.
 - f) Whether the child told anyone about the event(s).
 - g) The time frame and location/venue.
 - h) Alternative explanations for the allegations.
- xviii) However, interviewers should avoid probing for unnecessary details. For example, it may not be essential to get a detailed description of an alleged perpetrator if he/she is someone who is familiar to the child (e.g., a relative or teacher). Although it is useful if the child can recall when and where each event occurred, children may have difficulty specifying this information if they are young, if the event happened a long time ago, or if there has been ongoing abuse over a period of time.
- xix) The child may get exhausted frequently and easily; in such an event, it is advisable not to prolong the inquiry, but rather to divert the child's mind and come back to the sexual abuse when the child is refreshed.
- xx) Regularly check if the child is hungry or thirsty, tired or sleepy, and address these needs immediately.
- xxi) Let the child do the talking and answer any questions the child may have in a direct manner.
- xxii) Avoid questioning the child as to why he behaved in a particular way (e.g., "Why didn't you tell your mother that night?"). Young children have difficulty answering such questions and may feel that you are blaming them for the situation.
- xxiii) Avoid correcting the child's behaviour unnecessarily during the interview. It can be helpful to direct the child's attention with meaningful explanations (e.g., "I have a little trouble hearing, so it helps me a lot if you look at me when you are talking so that I can hear you") but avoid correcting nervous behaviour that may be slowing

the pace of the interview or even preventing it from proceeding.

- xxiv) When two professionals will be present, it is best to appoint one as the primary interviewer, with the second professional taking notes or suggesting additional questions when the interview is drawing to a close.
- xxv) Interviewers should not discuss the case in front of the child.
- xxvi) Individuals who might be accused of influencing children to discuss abuse, such as parents involved in custody disputes or therapists, should not be allowed to sit with children during interviews.
- xxvii) In some cases, the interviewer may consider it appropriate to allow a support person to sit in on the interview; but in these situations, such a person be instructed that only the child is allowed to talk unless a question is directed to the support person. Also, the support person should be seated out of the child's line of vision to avoid allegations that the child was reacting to nonverbal signals from a trusted adult.
- xxviii) When planning investigative strategies, consider other children (boys as well as girls) that may have had contact with the alleged perpetrator. For example, there may be an indication to examine the child's siblings. Also consider interviewing the parent or guardian or other family member of the child, without the child present.
- xxix) The interviewer should convey to all parties that no assumptions have been made about whether abuse has occurred.
- xxx) The interviewer should take the time necessary to perform a complete evaluation and should avoid any coercive quality to the interview.
- xxxi) Interview procedures may be modified in cases involving very young, minimally verbal children or children with special needs (e.g., developmentally delayed, electively mute, non-native speakers).
- xxxii) Try to establish the child's developmental level in order to understand any limitations as well as appropriate interactions. It is important to realize that young children have little or no concept of numbers or time, and that they have limited vocabulary and may use terminology differently to adults, making interpretation of questions and answers a sensitive matter.
- xxxiii) A variety of non-verbal tools may be used to assist young children in communication, including drawings, toys, doll houses, dolls, puppets, etc. Since such materials have the potential to be distracting or misleading they should be used with care. They are discretionary for older children.
- xxxiv) Storybooks, colouring books or videos that contain explicit descriptions of abuse situations are potentially suggestive and are primary teaching tools. They are typically not appropriate for information-gathering purposes.

2.1.4. What are the time lines concerning the protocol to be followed by Police in POCSO cases?

The evidence of the child must be recorded within 30 days of the Special Court having taken cognizance of the offence. If it is delayed, reasons will have to be recorded by the Special Court explaining the delay. Further, under the POCSO Act, the trial must be completed within a year of filing the charge sheet. Trials related to offences under Sections 376, 376A, 376B, 376C or 376D, IPC should, as far as possible be completed within two months from the date of filing of the charge sheet.⁵

2.1.5. What are the legal consequences for non-compliance with duties?

The police and SJPU can be held liable for failure to comply with the child-friendly procedures under the POCSO Act. The penalties for such failure have been stipulated under the IPC. For instance, an officer cannot refuse to register a complaint on the grounds of non-availability of a woman police officer. If a woman police officer is unavailable, the FIR may be recorded by any woman officer⁶ within the police department. Refusal to register an FIR is a criminal offence under the Indian Penal Code (IPC) and an offence under Section 21(1) of the POCSO Act as well.⁷

Under the IPC, a public servant who “knowingly disobeys any direction of the law which prohibits him or her from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter,” can be punished with a fine and rigorous imprisonment for a minimum term of six months, which may extend to two years.⁸ For instance, if a sub-inspector summons a child to the police station to record her statement or detains her in the night in the police station, she or he can be held liable under the IPC.

A public servant is also liable if she or he “knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which she or he should conduct the investigation.”⁹ For instance, under the POCSO Act, the investigating officer must ensure that the child is not exposed to the accused during investigation. Failure to ensure this can result in criminal prosecution.

5 Proviso to Section 309, CrPC, 1973.

6 Section 154 (1), Cr.PC, 1973 proviso: Provided that if the information is given by the woman against whom an offence under Sections 326A, 326B, 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded by a woman police officer or any woman officer.

7 Section 166A(c), IPC, 1860.

8 Section 166A(a), IPC, 1860.

9 Section 166A(b), IPC, 1860.

2.2. What steps should the police take within 24 hours of report of a sexual offence?

When the SJPU or police receive information relating to a sexual offence that has been or is likely to be committed against a child, they should take the following steps, which are in accordance with the POCSO Act, CrPC, and directions issued by the Supreme Court in *State of Karnataka v. Shivanna*¹⁰:

I. Record the Complaint

- Record the information in writing.
- If the informant/complainant is a child, then the information must be recorded in a simple manner, so that the child understands it.¹¹ The statement must also be recorded by a woman police officer or any woman officer.¹²
- Assign an entry number to the information.¹³
- Read the statement over to the informant/complainant.¹⁴
- Enter the complaint in a book kept by the Police unit.¹⁵
- Arrange for a qualified interpreter or translator, for a child who does not understand the language in which the report is being recorded.¹⁶

II. Recording FIR

An FIR must be filed when any person having information pertaining to a sexual offence against a child tries to lodge one.¹⁷ If a police officer refuses to register an FIR, it is a cognizable and bailable offence under Section 166A(c) of the IPC as well as under Section 21(1) of the POCSO Act. Such failure is punishable under the IPC with fine and rigorous imprisonment of six months which may extend to two years and with imprisonment of either description which may extend to six months or fine or both under the POCSO Act.

III. Assess whether the child is in need of care and protection

Although all child victims of a sexual offence need immediate care, they are not deemed to be “children in need of care and protection” (CNCP) as defined under the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act). Section 2 (d) of the JJ Act defines a CNCP as *inter alia* a child who is homeless, lacks parental care and control, who suffers or is likely to suffer neglect, abuse, exploitation, trafficking or injury, who

10 <http://indiankanoon.org/doc/2622362/>

11 Section 19(3), POCSO Act, 2012.

12 Section 24(1), POCSO Act, 2012.

13 Section 19(2)(a), POCSO Act, 2012.

14 Section 19(2)(b), POCSO Act, 2012.

15 Section 19(2)(c), POCSO Act, 2012.

16 Section 19(4), POCSO Act, 2012.

17 Rule 4(2)(A), POCSO Act, 2012.

is physically and mentally challenged and lacks care or is a victim of armed conflict, civil commotion or natural calamity. The Child Welfare Committee (CWC) established under the JJ Act decides how CNCs should be dealt with particularly where the child has no parents or guardians. Section 32(1) of the JJ Act provides that “[a]ny child in need of care and protection *may* be produced before the Committee by a police officer, a public servant, a childline, or similar agency, a social worker or the child himself/herself”, which itself means that under the JJ Act, it is not mandatory to produce all children before the CWCs.

The POCSO Act and Rules do not require the production of all child survivors before the CWC. According to Rule 4(3), POCSO Rules, the SJPU/police need to produce the child victim/survivor before the CWC within 24 hours only if:

- The child is living in the same house or shared household with the person who allegedly committed or attempted to commit a sexual offence against him/her.
- The child is living in the same house or shared household with the person who is likely to commit a sexual offence against him/her.
- The child is staying in a child care institution and does not have any parental support.
- The child is without a home and parental support.

The POCSO Rules clearly do not envisage that every child victim of sexual abuse be produced before the CWC, but instead permits the police to make such decisions. The Act and Rules also provide that such a decision should be accompanied by reasons and is provided in writing to the CWC in a Care and Protection Report. The legislative intention seems to be the prevention of secondary victimization of the child victim by limiting the situations in which they must be produced before various authorities.

The police must also record the reasons in writing as to whether they believe the child is in need of care and protection and request the CWC to undertake a detailed assessment in order to determine the same. Once the child is produced before the CWC, it is the CWC that will determine where the child should reside, which could include the Children’s Home established under the JJ Act. A suggested format for a Care and Protection Report by the Police/SJPU is provided in Box No. 2 below.

IV. Facilitate Emergency Medical Care

The SJPU/police must assess if the child is in need of immediate emergency medical care. If such a need is identified then the police should proceed to make arrangements to take the child to the nearest hospital or medical care facility for such care, irrespective of whether it is a government hospital or a private one as per Rule 5(1), POCSO Rules, 2012.

V. Facilitate Medical Examination.

The SJPU/police must take the child to the hospital for medical examination within 24 hours of having received the report. They must also ensure that the samples received for forensic testing are sent to the Forensic Laboratory at the earliest.

VI. Facilitate Recording of Statement by Magistrate

In accordance with the directions laid down by the Supreme Court in *State of Karnataka v. Shivanna*¹⁸ and Section 164(5A)(a) of the CrPC:

- The SJPU or local police must take the child within 24 hours to any Metropolitan/ preferably Judicial Magistrate for the purpose of recording the child's statement under Section 164, CrPC.
- As far as possible, the victim should be taken to the nearest Lady Metropolitan/ preferably Lady Judicial Magistrate, for this purpose.
- The Investigating Officer should record specifically the date and the time at which she/he learnt about the commission of the offence and the date and time at which she/he took the victim to the Metropolitan/preferably Lady Judicial Magistrate.
- If there is any delay (exceeding 24 hours), in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.
- A copy of the medical examination report should also be immediately handed over to the Magistrate who records the statement of the victim under Section 164 Cr.PC.

VII. Report to the Special Court and Child Welfare Committee

The SJPU/ Police must inform the CWC and the Special Court about the case and steps that they have taken to ensure care and protection at their level, within 24 hours of receiving the information about the said offence.

VIII. Provide information to the informant and victim

- The SJPU/Police must give the informant their name, designation, address, and telephone number as well as the name, designation and contact details of their supervisor. This is to ensure that adequate contact information is provided to the informant about the police personnel responsible for dealing with the case.
- They must also inform the child and her/his parent/s, guardian, or other person about the availability of emergency health services, support services, procedures related to the case, status of the arrest of accused, availability of victim

¹⁸ <http://indiankanoon.org/doc/2622362/>

compensation, status of investigation, filing of charge-sheet, schedule of court proceedings, etc.

2.3. Duty to record complaint and file FIR

2.3.1. When should an FIR be registered?

An FIR must be registered when the information given to a police officer pertains to the commission of a cognizable offence.¹⁹ It is not necessary that this should be done only by an aggrieved person.²⁰ The complaint can be filed by any person.²⁰ Therefore, as soon as such information is given to the police, an FIR must be recorded, whether or not the aggrieved party has come in person to the police station or not. The police officer must record any information pertaining to the offence. The FIR must be recorded in writing and a free copy of the same must be given to the informant.²¹ Recording FIRs relating to cognizable offences under the Act cannot be refused or postponed due to lack of territorial jurisdiction.²² In cases where the offence was not committed within the jurisdiction of the concerned police station, the officer must register a 'Zero' FIR,²³ and then take steps to immediately transfer the same to the police station with the relevant jurisdiction.²⁴

2.3.2. Should an FIR be registered when the police receive a report of commission of offence or likelihood or both?

Clauses (1) and (2) of Section 19 of the POCSO Act, obligate the police/SJPU to record a 'report' of an apprehension that an offence is likely to be committed or information that it has already been committed. Rule 4(2) of the POCSO Rules requires the police to record and register an FIR in accordance with Section 154 of the CrPC. These provisions have to be read with Section 21(1) of the POCSO Act and Section 166B(c) of the IPC that prescribe a punishment for failure to record information about sexual offences. Where the information suggests that the offence has not yet been committed but is likely, an entry should be made in the daily diary.

19 Rule 4(2)(A), POCSO Rules, 2012 read with Section 154(1), CrPC, 1973.

20 Section 19 (1), POCSO Act, 2012.

21 Section 154 (2), CrPC, 1973.

22 NCPCR, Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders Police, Special Courts and Special Prosecutors, p. 29 at <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=407&lid=844>

23 A Zero FIR is the recording of an FIR even if the crime is not committed within the jurisdiction of the station. After transfer of the FIR to the police station within whose jurisdiction the crime has taken place, the FIR lodged earlier is then cancelled.

24 Sexual Offences Against Women and Children Guidelines to Police issued by Mumbai Police Commissioner Special Police Circular No. 27/2013, Dated 12.8.2013, at http://majlislaw.com/file/RAHAT_Police_Circular_Eng_1.pdf

2.3.3. What action should the police take if it is only a case of apprehension?

Even in cases where there is only apprehension of the likely commission of an offence, the police must take immediate steps to ensure that a report is recorded as required under Section 19(2) of the POCSO Act. If necessary, they must also take the steps outlined in Section 2.2. above.

2.3.4. Do the police have discretion to register an FIR upon receiving information related to the commission of a cognizable offence?

An FIR will have to be registered if the information received pertains to the commission of a cognizable offence. The police have no discretion and cannot undertake a preliminary inquiry to ascertain the veracity of the information received before registering an FIR. Such an inquiry can be undertaken only if the information does not disclose a cognizable offence, but points to the need to make such an inquiry. This was clarified by the Supreme Court in *Lalita Kumari v. Govt. of UP*²⁵ wherein it was held that “[r]egistration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.”

2.3.5. Does the victim have to come to the police station to register the FIR?

Information can be given by anyone on behalf of the victim. If the victim is temporarily or permanently physically or mentally disabled, the information must be recorded by a police officer at the child’s residence or at a place of the child’s choice, in the presence of an interpreter or special educator, and the recording of such information must be videographed.²⁶

2.3.6. Does the police/SJPU have any discretion in respect of investigation in sexual offences?

The discretion afforded by the CrPC to an Investigating Officer is available to him/her even in respect of sexual offences. Proviso (b) to Section 157(1) of the CrPC, states that “if it appears to the officer in charge of a police station that there is no sufficient ground for entering [into] an investigation, he shall not investigate the case.”

In *State of Haryana v. Bhajan Lal*²⁷, the Supreme Court made the following observations in respect of investigation by the police:

The commencement of investigation in a cognizable offence by a police officer is

25 AIR 2014 SC 187.

26 Section 154(1)(a) and Section 154(1)(b), CrPC, 1973.

27 AIR 1992 SC 604.

subject to two conditions, firstly, the police officer should have reason to suspect the commission of a cognizable offence as required by sec. 157(1) Cr.P.C., and secondly, the police officer should subjectively satisfy himself as to whether there is sufficient ground for entering on an investigation even before he starts an investigation into the facts and circumstances of the case as contemplated under clause (b) of the proviso to sec. 157(1). Further, as clause (b) of the proviso permits the police officer to satisfy himself about the sufficiency of the ground even before entering on an investigation, it postulates that the police officer has to draw his satisfaction only on the materials which were placed before him at that stage, namely, the first information together with the documents, if any, enclosed. In other words, the police officer has to satisfy himself only on the allegations mentioned in the first information before he enters on an investigation as to whether those allegations do constitute a cognizable offence warranting an investigation.

2.3.7. Should the police frame charges under the POCSO Act or IPC or both?

All relevant provisions will have to be mentioned in the charge sheet. The police cannot and should not choose between the provisions of the POCSO Act and the IPC. In fact, the provisions of the POCSO Act should definitely not be left out, because the special trial procedures will apply only if an offence is alleged under this Act. For instance, if charges are framed under Section 376, IPC and Section 4, POCSO Act is not included; the matter may not necessarily come before a Special Court. Further, committal proceedings would also be required. Besides, ingredients of offences and the burden of proof under the two laws are different. For instance, rape of a child below 16 years is a ground for aggravated rape under the IPC, while penetrative sexual assault of a child below 12 years is a ground for aggravated penetrative sexual assault under the POCSO Act. Presumptions of guilt and culpable mental intention will apply to offences under the POCSO Act but not to the offences under the IPC.

Therefore, all relevant provisions must be included in the charge sheet, even though the provisions may appear to be similar.

2.4. Recording of Statement by the Police

2.4.1. What are the specific duties of a police officer recording the statement of a child victim?

While recording the statement of the child, the police/SJPU should ensure that they do the following:

- Wear plain clothes and not appear in uniform.
- Ensure that the child is shielded from being exposed to the accused and that the

child does not come in contact with him/her while recording the statement or during the investigation.

- Ensure that the child does not remain in the police station at night, for any reason whatsoever.
- Take the help of qualified translators, interpreters, experts or special educators if necessary.
- Record the statement by audio-video electronic means, as far as possible.
- Ensure that the identity of the child is protected from the public and the media. Disclosure of the identity of a child without the permission of the Special Court is an offence. The police should in fact initiate legal action against a person if there is a breach of this safeguard.

2.4.2. Where should the statement of the child be recorded?

The statement of the child should be recorded at a place preferred by the child. This could include the child's own home or wherever the child resides. For instance, if a street child wants his statement to be recorded near a temple where he resides, the police will have to record the statement of the child at that spot. The police cannot insist that the child come to the police station for the purpose of recording of the statement.

2.4.3. Who should record the statement of a child victim?

According to the POCSO Act, as far as practicable, the child's statement should be recorded by a woman police officer not below the rank of a Sub-Inspector. The officer recording the statement of a child should be in plain clothes and not in uniform while recording the statement. However, according to the CrPC, statement of a girl against whom any sexual offence under the IPC has been committed or attempted, *should be* recorded by a woman police officer or any woman officer. It is therefore mandatory that statements of girls are recorded only by a woman police officer or any woman officer.

2.4.4. In whose presence should the statement of the child be recorded by the police?

At the time of recording the statement, a parent or anyone who the child trusts shall be present.²⁸ For instance, an NGO worker can be regarded as a "person of trust or confidence" if so expressed by the child victim and can be requested to be present at the time of recording the statement.²⁹ This could include a CWC member but only on the request of the child. The CWC cannot insist that the police record the statement of the child in its presence unless specifically requested by the child. Although the Act does not expressly state it, it is obvious that if an allegation lies against a parent, she/

²⁸ Section 26(1), POCSO Act.

²⁹ Ministry of Women and Child Development, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012, September, 2013, p. 58.

he becomes thereby the accused and thus should not accompany the child, or come in contact with, or be present when the child's statement is being recorded.

2.4.5. When should the assistance of interpreters, translators, experts or special educators be taken by the police?

While recording the statement of the child, the police must take steps to ensure the child is comfortable. If necessary, the assistance of qualified translator or interpreter can be sought while recording the statement. Section 26(3) of the POCSO Act provides that in the case of a child having a mental or physical disability, the assistance of a special educator or an expert who is familiar with the manner of communication of the child may be requested to record the statement of the child. "Expert" has been defined to mean "a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability."³⁰

Further, the assistance of interpreters may be required during investigation and trial of cases of child sexual abuse, when there are witnesses or parties who speak a language different from that used in the Court which is hearing the case, or in cases where the witnesses and parties have speech or hearing impairments, or any other communication difficulties.

The DCPU is responsible for maintaining a register with names, addresses and contact details of interpreters, translators, and special educators. In case the help of interpreters or translators is needed, the police or SJPU can contact the DCPU. In cases where an interpreter is not available, a non-professional, who is otherwise experienced or trained in the relevant language, may be requested to interpret on behalf of the child.³¹ However, it must be ensured that there is no conflict of interest in such cases. For instance, if the father is the accused in the case, the child's mother cannot be the interpreter.³²

2.4.6. Can the police seek the assistance of a child psychiatrist or psychologist while recording the statement of the child?

The POCSO Act and Rules allow the police to take the assistance of experts to communicate with children. While engaging an expert, a child psychiatrist for instance, care will have to be taken to ensure that there is no conflict of interest as per Rule 3(8), POCSO Rules.

In the case of *Court on its own motion v. State*,³³ the Delhi High Court issued guidelines

³⁰ Rule 2(1)(c), POCSO Rules, 2012.

³¹ Rule 3(3), *ibid*.

³² Ministry of Women and Child Development, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012, September, 2013, p. 20.

³³ W.P. (CrI.) No. 930/2007 decided by the Delhi High Court on 14.08.2007.

to be followed by the police, Magistrate, medical practitioners and trial courts while dealing with a case of child sexual abuse. In connection with recording of the statement by the police, the Court stated the following:

“Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case... *In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.*”(emphasis added)

The above guidelines and the POCSO Act and Rules suggest that the Investigating Officer can enlist the support of a child psychiatrist or expert in child development while taking the statement of the child. The IO could list the information she/he seeks to elicit from the child and request the psychiatrist to help frame the questions. The assistance of a child psychiatrist can be taken to ensure that the interview is conducted in a sensitive manner and the child is not further traumatized. Questions can be put to the child in keeping with the child’s development, psychological state, verbal skills, and cognitive maturity.

However it must be noted that, the counsellor or psychiatrist facilitating the forensic interview should not be asked to also provide counselling or therapeutic services to the child and vice-versa. The two roles are distinct and should not be blurred as it may later have a negative impact on the child as well as the evidentiary value of the statement in court.

2.4.7. What should be the rank of the Investigating Officer in cases of sexual offences?

A thorough investigation of the case is one of the essential ingredients that enable a conviction in a criminal case. The POCSO Act, 2012 does not specify the rank of the Investigating Officer required for such cases. Section 156 of the CrPC prescribes that upon receiving a report regarding a cognisable offence, an officer-in-charge of the jurisdictional police station is authorised to conduct an investigation. According to Section 157(1) of the CrPC, the officer-in-charge of a police station can either proceed in person or depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.

The State Police Manual or circulars will have to be considered to identify the rank of police officers who can undertake investigation in POCSO cases. For instance, the Karnataka Government issued an order in 1961 as per which the rank of police officers

has been prescribed as “of and above the rank of H[ead] C[onstable].”³⁴ This Manual also stipulates that ‘heinous offences’ should be investigated by the Circle Inspector.³⁵ Rape has been designated to be a ‘heinous crime’ under the Karnataka Police Manual, and in such cases a copy of the FIR has to be sent directly to the Superintendent, to the Sub-Divisional Officer, to the Circle Inspector, to the local Magistrate and also to the Magistrate having jurisdiction (in case he is not the local Magistrate), and the District Magistrate.³⁶

In 2010, the Delhi Police issued Standing Order No. 303 detailing instructions regarding investigation of rape or sexual assault cases, as per which the Assistant Commissioner of Police has to personally supervise all investigation into sexual offences.³⁷ The Order also refers to a direction stipulated by the Delhi High Court,³⁸ as per which “the investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.”

These examples show the ways in which the decision to appoint an Investigating Officer can be taken. More important than the rank and the gender of the Investigating Officer, is the attitude and skill of the officer in handling children and adolescents, particularly those who are victims of sexual offences. Concerted efforts should be made to identify and cultivate these skills in all designated Investigating Officers, as these are essential to an effective, efficient and most importantly, a child friendly investigative process.

2.4.8. How can the voluntary nature of the statement of the child be assured?

Children traumatized by sexual abuse find it very difficult to communicate their experience to people they do not know. However, the child’s statement is a valuable piece of evidence required for a successful prosecution. This statement has to be voluntary and not under duress. The statement must be recorded in a place where the child prefers and in the presence of parents or any other person in whom the child trusts or has confidence. In order to ensure the voluntary nature of the statement of the child, the setting and the manner of questioning the child must be child-friendly. In order to enable this, the assistance of an expert who can establish a rapport with children and adolescents may be requested. Further, to prevent intimidation by the accused, the child victim should not come in contact with the accused while the statement is being

34 Karnataka Police Manual, Chapter 28 – General Instructions to Investigating Officers, para 1237, <http://www.ksp.gov.in/home/policemanual/ch28.php>

35 *ibid*, paras 201, 208.

36 *ibid*, para 1216.

37 Delhi Police, Standing Order No. 303/ 2010 Guidelines to be followed by the police while investigating cases of rape, http://www.nipsa.in/uploads/country_resources_file/1162_1.pdf

38 *Court on its own v. State*, W.P. (Crl.) No. 930/2007.

recorded.

In the case of *Court on its own motion v. State*³⁹, the Delhi High Court stipulated guidelines to prevent the victimization of child victims, as per which: “The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of “Ascertaining voluntary nature of statement” unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.” This will also apply to the police. If there is an apprehension that the child may be tutored, it can be ensured that the parent/trusted person is not in the line of vision of the child or in physical contact. However, the child should not be separated from a parent, unless she or he is the alleged perpetrator.

2.4.9. What can be done to prevent witnesses from turning hostile?

Victims of sexual offences are stigmatized and subjected to a lot of scrutiny and pressure by the community, media, and law enforcement authorities. However, where the accused is a family member and/or known to the victim, there is often additional pressure to retract the statement or compromise the case. In cases of incest, the victim herself/himself feels compelled not to register a case against a ‘loved one’ for fear of being the cause of public shame and family breakdown. Victims and their families may also face a threat of violence or retaliation and need a lot of support in order to stand by their statement.

It may be noted, if a witness does turn hostile after recording the statement, their statement will be subject to more scrutiny, but will not be rejected as evidence. In *State of UP v. Ramesh Prasad Misra*,⁴⁰ the Supreme Court observed: “It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.”⁴¹

The police should take the following steps to minimize the likelihood of witnesses turning hostile:

- (1) Ensure that the statement of the child is recorded by the Magistrate under Section 164, CrPC, within 24 hours. It is now mandatory for the police to do so in cases involving sexual offences under Section 164(5A)(a), CrPC, read along with the Supreme Court’s direction in *State of Karnataka v. Shivanna*.⁴²
- (2) Ensure that support services including the services of a Support Person and

39 W.P. (Crl.) No. 930/2007 decided by the Delhi High Court on 14.08.2007.

40 (1996) 10 SCC 360.

41 *ibid*, para 7.

42 <http://indiankanoon.org/doc/2622362/>

- (m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;
- (n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/ profession, if desired;
- (o) Any other form of protection measures considered necessary, and specifically, those requested by the witness.”

2.4.10. What should the police do if the child and the child’s family refuse to cooperate with the investigation?

Section 157, CrPC casts duty on the Investigating Officer to forthwith send the report of the cognizable offence to the Magistrate, the reason being, to keep the concerned Magistrate informed of the investigation so that he can issue appropriate directions,⁵⁶ In POCSO cases, the information regarding non-cooperation of the complainant needs to be sent to the Special Court with a request for further directions. Alternatively, the police can investigate the other aspects of the case and file a final report seeking closure of the case under Section 173, CrPC.

2.4.11. When can the police officer be in uniform?

Section 24(2) of the POCSO Act provides that a police officer must be wearing plain clothes, and not a uniform while recording the child victim’s statement. This is because children can be intimidated by people in uniforms, which may hinder them from freely communicating with the officer concerned. However, the Act does not further provide situations where the police officer can indeed wear uniform. For instance, the Act does not expressly state whether or not the officer should be in uniform while taking the child for medical examination, while producing the child before the CWC or while taking the child victim to a Magistrate for recording the statement under Section 164, CrPC. Therefore, a police officer who is dealing with a child victim should wear plain clothes, except in circumstances where it would amount to a dereliction of duty. All officers should keep a set of plain clothes in the police station, to enable compliance with this requirement.

2.4.12. Recording of statements of children with disabilities

The police/SJPU could avail the services of experienced, trained and qualified special educators/translators, interpreters, or experts who are familiar with the mode of communication of children with disabilities while recording the statement of a child with disability. For instance, if a speech and hearing impaired child’s evidence or statement has to be recorded, the services of a sign language expert may be sought. Such statement, as in any other case, must be videographed as well.

⁵⁶ *Swati Ram v. State of Rajasthan* (1997) 2 Crimes 148 (Raj).

2.4.13. Test Identification Parade

Section 24(3) of the POCSO Act expressly states that the police officer responsible for investigation shall ensure that the child victim does not come in contact in any way with the accused, at any point in time, even outside of the courtroom. Therefore, for the purpose of identification, the child can be asked to identify the accused in a photograph. The accused can also be shown to her/him through a one-way mirror.

The Delhi High Court in the case of *Rakesh Kumar v. State*⁵⁷ laid down the following guidelines in respect of children below 12 years of age identifying accused persons:

- a) In every case where witness is a child below the age of 12 years TIP proceedings shall be held in one of the court rooms attached with the main Tihar Jail so that the child does not enter the main jail complex to reach the Test Identification Parade room.
- b) Installation of semi reflective screen or any other screen or mechanism in a room where TIP proceedings will be conducted so that the child witness is not confronted face to face with the criminals participating in the TIP proceedings.
- c) A person accused of the offence and the others who may be participating in the TIP will be explained the procedure and the manner of TIP proceedings to be held in a case of child witness.
- d) No officer below the rank of Deputy Superintendent of Jail shall accompany the child witness at the time of TIP proceedings and endeavour shall also be made by the Jail Superintendent that, so far as possible only female officer is deployed wherever witness happens to be a girl child for the purposes of identifying the accused person.
- e) No police official shall be seen in a uniform right from the stage when the child enters the TIP Room and till he/she leaves the premises after the completion of TIP proceedings. The child witness shall be entitled to accompany his parents/guardians or any of his close relatives so as to make the child comfortable before participating for identifying the accused in the Test Identification Parade.
- f) Endeavour shall be made by Director General (Prisons)/Jail Superintendent that a lady officer who is more humane, sensitive and compassionate is given duty to accompany the child witness.
- g) The child friendly atmosphere will be created in a room where the child is brought first and the stay of the child will be made most comfortable so that the child finds the place to be attractive and conducive to his/her requirements.
- h) Necessary arrangements for light refreshment to the general liking of children below the age of 12 years shall also remain in place to keep the mood of the child

⁵⁷ CrI. A. 513/1998, decided on - 30.05.2014.

counsellor are made available to a child victim who needs such support. Their involvement can facilitate healing and also enable the child to confidently testify in court. If the child and her/his family do not receive timely and effective counselling and support, there is every possibility that the child could turn hostile in court. A Support Person could help them in accessing counselling services and also navigate through the legal maze.

- (3) Assure the victim and witnesses that there are legal options available to respond to threats or intimidation by the accused and advise them to inform the police immediately on receiving such a threat.

Although, no legislation in India has provided for specific protection of witnesses, the courts have, over the years provided for guidelines to protect vulnerable witnesses. The Delhi High Court, in the case of *Neelam Katara v. Union of India*⁴³ for the first time issued guidelines to provide protection to the witness for crime punishable with capital punishment and life imprisonment.

Recently, the state of Delhi has become the first in the country to issue a Witness Protection Scheme.⁴⁴

Box No 2: Highlights of the Delhi Witness Protection Scheme, 2015

The Scheme classifies witnesses into three categories as per the threat perception, based on threats to life, safety, reputation or property, as well as to moderate threats which extend to harassment and intimidation.⁴⁵ The Competent Authority under the Scheme is the Member Secretary or Officer on Special Duty of the Delhi State Legal Services Authority.⁴⁶ They have been empowered to pass orders for witness protection under the Scheme.

Witnesses seeking protection will have to file an application before the Competent Authority with supporting documents.⁴⁷ Applications for identity protection will also lie before the Competent Authority.⁴⁸ The Competent Authority will then call for a Threat Analysis Report from the Addl. CP/DCP/Addl. DCP of the District/Unit investigating the case.⁴⁹ Interim protection orders can be passed depending on the severity of the case.⁵⁰ The Threat Analysis Report must be submitted within five working days and the report must categorize the threat perception and indicate protective measures that

43 Crl. W. No. 247/2002 decided on 14.10.2003 by the Delhi High Court.

44 Delhi Witness Protection Scheme, 2015.

45 Clause 3, Delhi Witness Protection Scheme, 2015.

46 Clause 2(c), Delhi Witness Protection Scheme, 2015.

47 Clause 5, Delhi Witness Protection Scheme, 2015.

48 Clause 9, Delhi Witness Protection Scheme, 2015.

49 Clause 6(a), Delhi Witness Protection Scheme, 2015.

50 Clause 6(b), Delhi Witness Protection Scheme, 2015.

can be taken.⁵¹ The Competent Authority should interact with the witness to ascertain her/his protection needs and also conduct the hearings on the application *in-camera*.⁵² The application should be disposed within seven working days of its filing.⁵³ The protection order should be implemented by the Witness Protection Cell and the overall responsibility of ensuring this is on the Commissioner of Police, Delhi.⁵⁴ However, change of identity/relocation orders will have to be implemented by the Divisional Commissioner, GNTCD, Delhi. Pursuant to the Witness Protection Order, monthly follow-up reports will have to be filed by the Cell before the Competent Authority.⁵⁵

Clause 7 of the Scheme details the types of protection. It states:

The witness protection measures ordered shall be proportional to the threat and for limited duration. They may include:

- (a) Ensuring that witness and accused do not come face to face during investigation or trial;
- (b) Monitoring of mail and telephone calls;
- (c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;
- (d) Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing, etc;
- (e) Concealment of identity of the witness, by referring to him/her with the changed name or alphabet;
- (f) Emergency contact persons for the witness;
- (g) Close protection, regular patrolling around the witness's house;
- (h) Temporary change of residence to a relative's house or a nearby town;
- (i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;
- (j) Holding of in-camera trials;
- (k) Allowing a support person to remain present during recording of statement and deposition;
- (l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live links, one way mirrors and screens, apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

51 Clauses 6(c-d), Delhi Witness Protection Scheme, 2015.

52 Clauses 6(e-f), Delhi Witness Protection Scheme, 2015.

53 Clause 6(g), Delhi Witness Protection Scheme, 2015.

54 Clause 6(h), Delhi Witness Protection Scheme, 2015.

55 Clause 6(i), Delhi Witness Protection Scheme, 2015.

2.5. Recording of statement by the Magistrate

2.5.1. Is it mandatory for the police to facilitate the recording of the statement of a child victim of a sexual offence by a Magistrate under Section 164 of the CrPC?

Yes, it is now mandatory for the police to ensure that the statement of a victim of sexual offences is recorded by a Magistrate under Section 164(5A)(a) of the CrPC and as per the Supreme Court's direction in *State of Karnataka v. Shivanna*⁵⁹. If there is any delay (exceeding 24 hours), in taking the victim to the Magistrate, the Investigating Officer should record the reasons in the case diary and hand over a copy of the same to the Magistrate.

The statement of a child under Section 164 of the CrPC should be recorded before a Magistrate. However, if the child victim is severely injured and is in a hospital, the Magistrate can record the child's statement in the hospital.⁶⁰

2.5.2. Can a statement under Section 164 of the CrPC be recorded by a Child Welfare Committee?

Members of the CWC cannot record statements under Section 164 of the CrPC and statements recorded by them will not carry the same value as that recorded by a Metropolitan Magistrate or Judicial Magistrate. Under the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act), the CWCs have been empowered to function as a Bench of Magistrates. They hold the powers available to Magistrates under the CrPC as a bench, not as individual members. They can exercise limited powers in order to discharge their mandate under the JJ Act. A statement under Section 164 of the CrPC can be recorded only by a Metropolitan Magistrate or a Judicial Magistrate, who are qualified judicial officers. (See Section 5.4.5, Chapter 5 for a detailed explanation)

2.6. Duty to Facilitate Emergency Medical Care

2.6.1. Who is entitled to receive emergency medical care?

There are two categories of children who are entitled to receive emergency medical care:

58 *ibid.*

59 <http://indiankanoon.org/doc/2622362/>

60 Standing Order No. 303/2010 issued by the Delhi Police – 'Guidelines to be followed by the Police while investigating cases of rape'. Also see Guidelines for Prevention of Child Abuse, Delhi Commission for Protection of Child Rights, May 2014 available at http://delhi.gov.in/wps/wcm/connect/DOIT_DCPCR/dcpr/what+s+new/guidelines+for+the+prevention+of+child+abuse

- Children who are victims of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, and aggravated sexual assault.
- Child victims of offences other than those listed above, who, in the opinion of the SJPU/police are in need of urgent medical care and protection.

2.6.2. Role of the SJPU or police in facilitating emergency medical care

After a case has been reported to the SJPU/police, they must determine if the child is in need of urgent medical care and protection. However, as stated above, if the child is a victim of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, or aggravated sexual assault, then she/ he will have to be immediately taken for emergency medical care. For instance, if a child has been gang-raped, this would constitute an aggravated penetrative sexual assault, and in such case the police would have to take her to hospital immediately. As stated earlier, it is the duty of the SJPU/police to ensure that a child is taken to the nearest hospital or medical facility within 24 hours of the report being registered.

2.6.3. Hospitals in which emergency medical care be availed

The POCSO Rules do not insist that a child be taken only to a government hospital. It requires the child to be taken to the *nearest* hospital or medical care facility. Thus, in order to access emergency medical care, a child can be taken to a private hospital or a government hospital, whichever is closer. Further, under Section 357C, CrPC, a mandatory obligation has been cast on public *and* private hospitals to provide immediate first-aid or medical treatment to victims of sexual offences free of cost.

2.6.4. Can any hospital deny immediate first-aid or medical treatment to victims of sexual offences?

Hospitals cannot deny immediate first-aid or medical treatment. Under Section 357C of the CrPC, a mandatory obligation has been cast on public and private hospitals to provide immediate first-aid or medical treatment free of cost to victims of sexual offences. Failure to provide such treatment is punishable under Section 166B, IPC with imprisonment which may extend to one year or fine or both.

2.6.5. Can medical care be tendered in the absence of a parent, guardian or person whom the child trusts?

Yes, medical care can be tendered in the absence of parent, guardian or trusted person. In such situations, the medical care must be tendered in the presence of a woman nominated by the head of the medical institution. For an explanation of the distinction between medical care and medical examination refer to Section 3.1, Chapter III – Medical examination and Emergency Medical Care: Procedures and Responsibilities.

2.6.6. Can the doctor administering first aid or emergency medical care be asked to conduct the forensic interview?

It is important to ensure that the two aspects of ascertaining information (medical history and interview), are conducted in a coordinated manner to ensure that the child victim does not feel traumatized by having to relive the incident multiple times. However, a doctor providing emergency medical care is essentially providing a therapeutic service that is distinct from a doctor conducting a medical examination who is doing so for a forensic purpose. Such a doctor should not be asked to assist in the forensic interview as this could result in a conflict of their obligation to the patient. The police can, however, request that samples be collected and handed over to the police for forensic analysis.

2.7. Duty to Facilitate Medical Examination of the Child

2.7.1. What is the time frame within which the child victim should be taken for medical examination?

The police/SJPU has the responsibility of taking the child for a medical examination, within 24 hours from the time the case was reported to them.⁶¹

2.7.2. Who can carry out the medical examination of a child victim of a sexual offence?

The medical examination has to be conducted by a Registered Medical Practitioner (RMP) of a government hospital. An RMP is a medical practitioner, who possesses any medical qualification listed in the Indian Medical Council Act, 1956 and whose name is in the State Medical Register. If an RMP is not available at the government hospital, then the medical examination can be conducted at a private hospital.

If the child victim is a girl, the medical examination must be conducted by a woman doctor.⁶² It is not mandatory for a gynecologist to examine such a case. The Guidelines and Protocols for Medico-legal care for survivors/victims of Sexual Violence issued by the Ministry of Health & Family Welfare, Government of India, lay down that, in case a female doctor is not available, a male doctor may conduct the examination in the presence of a female attendant.⁶³ In the case of a transgender/intersex person, the survivor should be given a choice to be examined by a female doctor or a male doctor. However, if such a doctor is unavailable, the medical examination should not be denied or delayed.⁶⁴

61 Section 27, POCSO Act, 2012 read with Section 164A, CrPC.

62 Ministry of Women and Child Development, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012, September, 2013, p. 58.

63 Ministry of Health & Family Welfare, Government of India, Guidelines and Protocols for Medico-legal care for survivors/victims of Sexual Violence, p. 20, available at <http://mohfw.nic.in/showfile.php?lid=2737>

64 *ibid.*

It is advised that police officers maintain a list of doctors where victims may be taken for both medical examination and treatment. In the case *Siksha v. State of Himachal Pradesh*⁶⁵, a minor girl child victim of rape was taken by the police officer to three medical establishments by the police officer and was finally examined only at 5:40 am, by which time she had undergone 15 hours of trauma. A situation like this must be avoided and therefore, police should be prepared in advance by maintaining a list of numbers of hospitals and doctors.⁶⁶ The medical examination visit should be also planned so as to ensure minimum waiting time and the consequent stress on the child.

2.7.3. Is registration of FIR required before a medical examination is conducted?

There is no need for an FIR or even a complaint or any kind of documentation to be registered before a medical examination on a child victim of a sexual offence is conducted. The police/ SJPu should not insist that an FIR be filed before the conduct of the medical examination. This is to ensure that the child is not denied a medical examination based on lack of an FIR and that evidence is thus immediately collected. They should also inform the doctors that there is no such requirement under the law, if there is hesitation on their part to examine the child.

2.7.4. Do victims or survivors have to pay for first aid or medical treatment in sexual offence cases?

As per Section 357C of the Code of Criminal Procedure, the private hospitals have a duty to provide first aid or medical treatment to female victims of rape or acid attacks. This service has to be provided free of cost. In all other offences, if the victims, whether male and female, approach the private hospitals, the expenses will have to be incurred by the parties. This amount may however be claimed later as part of the compensation from the State Government. Failure to provide free first aid is a punishable offence under Section 166B, IPC.

2.7.5. Is it necessary for permission to be taken from the CWC for DNA testing of the foetus of a pregnant child?

A DNA test is not part of a routine medical examination that the CWC is empowered to order. Such an order can be passed only by the Special Court in accordance with the following guidelines laid down by the Supreme Court in *Goutam Kundu v. State of West Bengal*⁶⁷ on DNA testing to establish paternity:

(1) That courts in India cannot order blood test as matter of course;

65 2013 Cri L.J. 2036

66 NCPCR, Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders Police, Special Courts and Special Prosecutors, p. 52 at <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=407&lid=844>.

67 AIR 1993 SC 2295.

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

...

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.

Nevertheless, all survivors of sexual abuse have the right to withhold consent and not participate in police investigations. This will not, however, disentitle them from receiving medical treatment, support, or counselling.

2.8. Facilitate Evidence Collection

2.8.1. What guidelines should the police follow for collection of forensic samples?

The SJPU/local police must ensure that the samples collected for the purpose of forensic tests are sent to a Forensic Science Laboratory (FSL) at the earliest. Samples must be collected in accordance with Section 27, POCSO Act and in accordance with the guidance issued by the State FSL. The items being sent to the FSL must be recorded in the requisite registers.

Labelling of samples meant for the FSL is crucial. The Investigating Officer must clearly identify the stain on clothes as well as the test that must be run. For instance, a blood stained underwear is sent to the FSL without any specification. The FSL report states that no semen stains were found on the garment. Crucial time is thus lost due to the failure to specify the nature of the stain and the analysis required.⁶⁸

Relevant information such as whether the victim/survivor had changed clothes, washed them, defecated, urinated, showered, etc., should also be gathered and conveyed to the FSL.

The Department of Health Research (DHR) Guidelines on Forensic Medical Care for Victims of Sexual Assault, 2013⁶⁹ lays down the following guidelines on evidence collection and handling:

- “Collect carefully, avoiding contamination

68 This example was shared is contributed by Dr. Jagadeesh N. (Professor of Forensic Medicine & Toxicology, Vydehi Institute of Medical Sciences & Research Centre, Bangalore).

69 Guidelines laid down by the Department of Health Research, Ministry of Health and Family Welfare, available at <http://www.icmr.nic.in/dhr/pdf/1%20DHR%20Forensic%20Medical%20Manual%20Sexual%20Assault.pdf>

Box No. 3: Suggested Format for a Care and Protection Report by the Police

Police Station, District

Case No:-

Year of Registration of the case:

1. Name of the child:
2. Age:
3. Address:
4. Sex:
5. Class and school (if studying)
6. Date of incident:
7. Date on which police/SJPU received information:
8. Date on which police/SJPU intimated CWC:
9. Details of the complaint:
10. Designation and details of officer who recorded the complaint:
11. Designation and details of Investigating Officer:
12. Is the child in need of care and protection? Yes/No
 - a. If yes, reasons for believing that the child is in need of care and protection:
 - b. Is the child:
 - i. Living in the same or shared household as the alleged perpetrator:
 - ii. Living in a child care institution and is without parental support:
 - iii. Without any home and parental support:
13. Details of steps taken to ensure immediate care and protection:
 - a. Has emergency medical care been facilitated? Yes/No. Details
 - b. Has the child been placed in a temporary shelter? Yes/No. Details
 - c. Any other steps.
14. Has the child's statement been recorded under Section 164, CrPC? Yes/No
15. Has the medical examination been facilitated? Yes/No. Details

The following documents should be appended to the Care and Protection Report:

1. Copy of the report recorded under Section 19(1), POCSO Act
2. Copy of the FIR if registered.
3. Copy of the medical reports

- Collect specimens as early as possible; 72 hours after the assault the value of evidentiary material decreases dramatically.
- All appropriate evidences including cloths, swabs, and slides must be air dried prior to packaging
- Placing items in appropriate evidence containers

- Storing evidence in a secure area and
- Maintaining the chain of custody.
- All items of evidence must be clearly labeled to enable the person who collected the evidence to identify it in court later and to ensure that the chain of custody is maintained.”⁷⁰

In *Vinay Kumar v. State*⁷¹, the term “chain of custody” was explained to mean:

...the complete record of biological evidence from the place of its extraction and up to its presentation in the Court and its complete documentation at every stage. The possession, time and date of transfer, and location of evidence from the time it is obtained to the time it is presented in the Court is called the “chain of custody”.

A break in the chain of custody will render the evidence unreliable and will entitle the accused to the benefit of doubt. Thus immense care has to be taken to ensure that there is no such break.

2.9. Duty of the police and SJPu to ensure care and protection

2.9.1. Are all child victims of sexual offences also children in need of care and protection?

As stated above in Section 2.2 (III), not every child survivor under the POCSO Act is a child in need of care and protection. If a child has a supportive family that is capable of attending to his or her care and protection needs, the child must not be treated as a ‘child in need of care and protection’. Producing every child survivor before the CWC can aggravate their trauma and cause secondary victimization.

2.9.2. What information is relevant to determine whether a child is in need of care and protection?

The police must record in writing to the reason why they believe the child is in need of care and protection keeping the factors explained above in mind. They must request the CWC to undertake a detailed assessment in order to determine the same. A Care and Protection Report should also be submitted to the CWC, stating reasons why the police are of the opinion that the child is in need of care and protection and detail the immediate steps taken to ensure the same. As has already been explained above, not all child survivors of sexual offences need to be produced before the CWC. It is only those child survivors who require care and protection in situations where the threat of abuse or abuse has transpired within the home or where the child lacks parental support, that she or her needs to be produced before the CWC. The family background,

⁷⁰ *ibid*, p. 27.

⁷¹ CrL. A 670 of 2007 decided on 03.07.2012 by Delhi High Court.

support systems, exposure to violence, and the absence of a responsible or caring adult are factors that must be considered before arriving at a best interest determination on this matter.

2.9.3. What measures can the police take for immediate care and protection?

The police/SJPU must take the following immediate steps within 24 hours of the report of the case:

- i. Upon recording the case, if the police or SJPU is satisfied that the child is in need of care and protection, it must record its reasons in writing and immediately arrange to give the child necessary care and protection. This would include admitting the child into a Shelter Home or to the nearest hospital. The police must produce the child before the CWC if the child is found to be in need of care and protection, or has no parental support.
- ii. If the medical examination was not conducted prior to reporting the case, it must be done in accordance with Section 164A of the CrPC.⁷² Samples must be collected for the purpose of the forensic tests and sent to the FSL at the earliest.
- iii. If the child is in need of urgent medical care and protection, she or he must be

⁷² 164A, CrPC. Medical Examination of The Victim of Rape. – (1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the government or a local authority and in the absence of a such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her and prepare a report of his examination giving the following particulars, namely:-

- (i) the name and address of the woman and of the person by whom she was brought;
- (ii) the age of the woman;
- (iii) the description of material taken from the person of the woman for dna profiling;
- (iv) marks of injury, if any, on the person of the woman;
- (v) general mental condition of the woman; and
- (vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation. – For the purposes of this section, “examination” and “registered medical practitioner” shall have the same meanings as in section 53’]

taken for emergency medical care to the nearest hospital or medical care facility centre.

The police or the SJPU must report the matter to the CWC and the Special Court and also indicate the steps taken to extend care and protection to the child. If a Special Court has not been designated the matter must then be reported to the Sessions Court. (Also refer to Section 2.2. above for the complete list of steps that must be taken within 24 hours of a report of a sexual offence).

2.9.4. When should the police inform the CWC and Special Court about a case under POCSO?

The Special Juvenile Police Unit (SJPU) or local police must send a report to the CWC and the Special Court of the commission of a sexual offence or an apprehension that it is likely to be committed, within 24 hours of the receipt of the information by the police under Section 19, POCSO Act. The CWC must also receive a written report from the SJPU or police containing reasons why they are satisfied that a child survivor is in need of care and protection and the immediate steps they have taken to address this. A suggested format for the Care and Protection Report is provided in Box No. 2 above.

2.9.5. Can the police request the CWC to keep a child in a Children's Home till the evidence of the child is recorded in court, with the sole objective of preventing the child from being pressurized by the family to change her/his stand in Court?

One of the key principles informing the juvenile justice system in India is that institutionalization should be a measure of last resort and for the shortest possible duration. This principle applies to children who may have to be removed from the custody of their parents if their safety and well-being is threatened. Rule 4(5), POCSO Rules stipulates the factors that must be considered by the CWC before removing a child from the custody of her/his parents. Refer to Section 5.5, Chapter 5. Functions of CWCs under the POCSO Act. One factor is the need for the child to remain in the care of his or her family and to maintain a connection with them. Concerns that the child may be pressurised to change her/his stand in the Court and turn hostile, though valid, cannot serve as the basis for institutionalization or continued detention in a Children's Home as it is not as important as meeting the need for care by the non-offending parent/s/family during this traumatic period, and therefore against the best interest of the child. Deprivation of parental care, love and affection with the intention that the child depose true facts of the case before the Court, will invariably affect the psychological well-being of the child and hamper healing and recovery. Besides, the schedule of court processes is unpredictable. A child cannot be detained for days, weeks, months or years together under the pretext of securing the quality of the evidence. Though a decision to

institutionalize a child will be taken by the CWC, after it makes a finding that the child is at risk of neglect, abuse, exploitation or injury, as specified under the JJ Act, the police also have to play their own role in preventing secondary victimization and unnecessary institutionalization, as the fundamental principle of detention to be a measure of last resort is to be adhered to by all stakeholders responsible for the implementation of the JJ Act.

2.10. Duty of police to protect the identity of the child

While reporting information about a sexual offence against a child, the media should ensure the child's identity is not disclosed. Any information that could lead to the identification of the child victim, such as the name, address, photograph, family details, school details, information about the locality where the child is residing, etc., should not be published, as this will amount to an offence under Section 23, POCSO Act. The media can disclose the identity of the child only if the Special Court permits such disclosure in the interest of the child.⁷³ For instance, if a child is found on the streets and is not aware of her address or contact details of her parents, the Special Court may authorize the publication of her picture so that her family can be found. Additionally where a child is in need of care and protection, the CWC can permit the disclosure of the identity of the child, where it deems it to be in the interest of the child.⁷⁴ For instance, where a child victim's parents need to be traced and the child is unable to provide information to locate them, then a newspaper advertisement may be permitted, disclosing only those details of the child that would enable the parents to come forward, and not any details about the alleged sexual abuse.

In the event that the media violates this provision, the publisher or owner of the media or studio shall be jointly or severally liable for the violation by the employee.⁷⁵ Further, any person who violates this provision shall be penalized with imprisonment for not less than 6 months and up to one year, or fine, or both.⁷⁶ The police can initiate action on its own, if it comes across a breach of this safeguard.

2.11. Coordination with other authorities and functionaries

The police should engage with relevant authorities, bodies, and individuals to ensure an effective and coordinated response to sexual offences against children. It should maintain a working relationship with the following:

⁷³ *Supra* n. 28.

⁷⁴ Section 21(1), JJ Act 2000.

⁷⁵ Section 23(3), POCSO Act, 2012.

⁷⁶ Section 23(4), *ibid*.

a. District Child Protection Unit (DCPU)

Apart from the various duties of the DCPU in the Juvenile Justice (Care and Protection of Children) Act, 2000 and in the various State Rules, the DCPU is responsible for maintaining a register with the contact details of interpreters, translators and special educators. The DCPU must share this information with the police. The DCPU is also required to provide Support Persons for CWCs who may appoint them to assist victims and their families in navigating the criminal justice system.

b. Support Person

The police have the duty to inform the child victim and his / her parent of the right to of the availability of support services and must assist the child in availing these services by helping establish contact with persons who can provide them, including the services of a Support Person.

c. Translators, interpreters, experts and special educators

The DCPU is responsible for the maintenance of a register with names, addresses and contact details of interpreters, translators, and special educators. The police must contact the DCPU if a child victim needs the services of any or all of them.

d. Forensic Science Laboratories

The SJPU/local police must ensure that the samples collected for the purpose of forensic tests are sent to the FSL at the earliest. The exact nature of forensic evidence collected will be depend on factors such as the nature of assault, time between assault and examination and if the victim has bathed or washed herself or himself after the assault. Every State must ensure that there is clarity regarding what evidence must be collected and where the samples must be sent for scrutiny.

e. CWC

Within 24 hours of receiving a complaint, the police must report to the Special Court and the CWC. The police must also submit a Care and Protection Report containing reasons why they believe the child is in need of care and protection, details of steps taken by them to ensure immediate care and protection, and a request to the CWC to undertake a detailed assessment and take the necessary steps.

f. Special Public Prosecutors

Trials under the POCSO Act should exclusively be handled by Special Public Prosecutors (SPP). The police should maintain regular contact with the SPP and share updates with the victim, family and Support Person.

g. Juvenile Justice Board (JJB)

Rule 10 of the JJ Model Rules 2007 prescribes the functions of the JJB. One of the

functions is to pass necessary directions to the police to ensure necessary infrastructure is in place so that the minimum standards of justice and treatment are maintained in accordance with the spirit of the JJ Act. Therefore, there is need for the police to cooperate with the JJB in this regard.

h. SCPCR and NCPCR

The SCPCR and NCPCR have a monitoring role to ensure that the POCSO Act is being effectively implemented. Therefore, if they request the police to submit any information to them to enable them to perform their monitoring function, the police must cooperate and submit the required information.

i. NGOs and individuals working with children

The SJPU needs to work with voluntary organisations, local governing bodies and community based organisations while identifying juvenile sex offenders and while reporting cases of child sexual abuse, in the context of the POCSO Act. The SJPU should maintain a list of NGOs / voluntary organisations in their own respective jurisdictions that work on prevention of sexual crimes and extend support services to victims.

Chapter 3: Medical examination and Emergency Medical Care: Procedures and Responsibilities¹

3.1. Introduction

Medical practitioners have an important role to play under the POCSO Act. Their responsibilities are both medical and legal in nature (medico-legal obligations). They play a crucial role in the provision of medical care and the collection of evidence. They are often the first port of call when the child is displaying abnormal behavior, bruises, abnormal menstrual cycle, or discharges. In their professional capacity, they are likely to detect or identify a case of child sexual abuse in the course of examination of a child. In providing emergency medical care, they have a responsibility to facilitate the physical and psychological healing of children who are victims of sexual offences. A professionally conducted medical examination has the potential to bolster the prosecution of sexual offences. Even though the purpose of a medical examination is to gather forensic evidence, care must be taken to ensure that the child is not traumatized or harassed during the process and the autonomy and privacy of the child is respected. It is, however, possible for forensic evidence to be collected in the course of providing emergency medical care and treatment.

The table below indicates some distinctive features of emergency medical treatment and medical examination as per the POCSO Act and Rules and the CrPC.

Table No. 6.: Types of medical interventions provided for under the POCSO Act and the CrPC

Type of intervention	Objective	Where should it be conducted?	Is FIR required prior to the intervention?	Legal Provision
Emergency Medical Care and Treatment	• Therapeutic - to extend medical care and treatment	<i>Nearest</i> hospital or medical care facility centre – that means both Government and private hospitals	No	Rule 5, POCSO Rule and Section 357C, CrPC

¹ This chapter was authored by Swagata Raha and Shruthi Ramakrishnan with inputs from Gulika Reddy and Geeta Sajjanshetty. Feedback was also received from Anuroopa Giliyal. It was reviewed externally by Dr. Jagadeesh N, Dr. Sowmya B and Dr. Kaveri Haritas and edited by Arlene Manoharan.

Medical Examination	• Forensic – for the purpose of evidence collection	Government hospital. If a registered medical practitioner of a government hospital is unavailable, it can be conducted by a registered medical practitioner in any other hospital including a private hospital.	No	Section 27, POCSO Act & Section 164A, CrPC
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The POCSO Act and the IPC together cover a variety of sexual offences against children which are touch-based and non-touch-based, as well as penetrative and non-penetrative. While comprehending these offences, it must be kept in mind that consent to any sexual act is irrelevant under the POCSO Act as all children below the age of 18 years are deemed incapable of giving consent.

Further, it is important to note that the POCSO Act and the Criminal Law Amendment Act, 2013 (CLAA) have drastically widened the notion of what amounts to a ‘sexual assault’ and ‘rape’. While previously any form of sexual abuse falling short of peno-vaginal penetration, fell under the obscure offence ‘outraging the modesty of a woman’ under section 354 of the IPC, the law now recognizes a wide range of offences.

Penetration is not restricted to the traditionally understood ‘peno-vaginal penetration’ and has been expanded to cover penetration through:

- i. penis,
- ii. object,
- iii. part of the perpetrator’s body,
- iv. part of the child’s body, or
- v. mouth

The penetration could be of any of the following:

- i. vagina,
- ii. mouth,
- iii. urethra, or
- iv. anus

The penetration need not be by the perpetrator upon the child but can also be *vice versa* i.e., the perpetrator making the child penetrate him or her or making another person penetrate the child. It is also important to note that Section 375 of the IPC was amended in 2013, through which the definition of rape was expanded similarly to include the above notion of penetration.

Box No. 4: Snapshot of legal framework on sexual offences against children for doctors

- Child is a person below 18 years of age
- Both girls and boys can be victims of child sexual abuse
- Both men and women can be perpetrators of child sexual abuse
- Even a child under 18 years can be a perpetrator of child sexual abuse under the POCSO Act
- A child cannot consent to sexual intercourse. Even where a child willingly has sexual intercourse with somebody, it will constitute rape and penetrative sexual assault as per the law.
- Sexual intercourse with a child by the spouse of the child is *not* an exception and will constitute the offence of penetrative sexual assault.
- Informed consent must precede medical examination and treatment
- The autonomy, privacy and dignity of the child victims must be respected while conducting medical examination.
- Treatment without consent can be administered only in life threatening cases
- Refusal to consent for medical examination and treatment should always be documented in writing and signed by the child and/or guardian, as applicable. This refusal to undergo medical examination *must* not in any way affect the quality or provision of medical treatment provided to the child.
- Medical examination should be conducted in the presence of the parent of the child or any other person the child has trust in.
- A girl child should be examined only by a female doctor.
- No FIR or legal requisition is required for conducting medical examination or providing medical treatment in cases of sexual offences.
- First aid and treatment should be provided free of cost.
- If not already informed, the police should be informed immediately after medical treatment or aid is rendered/initiated.

It is crucial that medical practitioners are aware of the different offences under the law so as to be able to fully discharge their responsibilities and legal obligations. Please see Section 1.2, Chapter 1 – Overview of the Legal Framework relevant to Sexual Offences against Children, for a complete list and description of the different types of sexual offences.

Relevant guidelines and protocols

Several manuals and guidelines have been issued by government departments and non-governmental entities on the roles and responsibilities of medical practitioners

towards victims of sexual violence or sexual abuse. It is important to note that consent to any sexual act is irrelevant under the POCSO Act as all children below the age of 18 years are deemed incapable of giving consent. This must be borne in mind while referring to medical manuals and guidelines. The below-mentioned guidelines serve as an instructive and practical guide on how to deal with victims of sexual violence, and should inform the practice of all medical practitioners and hospitals:

1. Ministry of Health and Family Welfare, *Guidelines and Protocols: Medico-legal care for victims/victims of sexual violence*, 19 March 2014.² (MOHFW Guidelines)
2. CEHAT, *Manual for Medical Examination of Sexual Assault*, 2010, updated 2012.³
3. Department of Health and Family Welfare, Govt. of NCT of Delhi, *Guidelines for rapid response by hospitals in case of MLC examination of victims of sexual assault*, 28 January 2013 (CEHAT Manual).
4. Guidelines issued by the Government of Tamil Nadu under Section 39, POCSO Act, for the use of Professionals and Experts under the POCSO Act, 2015 (TN Guidelines).
5. Model Guidelines under Section 39, POCSO Act, issued by the Ministry of Women and Child Development, 2013 (See Chapter 4 of the Model Guidelines).⁴
6. Forensic Medical Examination of Sexual Assault Cases: An Instructional Manual and Proforma, Ministry of Health and Family Welfare, Director of Health Services, Government of Maharashtra, 2013.⁵

3.2. Legal Obligations towards survivors of child sexual abuse

According to the legal framework, doctors are expected to:

- Provide **free first-aid or medical treatment** to victims of sexual offences under the IPC and inform the police immediately. (Section 357C, CrPC). Failure to provide such treatment is punishable under Section 166B, IPC with imprisonment which may extend to one year or fine or both.
- Provide **emergency medical care** and treatment to child survivors of sexual offences in the presence of a parent/guardian/person whom the child trusts. (Rule 5, POCSO Rules)
- Undertake **medical examination** in the presence of a parent/person whom the

2 Available at http://www.mohfw.nic.in/WriteReadData/1892s/9535223249GuidelinesandProtocolsorsexualviolence_MOHFWf.pdf

3 Available at <http://www.cehat.org/go/uploads/Publications/R83Manual.pdf>

4 Available at <http://wcd.nic.in/act/POCSO%20-%20Model%20Guidelines.pdf>

5 Available at http://majlislaw.com/file/Forensic_Medical_Examination_GR_100513.pdf

child trusts and after having obtained informed consent from the child or on her/his behalf and record details of injuries (if any), materials collected, and conclusions. (Section 27, POCSO Act and Section 164A, CrPC)

- **Report information** about child sexual abuse or suspected child sexual abuse

Box No. 5: Guidelines for Responding to Children

1. **Extracted from Ministry of Health and Family Welfare, *Guidelines and Protocols Medico-legal care for survivors/victims of sexual violence, (2014) pp 18-19.***
2. While the principles of medical examination and treatment for children remains the same as that for adults, it is important to keep some specific guidelines in mind:
3. In case the child is under 12 years of age, consent for examination needs to be sought from the parent or guardian.
4. Children may be accompanied by the abuser when they come for medical treatment, so be aware and screen when you suspect abuse. In such situations, a female person appointed by the head of the hospital/institution may be called in to be present during the examination.
5. Do not assume that because the child is young he/she will not be able to provide a history. History seeking can be facilitated by use of dolls and body charts.
6. Believe what is being reported by the child. There are misconceptions that children lie or that they are tutored by parents to make false complaints against others. Do not let such myths affect the manner in which you respond to cases of child sexual abuse.
7. Specific needs of children must be kept in mind while providing care to child survivors. Doses of treatment will have to be adjusted as required in terms of medical treatment. For psychological support, it is imperative to speak with the carer/s of the survivor in addition the survivor themselves.
8. Health professionals must make a note of the following aspects while screening for sexual abuse. Assurance of confidentiality and provision of privacy are keys to enabling children to speak about the abuse. However, genital and anal examination should not be conducted mechanically or routinely. A few indicators for routine enquiry are –
 - Pain on urination and /or defecation
 - Abdominal pain/ generalized body ache
 - Inability to sleep
 - Sudden withdrawal from peers/ adults
 - Feelings of anxiety, nervousness, helplessness
 - Inability to sleep
 - Weight loss
 - Feelings of ending one's life

obtained during the discharge of professional duties to the Special Juvenile Police Unit or the local police. (Sections 19(1) and 20, POCSO Act and Section 357C of the CrPC) Failure to provide such information is punishable under Section 166B of the IPC with imprisonment which may extend to one year or fine or both and under Section 21(1) of the POCSO Act with imprisonment which may extend to six months or fine or both.

The sections below addresses each of these obligations in detail outlining the role and responsibility of doctors dealing with victims of child sexual abuse. Refer to Section 1.8 on Rights of Children, Chapter I: Overview of the Legal Framework relevant to Sexual Offences against Children in India for a detailed explanation of rights and the corresponding duties of actors within the criminal justice system.

It is important to note that while discharging the above obligations, medical practitioners need to recognize the developmental needs of children and factor in the invisibility of child sexual abuse, particularly incest. The child may be brought in for other concerns such as fever, vomiting, burning, micturition, bruises etc. It is crucial for the doctor to identify possible sexual abuse from other symptoms while examining and treating them.

The 2014 Guidelines issued by the MOHFW offer guidance on the manner of dealing with children who may have been subjected to sexual abuse. Please refer to Box No. 4 below.

3.3. Obligation to provide free first-aid or treatment to survivors of sexual assault

The Criminal Law (Amendment) Act, 2013, has made it mandatory for all medical institutions to **immediately provide free first aid or medical treatment** to all victims of acid attack and sexual offences under the IPC. The above obligation applies to both public and private hospitals alike and no hospital or medical practitioner is exempted.⁶ Failure to provide such first aid or medical treatment immediately and at free cost is punishable under the IPC with imprisonment up to one year or fine or both.⁷

6 Section 357C, CrPC

7 Section 166B, IPC.

Box No. 6: Offences for which doctors are mandatorily required to provide free first aid or medical treatment

1. Rape,
2. Rape causing death or persistent vegetative state of victim,
3. Sexual intercourse by husband upon wife during separation,
4. Sexual intercourse by a person in authority,
5. Gang Rape,
6. Repeat offence of rape, and/or
7. Voluntary causing grievous hurt by use of acid.

First aid does not comprise only medical first aid but also includes psychological first aid. According to the Centre for Enquiry into Health and Allied Themes (CEHAT), “psychological first aid comprises of communicating to survivors basic messages that enable her to understand that sexual assault is not her fault, and is an act done with an intention of abusing power. Such first aid must also comprise of encouraging her to reveal feelings about abuse and deal with them. Suicide prevention is also a critical aspect of psychological first aid.”⁸

The terminology in the POCSO Rules is “emergency medical care” (EMC). Under the POCSO Rules, there are two categories of children who are entitled to EMC:

- Children who are victims of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, and aggravated sexual assault.
- Child victims of offences other than those listed above, who are, in the opinion of the Special Juvenile Police Unit (a specialized police team trained to deal with children who come into contact with the law) or police in need of urgent medical care and protection.

EMC must be provided even if there is a delay in reporting as the objective is therapeutic and not forensic.

3.3.1. What is the difference between the obligation to provide *first aid or medical treatment* and the obligation to provide *emergency medical care*?

First aid, medical treatment and emergency medical care are obligations under different laws.

Free First Aid/Medical Treatment is an obligation imposed by the CrPC that is to be

⁸ CEHAT, “Basic Procedures to be Followed in Sexual Assault Cases: Towards Guidelines for Support Groups and Others”, <http://www.cehat.org/go/uploads/SexualViolence/basicproceduressexualassault.pdf>

provided to all victims of sexual offences (as defined under the IPC) and acid attack. This obligation is only towards female victims as the IPC only recognizes women as victims and males as perpetrators of sexual offences. As the offences of penetrative sexual assault and sexual assault in the POCSO are also the offence of rape in the IPC, female victims under the age of 18 automatically have the benefit of this obligation as well.

Emergency medical care is an obligation under POCSO Act towards all child victims of sexual offences and includes both boys and girls below the age of 18 years. This obligation must be read along with the obligation to provide free first aid and medical treatment under the CrPC. In any event, most sexual offences under the POCSO Act are also offences under the IPC.

In sum, medical practitioners are under an obligation to provide free emergency medical care and treatment to *all victims* of sexual offences. The table below summarizes the two obligations.

Table No. 7: Obligations of medical practitioners to provide treatment to victims of sexual offences as mandated by law

Nature of Medical services	Legal Provision	Towards
Free Medical Care/ Medical Treatment	Section 357C, CrPC	Female victim of rape under Sections 376, 376A, 376B, 376C, 376D or 376E
Emergency Medical Care	Rule 5, POCSO Rules	Child victim, both male and female of all sexual offences under the POCSO Act. Note that emergency medical care is mandatory in case of offences under Sections 3, 5, 7 and 9 of the POCSO Act

3.3.2. Who can refer a child for emergency medical care?

The POCSO Rules mandate that the SJPU or a local police officer who receives information about the alleged commission of a sexual offence under the POCSO Act is required to ensure that the child is taken to the nearest medical facility for EMC if such care is deemed necessary. Although this obligation is placed on the police, anyone could bring a child into a medical facility for EMC. The child victim may contact the hospital directly as well. Even in cases where it is not an SJPU or local police who is referring a child for EMC, the doctors are legally obligated to provide medical care.

3.3.3. In which hospital should emergency medical care be provided?

The POCSO Rules do not insist that a child be taken only to a government hospital. The Rules require the child to be taken to the *nearest* hospital or medical care facility.

Thus, in order to access emergency medical care, a child can be taken to a private hospital or a government hospital, whichever is closer. Rule 5(3) of the POCSO Rules clearly bars doctors or hospitals from demanding legal documentation before rendering emergency medical care. Further, under Section 357C of the CrPC it is mandatory for public and private hospitals to provide immediate first-aid or medical treatment to victims of sexual offences free of charge.

3.3.4. What is the procedure for rendering emergency medical care?

The POCSO Act and Rules lay down principles, safeguards, and measures that must be adhered to by doctors while giving EMC. They are as follows⁹:

- a) The privacy of the child must be protected while rendering EMC to the child. For instance, a child should not be identified as a 'rape victim' in the hospital corridors or be examined in the presence of other persons unconnected to her/his care.
- b) EMC must always be given in the presence of a parent, guardian, or a person whom the child trusts or has confidence in.
- c) A girl child should be examined and attended to by a woman doctor.
- d) In the absence of a parent, guardian or other trusted person on the scene, the medical care should be rendered in the presence of woman nominated by the head of the medical institution.
- e) While rendering EMC, all the basic needs of the child victim must be addressed. Particularly, treatment for bruises or injuries and for exposure to HIV or sexually transmitted diseases must be given. In case there is a possibility of pregnancy, the doctor should discuss the pregnancy as well as the option of emergency contraceptives with the child and her parent or any other person whom she trusts. Where appropriate, referrals for mental or psychological health or counselling should also be made.
- f) No legal or magisterial requisition or documents should be demanded as a pre-requisite for tendering EMC.

EMC in most cases precedes the conduct of a medical examination, as the first priority is the health and safety of the child. However, "(w)hile doing so it may be pertinent to remember that the sites of treatment on the body would also be examined for evidence collection later."¹⁰ Medical practitioners providing emergency care should thus be careful so as to not destroy any evidence that may be present on the body of the victim.

⁹ Section 27, POCSO Act and Rule 5, POCSO Rules.

¹⁰ CEHAT Manual, p. 7.

3.3.5. Does a doctor have to take consent of the child or a parent/ guardian prior to providing emergency medical care? What should a doctor do in the case of an emergency if the victim is not in a position to give such consent and if no guardian / parent is available or reachable?

Informed consent of the child must generally precede any kind of medical treatment. Informed consent of parents or guardians needs to be taken if the child is below 12 years of age. Children above 12 years have the capacity to consent. However, in situations where there is threat to the life of the child or the child is in need of urgent medical attention and the child is not in a position to give consent and parent or guardian is not available, the doctor can provide emergency medical care.

Section 92 of the Indian Penal Code provides that “nothing is an offence even if it causes harm if it is done in good faith to benefit the person in cases where it is impossible for that person to give consent or the person is incapable of giving consent and such person has no guardian or person from whom it is possible to obtain consent.” Further, consent of the parents does not apply to situations where “the health professional reasonably believes the parent(s) or guardian committed the sexual assault on the patient even if the victim would not ordinarily be considered competent to give consent herself/himself.”¹¹ In these circumstances, consent of the Superintendent or RMO (Resident Medical Officer), may be taken.¹²

3.3.6. What should the doctor do if the parent is the perpetrator of sexual abuse?

According to the MOHFW Guidelines, the doctor should involve the social worker/ counsel or at the hospital if the perpetrator is the parent. The social worker will have to ascertain whom the child trusts, inform the police, who should along with the social worker assess if the child is in need of protection and care.¹³ The Guidelines even suggest that the child can be admitted to the hospital for 24 hours until a “long term strategy for shelter or child welfare home/services is made”.¹⁴

3.3.7. Is emergency medical care restricted to physical care?

EMC should address not only the physical needs of the child, but also the psychological health of the child. Towards this end, doctors can refer the child to a psychologist, psychiatrist, or therapist for his or her emotional healing. The MOHFW Guidelines,

11 Department of Health Research, ‘Forensic Medical Care for Victims of Sexual Assault’, Ministry of Health and Family Welfare, 2013, p. 10 <http://www.icmr.nic.in/dhr/pdf/1%20DHR%20Forensic%20Medical%20Manual%20Sexual%20Assault.pdf>

12 *ibid*

13 MOHFW Guidelines, p. 39.

14 *ibid*, p. 39.

2014 urge health professionals to offer psycho-social care and:¹⁵

- Speak to survivor in a private space
- Recognize her courage in reaching (them) as she has overcome several barriers.
- Recognise the dilemma faced by survivor in reporting violence. Do not label non reporting to police as false case.
- Assure the survivor that her treatment will not be compromised
- Inform survivor of available resources, referrals, legal rights so that she can take an informed decision.¹⁶

They must also:

- “Recognise that survivors may present varied emotions.
- Encourage the survivor to express her feelings.
- Encourage survivors to seek crisis counselling.
- Assess for suicidal ideation.
- Make a safety assessment and safety plan.
- Involve family and friends in healing process of survivor.”¹⁷

Box No. 7: Health Consequences of Sexual Assault

Extracted from CEHAT Manual for Medical Examination of Sexual Assault, 2012¹⁸

Physical Health Consequence

- severe abdominal pain
- burning micturition
- sexual dysfunction
- dyspareunia
- menstrual disorders
- urinary tract infections
- unwanted pregnancy
- miscarriage of an existing fetus
- exposure to sexually transmitted infections (including HIV/AIDS)
- pelvic inflammatory disease
- infertility
- unsafe abortion
- mutilated genitalia, and
- self-mutilation as a result of psychological trauma

Psychological Health Consequences:

Short term psychological effects:

15 *ibid*, p. 37.

16 *ibid*.

17 *ibid*, p. 38.

18 CEHAT Manual, pp. 5-6.

- fear and shock
- physical and emotional pain
- intense self-disgust, powerlessness
- worthlessness
- apathy
- denial
- numbing
- withdrawal and
- an inability to function normally in their daily lives

Long term psychological effects:

- depression and chronic anxiety
- feelings of vulnerability
- loss of control
- emotional distress
- impaired sense of self
- nightmares
- self-blame
- mistrust
- avoidance and post-traumatic stress disorder
- chronic mental disorders
- committing suicide or endangering their lives

3.3.8. What steps can a healthcare institution take to ensure that emergency medical care is provided in a sensitive manner having regard to the dignity and privacy of the child?

All healthcare institutions should put in place a Standard Operating Procedure (SOP) to clarify the protocol to be followed while dealing with sexual offences against children. This will ensure uniform practice and smooth handling of all such cases.¹⁹ In order to ensure privacy, a specific room should be designated within the institution for the taking of the history and the conduct of the examination. Such a room should be spacious, well lit, and have a comfortable examination table and well stocked with the necessary equipment.²⁰

The hospital should abide by the principle of non-discrimination and make it clear to all staffs that no person should be refused treatment or entry based on their caste, sexual orientation, gender identity, disability, religion, or any other status.²¹ Victims should not be identified as “rape victims” in official documents or referrals to other service providers as that could cause embarrassment or expose them to stigma.²²

¹⁹ MOHFW Guidelines, p. 20.

²⁰ MOHFW Guidelines, p. 20-21.

²¹ *ibid*, p. 4.

²² *ibid*, p. 38.

**Box No. 8: Important points to remember while rendering
Emergency Medical Care to a child**

- The privacy of the child should be protected at all times.
- EMC should be rendered only in the presence of a parent (provided the parent is not the alleged offender), guardian or any other person the child has trust and confidence.
- No legal or magisterial requisition or documentation should be demanded prior to rendering EMC.
- Any forensic evidence collected during EMC must be done through the established legal procedure.
- The medical practitioner providing EMC should attend to:
 - Cuts, bruises, and other injuries including genital injuries
 - Treatment for exposure to STDs including prophylaxis for identified STDs
 - Treatment for exposure to HIV including prophylaxis for HIV after consultation with infectious disease experts
 - Possible pregnancy and emergency contraceptives should be discussed with the pubertal child and her parent or any person the child has trust and confidence in
 - Referral for mental or psychological counselling

3.4. Obligations related to medical termination of pregnancy

Under the Medical Termination of Pregnancy Act, 1971(MTP Act) a pregnancy can be terminated by a registered medical practitioner if it does not exceed 12 weeks and if the practitioner is of the opinion that such continuance of the pregnancy would involve a risk to the pregnant woman's life or of grave physical or mental injury or that there is a substantial risk that if the child were born, she or he would suffer from serious physical or mental abnormalities. Termination of pregnancy exceeding 12 weeks but not exceeding 20 weeks is possible only if not less than two registered medical practitioners arrive at either of the two above-stated assessments.²³ Explanation 1 to Section 3(2) states that if the pregnancy is allegedly caused by rape, "the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman."

The preservation of the foetus in cases of termination of pregnancy of a child is vital for forensic purposes.

3.4.1. Can the doctor terminate pregnancy even if the child/family is unwilling to do so?

The termination of pregnancy does not strictly fall under 'emergency medical care' or

²³ Section 3(2), MTP Act.

‘first aid’ unless the continuation of such pregnancy is a threat to the life of the child. In the event of a pregnancy, the doctor must discuss the options available to the child. The decision to terminate a pregnancy lies with the child and the family provided, however, it meets the grounds of termination under the MTP Act.

Section 3(4)(a) of the MTP Act requires consent in writing from parent/s if the child is below 18 years of age, for terminating her pregnancy. Efforts could be made to explain the implications of continuing with the pregnancy or terminating it to the child/family, with the assistance of trained counsellors. Efforts must also be made to explain some of the other options available such as giving up the baby for adoption. Causing miscarriage without the consent of the woman is a punishable offence under Section 313 of the IPC unless it is done in good faith to save the life of the pregnant woman.²⁴ It is only in cases where such pregnancy is life-threatening that the doctor can decide to terminate the pregnancy without obtaining consent.²⁵

3.4.2. Can the pregnancy be terminated if the length of the pregnancy exceeds 20 weeks?

In July 2015, the Supreme Court of India dealt with a case that raises the issue of termination of pregnancy where the foetus is beyond 20 weeks. In *Chandrakant Jayantilal Suthar v. State of Gujarat*, the petitioner’s 14-year-old daughter became pregnant after she had allegedly been raped. Her parents moved an application before the Special Court under the POCSO Act for permission to terminate the pregnancy as it was a result of rape and the child was physically and mentally not prepared to continue the pregnancy. The Sessions Court directed the victim’s examination by a gynaecologist who opined that as per the sonography report, the pregnancy could not be terminated in view of the MTP Act as the foetus was nearly 24 weeks old, but could be done if the court were to pass a direction. The Sessions Court declined permission in view of the MTP Act. The order of the court was appealed before the Gujarat High Court.²⁶

The Gujarat High Court adopted a literal interpretation of the MTP Act and observed that had the Legislature intended that a pregnancy, the length of which exceeds twenty weeks can be terminated, it would have clearly stated so, while enacting the provision. The Court cannot read into the provisions of a statute something that is not there or is not intended to be there by the Legislature. It is bound to follow the law as it is.

The High Court also observed that there was no medical opinion on record to suggest that termination was necessary to save the life of the pregnant woman. It held that

²⁴ Section 312, IPC.

²⁵ Section 5(1), MTP Act.

²⁶ *Chandrakant Jayantilal Suthar v. State of Gujarat*, Special Criminal Application (Quashing) No. 4255 Of 2015. Decided by the Gujarat High Court on 23 July 2015.

termination was legally impermissible because of the provisions of the MTP Act. This judgment has been appealed before the Supreme Court.²⁷ In its order dated 28 July 2015, the Supreme Court directed the girl to be examined by three senior most available gynecologists of the Civil Hospital in Ahmedabad, along with the doctor who had examined her earlier, and a clinical psychologist attached to the hospital. The doctors must interact with the girl and determine if there is a serious threat to her life if the pregnancy is not terminated. If they conclude that there is a serious threat, the concerned doctor can perform the necessary surgery if the girl and the petitioner agree without taking any permission from the court. If, however, they disagree, the majority view of the doctors will prevail. In case of abortion, the hospital authorities should preserve the tissue from the foetus for DNA identification.

From the above case, it appears that termination is possible even if the foetus is beyond 20 weeks provided the continuation of the pregnancy poses a serious threat to the life of the pregnant woman. The termination, however, can be authorized only by a court of law.

3.4.3. Can the doctor terminate the pregnancy of a minor girl on the wishes of her parents if the minor objects to it?

Although the MTP Act requires the consent of the parents in order to terminate the pregnancy of a minor girl, this does not permit the doctor to terminate a pregnancy against her will.

The MTP Act is silent on how the disagreement between the child and the parent about the termination of pregnancy can be resolved. However, the Madras High Court has in the case of *V. Krishnan v. I.G. Rajan*²⁸ dealt with the question of “whether the guardian of a minor girl is entitled to an order from the Court directing the termination of the pregnancy of his ward, when the pregnant girl is not agreeable for such termination”.²⁹ Rejecting the argument of the petitioners that only the guardian may decide upon the termination of pregnancy of a minor girl, the court stated:

Section 3(4)(a) can never be understood as dispensing with the consent of the pregnant woman if she is below 18 years of age. The provision is only intended to help the registered medical practitioner to take into account all the relevant facts and circumstances as set out in s.3 so as to decide whether the continuance of the pregnancy will involve any of the risks mentioned in the Section.³⁰

Thus, no termination of pregnancy can occur against the wishes of a child.

27 SLP (CrI) No (s) 6013/2015.

28 1994 1 LW 89.

29 *ibid*, para 12.

30 *ibid*, para 43.

3.5. Obligation to Report Sexual Abuse

3.5.1. Should doctors inform the police if they have reason to believe that a child has been or is likely to be sexually assaulted?

Yes, medical practitioners are under an obligation to report the commission of a sexual offence under Section 19(1) and 20 of the POCSO Act as well as Section 357C of the CrPC. Failure to do so is punishable with imprisonment that may extend to six months or fine or both under Section 21(1) of the POCSO Act, and with imprisonment that may extend to one year or fine or both under Section 166B of the IPC.

3.5.2. Does a doctor have to obtain the consent of the patient before informing the police?

Considering the sensitivity and stigma associated with the issue of sexual abuse, many victims may be hesitant to report to the police. In such cases, medical practitioners must encourage the victim and the family to report on their own.

The duty imposed on medical practitioners to respect the dignity of the child and the best interest principle, may require that they share with the child her/his intention to report the abuse to the police. The information will have to be shared in a child-friendly and developmentally appropriate manner having regard to the age, maturity, and the likely impact of the disclosure to the police. In cases where the victim expresses her/his refusal to participate in a police investigation, such refusal must be documented and a clear note stating “informed refusal for police intimation” must be sent to the police.³¹ The doctor will, however, have to report the case in keeping with the mandatory obligation to report under Section 19(1) of the POCSO Act.

While the statutes do not require doctors to seek consent of the child or the guardian before informing the police, the MOHFW Guidelines require them to obtain their informed consent before they approach the police.³² The cooperation of the victim is crucial and it is therefore desirable that the victim’s views are sought and she/he is counseled before a police complaint is filed. This guideline is also in consonance with Article 12 of the UN Convention on the Rights of the Child as per which “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

3.5.3. Should the doctors intimate the police in cases where the victim is a child bride?

Yes, it is mandatory for the doctor to intimate information about such cases to the

³¹ MOHFW Guidelines, p. 25.

³² *ibid*, p. 9.

police. While marital rape is treated as an exception to rape under the Indian Penal Code, a similar exception does not find place in the POCSO Act. Therefore, a spouse of a person below the age of 18 years can be prosecuted under the POSCO Act.

3.5.4. Should the doctors report the occurrence of an offence if it comes to light three years after the occurrence of an offence?

Section 468 of the CrPC places a limitation period of three years for offences, which are punishable with a period exceeding one year but not exceeding three years. Thus the Special Court cannot take cognizance of certain offences such as sexual harassment under section 12 of the POCSO Act after the lapse of three years from the date of the incident. However, serious offences such as penetrative sexual assault, sexual assault, etc., do not have any prescribed limitation period.

The above limitation periods should be borne in mind by doctors while discharging their obligation to report.

3.5.5. What is the procedure to report an offence or the likelihood of an offence under the POCSO Act?

In the event that a doctor has knowledge or apprehension regarding the commission of an offence under the POCSO Act, the information must be reported to the local police or the SJPU. The report need not be made in person and can be made over the telephone. The doctor must ensure that while reporting to the police, the information given is ascribed an entry number and is read over to the doctor.

Hospitals must keep a list of contact information of the nearest police station and the nearest SJPU ready for doctors to contact.

3.5.6. What are the legal consequences of false reporting by a medical practitioner?

Where a doctor reports the commission of an offence and it is later discovered that no offence had occurred, the doctor will not incur any liability provided the information was given in good faith.³³ Refer to Section 1.3(c) in Chapter I above.

3.6. Medical Examination

3.6.1. What is the purpose of medical examination?

Medical evidence is required both to assess the extent of injuries of the victim and to collect evidence of the assault. Such evidence present on the body and clothes of the victim will deteriorate with time, making it imperative that the medical examination be

³³ Section 19(7), POCSO Act.

conducted as soon as possible.

Keeping in mind the sensitive nature of the examination and the importance of the collection of such evidence properly, the law lays down the procedure to be followed by a registered medical practitioner³⁴ during the examination. According to the MOHFW Guidelines, the purpose of the forensic medical examination in cases of sexual offence is to opine³⁵:

- Whether a sexual act has been attempted or completed. Sexual acts include genital, anal or oral penetration by the penis, fingers or other objects as well as any form of non-consensual sexual touching. A sexual act may not only be penetration by the penis but also slightest penetration of the vulva by the penis, such as minimal passage of the glans between the labia with or without emission of semen or rupture of the hymen.
- Whether such a sexual act is recent, and whether any harm has been caused to the survivor's body. This could include injuries inflicted on the survivor by the accused and by the survivor on the accused. However, the absence of signs of struggle does not imply consent.
- The age of the survivor needs to be verified in the case of adolescent girls/boys.
- Whether alcohol or drugs have been administered to the survivor needs to be ascertained.

3.6.2. What is the protocol that must be followed while conducting medical examination?

- (a) **Consent of the child or parent / guardian must be obtained prior to the examination:** A medical examination cannot be forced upon the child. The consent of the child must be obtained prior to conducting the medical examination. Where a child is unable to consent, the consent of the parent or guardian must be obtained. Section 90 of the Indian Penal Code states, that consent given by a child below 12 years is not consent unless the context shows otherwise. Hence, in cases of children under 12 years, consent should be taken from the parent or guardian on behalf of the child. If a parent of a child below 12 years or a child above 12 years refuses to give consent for the medical examination, the RMP will have to state in his/her report that he/she has not conducted the medical examination because there was no consent.

The Guidelines and Protocols on Medico Legal Care for Survivors/Victims of Sexual

34 As per section 53(2)(b), CrPC, a registered medical practitioner is any "medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 and whose name has been entered in a State Medical Register."

35 MOHFW Guidelines, p. 10.

Violence issued by the Ministry of Health and Family Welfare³⁶ specifically states that “(c)onsent should be taken for the following purposes: examination, sample collection for clinical and forensic examination, treatment...” It further states that consent has to be taken from parents in case child is below 12 years of age. Where the child survivor is above 12 years of age, her/his informed consent will have to be taken. This is in keeping with the right to dignity and bodily integrity of the child.

The POCSO Act and the CrPC require that the consent of the victim be taken before medical examination is carried out. If the child refuses to consent, generally medical examination cannot be conducted under law. However, efforts should be made to explain and convince the child about the importance of medical evidence, with the help of counsellors. If the child still does not consent, then the doctor is expected to record that the medical examination could not be conducted as no consent was given.³⁷ The doctor must also explain that the withholding of such consent will in no way affect or compromise the medical treatment of the child.³⁸ It is possible that the child may consent to medical treatment but not to a medical examination for the purpose of a police investigation. In such a situation, treatment should not be denied.³⁹

The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 requires physicians to obtain in writing the consent of the parent or guardian of a minor before performing an operation.⁴⁰ Failure to do so would amount to misconduct and could lead to a cancellation of the doctor’s license to practice.⁴¹

The police must also assess whether medical examination is warranted. For instance, in a case of sexual harassment under the POCSO Act, a medical examination may be irrelevant.

(b) Child cannot be alone during the examination: Section 27(3) of the POCSO Act provides that a child’s medical examination has to be mandatorily conducted in the presence of a trusted person. Such person could be a parent, guardian or any other person the child chooses to have during the medical examination. Section 27(4) of the POCSO Act provides that when a parent or such person cannot be present, the examination must be conducted in the presence of a woman nominated by the head of the medical institution. Under no circumstances should the child be alone during the medical examination.

36 *ibid*, p. 24

37 *ibid*, p. 25.

38 TN Guidelines, p. 28.

39 MOHFW Guidelines, p. 24.

40 Regulation 7.16, The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002

41 Kaushik, Narang & Agarwal, “Informed Consent in Pediatric Practice”, (1999) available at <http://www.indianpediatrics.net/dec2010/dec-1039-1046.htm> accessed on 28.04.14

(c) **No requirement for FIR/complaint:** Medical examination can be conducted irrespective of whether a FIR/complaint is filed. In the past such medical examination could only be done after receiving a police requisition, the Supreme Court has clarified this requirement in *State of Karnataka v. Manjanna*⁴², where it held that police requisition is not mandatory for a sexual assault survivor to seek medical examination and care and that the doctor must examine such cases even if the survivor comes to the hospital before filing an FIR. The POCSO Act also expressly states this. Therefore, it is clear that voluntary reporting to health facilities is now permissible.⁴³

3.6.3. Should consent be obtained if the case is referred to the hospital by competent authority such as a Child Welfare Committee?

Yes, consent should be obtained irrespective of how or by whom it has been referred (Police/ Court/ Child Welfare Committee).

3.6.4. In the course of medical examination are doctors required to determine whether or not the alleged sexual offence was consensual?

When the victim in consideration is a child, medical practitioners are not required to determine whether or not the alleged act was consensual or not as under the POCSO Act and the IPC, persons below the age of 18 years are deemed incapable of giving consent for sexual intercourse. Besides, the obligation to report does not depend on whether the alleged act was consensual or not.

3.6.5. By when should the child be medically examined?

In cases of an alleged commission of or an attempt to commit a sexual offence, the child should be medically examined within 24 hours of having received the information. It is the duty of the police or SJPU to facilitate the medical examination.

3.6.6. Should a medical examination be conducted if the case comes to light more than 72 hours after the offence was committed?

In sexual offence cases, it is critical that medical examination is conducted as soon as possible so that evidence that is available from the body/clothes of the victim and/ or offender is not lost. Unfortunately, due to the sensitive nature of the offence, many victims and families do not report the matter until several hours or even days/months after the occurrence of the offence leading to loss of valuable evidence. Although the likelihood of finding evidence is greatly reduced after 72 hours of the incident,⁴⁴ it is still important to conduct a medical examination. Despite such delay, the medical

42 AIR 2000 SC 2231

43 CEHAT Manual, p. 12.

44 *ibid*, p. 17

examination could still reveal physical injuries, presence of sexually transmitted diseases such as HIV/AIDS and the psychological impact of the offence. It also helps in collection of case history from the child.

3.6.7. Who can carry out the medical examination of a child victim of a sexual offence?

The medical examination has to be conducted by a Registered Medical Practitioner (RMP) of a government hospital. An RMP is a practitioner who possesses any medical qualification listed in the Indian Medical Council Act, 1956 and whose name is in the State Medical Register. If the child victim is a girl, the medical examination must be conducted only by a woman doctor. If an RMP is not available at the government hospital, then the medical examination can be conducted by a RMP at a private hospital. It is also not necessary that a gynecologist conduct a medical examination as it can be any RMP.⁴⁵

There is no need for an FIR or even a complaint or any kind of documentation to be registered before a medical examination on a child victim of a sexual offence is conducted.

The medical examination of a girl should be done only by a woman doctor. However, medical treatment or examination should not be delayed on grounds of non-availability of a lady doctor within the hospital. Suitable arrangements should be made to ensure the availability of female doctors within the hospital or on call. According to the MOHFW Guidelines, where a female doctor is not available, the examination can be conducted by a male doctor in the presence of a female attendant.⁴⁶ Transgendered children should be given the opportunity to decide whether they wish to be examined by a male or a female doctor.⁴⁷

3.6.8. In whose presence should the medical examination be conducted?

A child's medical examination has to be mandatorily conducted in the presence of a trusted person. Such person could be a parent, guardian or any other person whom the child chooses to have during the medical examination. If a parent or guardian is the alleged offender, he/she cannot be present during the medical examination.

If there is no parent, guardian or any other person of the child's choice available, it is the duty of the head of the medical institution to nominate a woman to be present during the medical examination. Under no circumstances should the child be alone during medical examination.

The MOHFW Guidelines expressly prohibit doctors from carrying out medical

⁴⁵ TN Guidelines, p. 25

⁴⁶ *ibid*, p. 20

⁴⁷ MOHFW Guidelines, p. 20.

examination, collecting samples or rendering treatment in the presence of the police.⁴⁸

3.6.9. Can a doctor insist that legal formalities need to be completed before conducting the medical examination?

No, the doctor cannot insist on legal formalities to be completed prior to the medical examination, as under Section 27 POCSO, medical examinations must be carried out even if an FIR or (police) complaint has not been registered.

3.6.10. What details should a report of the medical examination contain?

According to Section 164A(2) of the CrPC, the medical examination report of a victim of rape should contain the following details:

- name and address of the child and the person who brought the child;
- age of the child;
- description of material taken from the person of the child for DNA profiling;
- marks of injury, if any, on the person of the child;
- general mental condition of the child;
- other material particulars in reasonable detail.

The precise reasons for the conclusions arrived at must be stated in the report.⁴⁹ The report should also specifically record that consent by the child or by a competent person on behalf of the child was obtained.⁵⁰ An examination conducted without consent will be unlawful.⁵¹ The exact time of commencement and completion of the examination should also be noted in the report.⁵²

This report should be given to the Investigation Officer so that it is forwarded to the Special Court along with the police report. A brief provisional opinion should be drafted immediately after the initial examination indicating clinical findings and samples sent for analysis.⁵³

The MOHFW Guidelines add that the provisional opinion should also indicate if injuries are absent because of the:

- a. Inability of survivor to offer resistance to the assailant because of intoxication or threats
- b. Delay in reporting for examination
- c. Activities such as urinating, washing, bathing, changing clothes or douching

48 *ibid*, p. 41.

49 Section 164A(3), CrPC.

50 Section 164A(4), CrPC.

51 Section 164A(7), CrPC.

52 Section 164A(6), CrPC.

53 MOHFW Guidelines, p. 31.

which may lead to loss of evidence

d. Use of condom/vasectomy or diseases of vas.”⁵⁴

Table No. 8: Table indicative of type of evidence to be collected by doctors conducting the medical examination of child victims of sexual offences⁵⁵

History of sexual violence	Type of swab	Purpose	Points to consider
Peno-vaginal	Vaginal swabs	- Semen/sperm detection - lubricant - DNA	- whether ejaculation occurred inside vagina or outside - use of condom
	Body swabs	- semen/sperm detection - saliva (in case of sucking/licking)	if ejaculation occurred outside
Peno anal	Anal swabs	- Semen/sperm detection - DNA - lubricant - fecal matter	- whether ejaculation occurred inside anus or outside - use of condom
	Body swabs	- semen/sperm detection - saliva (in case of sucking/licking)	if ejaculation occurred outside
Peno oral	Oral swabs	- Semen/sperm detection - DNA - saliva	whether ejaculation occurred inside mouth or outside - use of condom
	Body swabs	- semen/sperm detection - saliva (in case of sucking/licking)	if ejaculation occurred outside
Use of objects	Swab of the orifice (anal, vaginal and/or oral)	Lubricant	Detection of lubricant used if any
Use of body parts (fingering)	Swab of the orifice (anal, vaginal and/or oral)	Lubricant	
Masturbation	Swab of orifice/body part	- Semen/sperm detection - DNA - lubricant	- whether ejaculation occurred or not - if ejaculated in orifice or body parts
Forensic evidence is likely to be found only upto 96 hours after the incident.			

⁵⁴ *ibid.*

⁵⁵ Source: MOHFW Guidelines, 2014, Annexure 4, p. 59.

3.6.11. Are medical practitioners required to record a finding of rape or sexual assault?

While the doctor may comment on the extent and nature of injuries suffered, the doctor cannot provide an opinion on whether the accused was the one who injured the victim, or that such injuries positively prove the offence of assault. Medical evidence being in the nature of an expert opinion can only clarify and explain the medical aspects of the case. A medical opinion can never trespass into providing a legal opinion. It can suggest the possibilities of how injuries may have been caused. Whether or not an act constitutes sexual assault or rape is a question of law and cannot be answered by a medical practitioner. For instance, while a doctor may opine that a person's death was as a result of injuries to the head, he cannot opine on whether the injuries signify the offence of murder.

In trials concerning sexual offences, the Supreme Court has stressed on the limits of a medical opinion. In *Madan Gopal Kakkad v. Naval Dubey*,⁵⁶ the medical practitioner who had examined the body of the victim testified that no rape had occurred and only the offence of 'attempt to rape' had been committed, based on the fact that penetration was only slight and the hymen had not ruptured. The Supreme Court dismissed the opinion, convicted the accused and endorsed the following paragraph from *Modi's Medical Jurisprudence and Toxicology* (21sted):

Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. (Emphasis added)

Thus, a medical practitioner can never provide an opinion on the nature of offence which has taken place. The assessment of whether a particular offence such as rape has occurred is a question of law which has to be determined upon the facts provided. Only judicial officers are empowered to make such assessment and it would be improper for a medical practitioner to make this determination. This has also been reiterated in the MOHFW Guidelines which cautions that the doctor must not conclude whether such

56 (1992) 3 SCC 204

an incident has occurred or not based on the medical examination and only his / her medical findings should be recorded in the medical report.⁵⁷ Further, they ‘must not entertain questions from the police such as “whether rape occurred”, “whether survivor is capable of sexual intercourse”, “whether the person is capable of having sexual intercourse”’.⁵⁸

Box No. 9: Important Points to Note while recording the case history of a child

Extracted from the CEHAT Manual, p. 15

- (1) Keep in mind that narration of the history of sexual assault might be a traumatizing experience for the survivor. It is very difficult for the child to talk about this and she/he might not want to tell you all the details.
- (2) Be very sensitive of this and explain to the child that the process of history taking is important for further treatment and for filing a case if needed.
- (3) Talk to the child in a non-threatening environment.
- (4) Do not pass judgmental remarks or comments that might appear unsympathetic and disbelieving. An accurate history can be obtained only by gaining the trust of the child and not by accusing him/her of lying.
- (5) Police officers must not be present while history is being recorded. Parents/ guardian/ a person of trust have to be around while recording the history.

3.6.12. Should the child be sedated during the examination?

Sedation is not a mandatory requirement. It needs to be considered only if the child is likely to experience unbearable pain if conscious. Sedation should be done only with the informed consent of the parents. According to the Model Guidelines, speculum exam on a pre-pubertal girl should be done under anaesthesia, not conscious sedation.⁵⁹

3.6.13. Is the “two-finger test” legally permissible?

No, the two-finger test is no longer permissible in view of the Supreme Court’s decision in *Lillu v. State of Haryana*, as per which “...the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity.”⁶⁰

The MOHFW Guidelines also reiterate this and state that “(p)er vaginum examination, commonly referred to by lay persons as ‘two-finger test’, must not be conducted for establishing an incident of sexual violence...”⁶¹

⁵⁷ MOHFW Guidelines, p. 61.

⁵⁸ *ibid*, p. 41.

⁵⁹ Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012 dated September 2013 prepared by the Ministry of Women and Child Development

⁶⁰ AIR 2013 SC 1784.

⁶¹ MOHFW Guidelines, p. 60.

According to Flavia Agnes, a leading advocate the term “two-finger” test has acquired a negative connotation and should be abandoned and replaced with “the more scientific, accurate and non-judgmental term, Per Vaginal test (P.V test)” that can corroborate abuse, particularly prolonged sexual abuse.⁶²

3.6.14. Is it appropriate for doctors to record whether or not a victim/survivor is “habituated to sexual intercourse”?

Doctors must cautiously avoid using stigmatizing language in their opinion or including details that interfere with the privacy and dignity of the victim/survivor. Whether or not a victim or survivor is or is not “habituated to sexual intercourse” does not detract from her/his claim of sexual abuse. This information is not material to prosecutions under the POCSO Act and the IPC as consensual past sexual practices are irrelevant.⁶³

The MOHFW Guidelines also prohibit the references to past sexual experience or habituation to sexual intercourse “...as it has no bearing on a case of sexual violence. No comment on shape, size, and/or elasticity of the anal opening or about previous sexual experience or habituation to anal intercourse should be made.”⁶⁴

3.6.15. Does the absence of injury to the hymen suggest that there has been no penetration?

An intact hymen can in no way disprove penetrative sexual assault as a sexual act may be committed without causing rupture to hymen. Rupture to hymen may be caused due to physical activities such as cycling, riding etc. The status of hymen does not provide information about sexual history, hence the condition of the hymen cannot be a determining factor to prove/disprove penetrative sexual assault.⁶⁵

Box No. 10: Establishing Rapport with the Survivor

Extracts from the MOHFW Guidelines⁶⁶

- Never say or do anything to suggest disbelief regarding the incident.
- Do not pass judgmental remarks or comments that might appear unsympathetic.
- Appreciate the survivor’s strength in coming to the hospital as it can serve to build a bond of trust.
- Convey important messages such as: the survivor is not responsible for precipitating the act of rape by any of her actions or inactions.
- Explain to the survivor that this is a crime/violence and not an act of lust or for

62 Flavia Agnes, “Two-finger test’: Truth and Hype”, *The Asian Age*, 23 June 2015, <http://www.asianage.com/columnists/two-finger-test-truth-and-hype-716>

63 Section 146, Indian Evidence Act.

64 MOHFW Guidelines, p. 60.

65 CEHAT Manual, p. 59.

66 MOHFW Guidelines, p. 9.

sexual pleasure.

- Emphasize that this is not a loss of honour, modesty or chastity but a violation of his/her rights and it is the perpetrator who should be ashamed.
- Take help of a counsellor, if required.

3.6.16. What are the obligations of a medical practitioner in relation to the medical examination of a person accused of committing an offence under the POCSO Act?

After the incidence of a sexual abuse, it is not just the victim who undergoes medical examination, but also the accused person. Where an accused has been apprehended by the police, the accused will also be brought for medical examination for the collection of forensic data.

Section 53A of the Criminal Procedure Code refers to the examination of a person accused of committing rape and stipulates the following:

- a. The medical examination must be conducted by a RMP of a government hospital. In the absence of such practitioner within a radius of 16 kilometers from the place where the offence was committed, it can be conducted by any other RMP, acting at the request of a police officer
- b. The report made should include:
 - a. the name and address of the accused and of the person by whom he was brought,
 - b. the age of the accused,
 - c. marks of injury, if any, on the person of the accused,
 - d. the description of material taken from the person of the accused for DNA profiling, and,
 - e. other material particulars in reasonable detail

The report must state clearly the reasons for any conclusions made. Further, the exact time of commencement and completion of the examination must also be noted down. Upon the completion of the report, it must immediately be handed over to the Investigating Officer.

The law does not require that the consent of the accused be taken prior to the examination of the accused. Where the accused in question is female, the examination must be conducted only by or under the supervision of a female registered medical practitioner.⁶⁷

Where an accused comes to a hospital on his/her own, a medical practitioner may not proceed to conduct a medical examination and collect evidences merely on the suspicion that the person may have committed a sexual offence. The practitioner can

⁶⁷ Section 53, CrPC

however upon such suspicion inform the police immediately.

Box No. 11: Problems faced by Victims During a Medical Examination

Extracted from RAHAT, *Pursuing this thing called 'Justice' – A Survivor Centric approach towards victims of Sexual Violence*, (2015).⁶⁸

Problems Faced By The Victim During Medical Examination:

1. The victim is made to wait for a long time before the medical examination commences.
2. Doctors are rude and impatient with the victim and her family.
3. Most victims do not recall giving consent and/or being explained about the procedure, prior to the commencement of the examination.
4. The medical examination is generally conducted in the labour ward and there is no victim friendly space created for conducting the examination.
5. In several cases, the victim was admitted into the hospital for 2 -3 days only for conducting the regular medical examination.
6. When a victim directly approaches the hospital some doctors do not report the offence as mandated under the law.⁶⁹

3.7. Value of Medical Evidence

Medical evidence very often forms an important part of most criminal trials and is particularly crucial in proving sexual offences due to the private nature of the crime. Where medical examination is duly conducted after a sexual violence, the FSL reports and medical opinion often provide the clinching evidence for the prosecution to establish the guilt of the accused.

Medical evidence is admissible in a court under section 45 of the Indian Evidence Act, 1872 pertaining to the 'opinion of experts':

45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts...

Thus medical evidence, although an important piece of evidence, is only in the nature of an expert opinion and a testimony of medical personnel, will not be considered a

68 Available at <http://aarambhindia.org/wp-content/uploads/2014/11/RAHAT-Highlights-Final-Report.pdf>

69 A Survivor Centric Approach towards victims of Sexual Violence, Highlights of the Report (Provisional), Rahat (Majlis), 2015

witness of fact unlike an eye-witness.⁷⁰

In one of the earliest cases on this issue, Justice S.K. Das clarified the role of medical evidence while appreciating the differing testimonies of two doctors in a murder trial.⁷¹ The judge explained:

One version was that the Colonel had been assaulted and thereby sustained the injuries; the other version was that he had sustained the injuries by a fall on a rough surface like the masonry letter box. None of the two doctors were giving direct evidence of how the injuries were caused; they were merely giving their opinion as to how in all probability they were caused.

A medical testimony is only to advise the court on the medical aspects of the case and is expected to “put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert’s opinion because once the expert’s opinion is accepted, it is not the opinion of the medical officer but of the Court.”⁷²

Thus, medical evidence may only render an opinion as to the physical condition of a person, the existence of diseases, the presence of poisonous substances, the extent of injuries and wounds, what weapons may cause such injuries, etc. Medical opinion, however, cannot speculate on which offence was committed or whether an accused person is guilty as these are questions of law.

3.7.1. What is the value of medical evidence in a criminal trial?

Although medical evidence plays a very important role in the decision of a case, the evidence provided is only *corroborative* in nature i.e., it will be used to confirm or support a claim already raised by some direct evidence. It will not be considered as direct evidence as opined in several judgments of the apex court⁷³. For instance, where an eyewitness testifies that he saw the accused hit the victim repeatedly with a shovel, the medical practitioner may opine in court that the injuries on the body of the victim were consistent with those that could be received from a shovel and he may testify the extent and grievousness of the injuries. The doctor’s testimony here will serve to support and confirm the testimony of the eyewitness.

Therefore, medical evidence cannot be used as conclusive proof of a claim but only has a supportive role to play. The testimony of an eyewitness or any other form of

70 *Nagindra Bala Mitra v. Sunil Chandra Roy*, AIR 1960 SC 706

71 *ibid.*

72 *Madan Gopal Kakkad v. Naval Dubbey*, (1992) 3 SCC 204

73 *Solanki Chimanbhai Ukabhai v. State Of Gujarat*, AIR 1983 SC 484; *Awadhesh v. State of M.P.*, AIR 1988 SC 1158

direct evidence will have supremacy over medical evidence.⁷⁴ This is not to suggest that medical evidence is not important but only to reaffirm that medical opinion is not conclusive and not a non-rebuttable evidence. Where the prosecutrix provides a coherent and clear testimony and this is corroborated and consistent with the medical opinion, the medical evidence greatly strengthens the prosecution case. Further, where the medical evidence supports the version of the prosecutrix, the opinion reinforces the credibility of the witness even for claims for which there is no corroborative evidence available.

3.7.2. Can a sexual offence be proven in the absence of supportive medical evidence?

While medical evidence has enormous weight in the trial of sexual offence cases and it is preferable for the prosecution to have medical evidence in support, it is not an absolute pre-requisite. The law does not require that to hold an accused guilty of a sexual offence, there must be supporting medical evidence.

Where a victim had never been medically examined or where the offence came to light long after the incident, it is likely that medical evidence would be lost in such cases. Besides, in a case of alleged sexual assault or sexual harassment, medical evidence is unlikely. Further, clinching medical evidence such as the presence of the accused person's spermatozoa, and body hair on the body of the victim start deteriorating immediately and can be easily lost where the victim takes a bath or washes the clothes worn at the time of the incident.

It is also relevant to note that medical evidence is not only sought from the body of the victim but also from the body of the accused. Often, the accused is not arrested until several days after the offence has occurred which also results in the loss of critical forensic evidence.

The Supreme Court has repeatedly affirmed that medical evidence is not an absolute pre-requisite in proving the commission of a sexual offence. The Supreme Court in *State of M.P. v. Dayal Sahu*⁷⁵ held that:

...non-examination of doctor in a case of rape is not always fatal to the prosecution when the testimony of the prosecutrix inspires confidence of the Court and non-production of doctor's report is not at all fatal. It was a case of rape on a girl of 13 years and if the learned Trial Court finds that evidence of the prosecutrix is sufficient, the DNA test is not at all necessary.

Thus corroboration of a victim's testimony is not required where the court determines

⁷⁴ *Thaman Kumar v. State of Union Territory of Chandigarh*, (2003) 6 SCC 380.

⁷⁵ 2005 CriLJ 4375 SC

that the testimony of the prosecutrix is sufficient and credible.⁷⁶

3.7.3. Are the presence of injuries and rupture of the hymen necessary to prove the offence of rape?

As held in *Madan Gopal Kakkad v. Naval Dubbey*,⁷⁷ the rupture to the hymen, the presence of injuries to the genitals, or even the presence of semen on the body of the victim are not necessary to prove the offence of rape. Penetration however slight is sufficient to establish an offence both under section 376 of the IPC (rape) and under section 3 of the POCSO Act (Penetrative Sexual Assault).

Where the lower courts have acquitted the accused merely on the basis of the fact that there were no injuries shown on the body of the victim, the Supreme Court in a number of cases has categorically rejected such approach and has reaffirmed that injuries are not a pre-requisite.

Where a High Court inferred consent on the part of the victim due to the absence of injuries, the Supreme Court held:

Absence of injuries on the person of the prosecutrix has weighed with the High Court for inferring consent on the part of the prosecutrix. We are not at all convinced. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. *Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent* on the part of the prosecutrix. It will all depend on the facts and circumstances of each case.⁷⁸ (emphasis added)

Further, the Supreme Court in *Ranjit Hazarika v. State Of Assam*⁷⁹ categorically laid down even where the medical evidence suggests that no offence has occurred, it cannot nullify the testimony of a credible witness. The Court in this regard held:

The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts.

To constitute the offence of rape, penetration, however slight, is sufficient. The

⁷⁶ See *State of Punjab v. Ramdev Singh* 2004 SCC (Cri) 307 where the court held that, "It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars."

⁷⁷ (1992) 3 SCC 204.

⁷⁸ *State of Rajasthan v. Noore Khan* (2000) 3 SCC 70.

⁷⁹ (1998) 8 SCC 635.

prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. *Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix* particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. *This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix...*” (emphasis added)

Further, Explanation 2 to section 375 IPC states—“... a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.” Thus the Indian does not insist for resistance to be offered that means there is no requirement of resistance injuries to be present in a case of sexual offence and also to prove sexual offence in the court of law

3.7.4. Is the presence of semen or spermatozoa of the accused on the body or clothing of the victim necessary to prove the offence of rape?

Even where a medical examination of the victim has taken place immediately after an assault, it is possible that no semen or spermatozoa was found on the body or clothing of the victim. Where the offender wore a condom during the assault, it is likely that a medical examination will not reveal the presence of semen on the body of the victim. The medical practitioner must thus be aware of these possibilities and not render an adverse opinion in such cases.

The Supreme Court has also opined that the “(m)ere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case.”⁸⁰

“If a murderer wears gloves, we say its a perfect murder; but if a rapist wears a condom, we say its a fake case.” Dr. Jagadeesh N. (Professor of Forensic Medicine & Toxicology, Vydehi Institute of Medical Sciences & Research Centre, Bangalore)

3.7.5. What is the value of medical evidence where it contradicts the direct evidence and the testimony of the prosecutrix?

Where there is an inconsistency between medical evidence and direct evidence, the direct evidence always gains precedence over the medical opinion, which is only secondary evidence. However, in such cases the prosecution will have to show that the

⁸⁰ *Prithi Chand v. State Of Himachal Pradesh* AIR 1989 SC 702.

victim is a credible witness and is trustworthy.

The Supreme Court in this respect stated,

Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.⁸¹

Therefore, despite the inconsistency, the evidence of the witnesses will receive an independent assessment of credibility.⁸² Where such inconsistency is glaring and the medical evidence completely contradicts the prosecutrix's version, it may prove fatal to the case as it will reflect on the credibility of the witness.⁸³ The Supreme Court in *Mani Ram v. State of UP*⁸⁴, held that "if the evidence of the prosecution witness is totally inconsistent with the medical evidence, there is a fundamental defect in the prosecution case and unless this inconsistency is reasonably explained, it is sufficient not only to discredit the evidence but the entire case."⁸⁵

81 *Thaman Kumar v. State of Union Territory of Chandigarh*, (2003) 6 SCC 380.

82 See also *Anandamay Bag v. State of West Bengal*, 2007 (4) CHN 470, wherein the Calcutta High Court held, "...in a case of rape medical evidence is not always final but medical evidence plays the role of secondary evidence. If the Court finds that evidence of prosecutrix is sufficient to come to the conclusion that prosecution case was true then there can be conviction on the basis of sole evidence of prosecutrix."

83 *Piara Singh v. State of Punjab*, AIR 1977 SC 2274. Here the Court held, "(w)here there is a glaring inconsistency between the direct evidence and the medical evidence in respect of the entire prosecution case, that is a manifest defect in the prosecution case."

84 1994 CrLJ 3848.

85 *ibid*, para 9

Chapter 4. Role of Magistrates¹

4.1. Duties of Magistrates under the POCSO Act

4.1.1. What procedures should a Magistrate follow while recording the statement of a child victim of sexual offences?

Sections 25 and 26 of the POCSO Act prescribe the role of the Magistrate in recording statement of children under Section 164, CrPC. In accordance with these provisions:

- Magistrates recording such statements have to ensure that it is recorded as spoken by the child and in the presence of the parents or any other person whom the child trusts or has confidence in.
- The Magistrate can take the help of qualified translators and interpreters², special educators, experts or any person familiar with the manner of communication of a child with disabilities³ while recording the statement.
- As far as possible, the Magistrate should ensure that the statement of the child is also recorded by audio-visual means.⁴
- The advocate of the accused cannot be present when the statement of the child is being recorded by the Magistrate.
- Documents being relied upon by the prosecution will have to be made available to the child and the child's family or representative.⁵

4.1.2. Can the statement of the child be recorded by the Magistrate, in the absence of the parents or a person whom the child trusts?

Section 26(1) of the POCSO Act expressly states that the statement of the child must be recorded by the Magistrate in the presence of the parents or any other person whom the child trusts or has confidence in. However, if the parent is the accused, then the statement should not be recorded in his or her presence.

Prior to the enactment of the POCSO Act, in *Court on its own motion v. State*⁶, the Delhi High Court laid down guidelines on dealing with child sexual abuse cases, for various functionaries of the criminal justice system. With respect to Magistrates, the court directed that “(t)he child victim shall not be separated from his/her parents/

1 This chapter was authored by Swagata Raha. Feedback was received from Shruthi Ramakrishnan, Geeta Sajjanshetty, and Anuroopa Giliyal. It was reviewed externally by Dr. S.B.N. Prakash and Dr. Kaveri Haritas and edited by Arlene Manoharan.

2 Section 26(2), POCSO Act.

3 Section 26(3), *ibid.*

4 Section 26(4), *ibid.*

5 Section 25(2), *ibid.*

6 W.P. (CrI.) No. 930/2007 decided on 14 August 2007. Available at <http://indiankanoon.org/doc/380556/>

guardians, nor taken out from his/her environment on the ground of ‘Ascertaining voluntary nature of statement’ unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.”

Thus, a child cannot be separated from his/her parents by the Magistrate, during the recording of the statement under Section 164, CrPC.

4.1.3. How should the statement of children with disabilities be recorded by the Magistrate?

The Magistrate/police/SJPU could avail the services of experienced, trained and qualified special educators/translators or interpreters who are familiar with the mode of communication of children with disabilities while recording the statement of a child with disability. For instance, if a speech and hearing impaired child’s evidence or statement has to be recorded, the services of a sign language expert may be sought. Such statement must be videographed as well.

As per Section 164(5A)(b), CrPC, the statement of a girl child with disability recorded by the Magistrate will be considered a statement in place of the examination-in-chief. The child can be cross-examined based on this statement. The child will not have to be subjected to an examination-in-chief at the time of trial thus saving the child the trauma of again recalling painful memories and repeating his or her statement. (See 4.1.4 below)

4.1.4. Should the statement of the child be recorded by audio-visual electronic means?

Yes, as mentioned previously in answer 4.1.1., wherever possible the child’s statement could be recorded by audio video electronic means. Making a child repeat the details of the sexual abuse that he/she has faced to concerned officials, forces the child to relive the trauma again, causing emotional stress in addition to the trauma of the abuse itself. The recording of the child’s statement by audio-visual means enables it to be replayed and prevents secondary victimization. Under the CrPC, it is now mandatory to videograph both the statement made by a child victim of sexual offences to the police and before a Magistrate.

4.1.5. Is the child and his or her parents or representative entitled to receive a copy of the statements made by other witnesses?

Yes, they are. Under section 25(2) of the POCSO Act, after the final report is filed by the police under Section 173, CrPC, the Magistrate must provide the child and his or her parents or representatives with a copy of all documents or relevant extracts on which the prosecution proposed to rely on and the statements recorded by the police

of all the persons whom the prosecution proposed to examine as its witnesses.⁷ If the Magistrate is satisfied that any document is voluminous, instead of furnishing the child with a copy thereof, he/she may direct that the child or his/her representative only be allowed to inspect it either personally or through a pleader in Court.⁸

4.2. Duties of the Magistrate under Section 164, CrPC

4.2.1. Who can record a statement of a child victim of sexual offences under Section 164, CrPC?

Any Magistrate can record a statement under Section 164, CrPC. However, a statement of a victim of sexual offences under the IPC can be recorded only by a Judicial Magistrate.⁹ In the recent case of *State of Karnataka v. Shivanna*¹⁰, the Supreme Court has given the following directions to the police, in the context of statements of victims of rape under Section 164, CrPC:

- i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to *any Metropolitan/preferably Judicial Magistrate* for the purpose of recording her statement under Section 164 Cr.P.C. A copy of the statement under Section 164 Cr.P.C. should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr.P.C. should not be disclosed to any person till the charge sheet/report under Section 173 Cr.P.C. is filed.
- (ii) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate. (emphasis added)

4.2.2. Can a statement under Section 164 of the CrPC be recorded by a Child Welfare Committee?

No, it cannot. A statement under Section 164, CrPC can only be recorded by a Metropolitan Magistrate or a Judicial Magistrate. Unless the law expressly authorizes the CWC to record statements under Section 164, no such power can be inferred or interpreted as flowing from Section 29(5) of the JJ Act. As far as practice goes, no court has thus far accepted statements recorded by the CWC as a statement recorded under Section 164, CrPC. For a detailed explanation refer to Section 5.4.5, Chapter V – Functions of CWCs under the POCSO Act.

⁷ Section 173(5), CrPC, 1973 read with Section 207, CrPC, 1973.

⁸ Second proviso to Section 207, CrPC, 1973.

⁹ Section 164(5A), CrPC, 1973.

¹⁰ <http://indiankanoon.org/doc/2622362/>

4.2.3. What is the role of the police/SJPU in facilitating the recording of a statement under Section 164 of the CrPC?

Please refer to Section 2.2. Steps to be taken by the police within 24 hours of report of a sexual offence, point VI in Chapter II: Duties of Police and the Special Juvenile Police Unit.

Magistrates should ensure that the police have adhered to the procedure prescribed under the POCSO Act, CrPC and by the Supreme Court. The following checklist should be considered:

- **24 hours** - Child is brought within 24 hours of the alleged commission of the offence to the Metropolitan Magistrate (preferably a lady) for recording his/her statement under Section 164 of the CrPC.
- **Delay explained** - In case the child was taken after 24 hours, reasons for delay should be recorded by the Investigating Officer in the case diary and handed over to the Magistrate.
- **Time and date of report and presentation of victim before the Magistrate** - The Investigation Officer has noted the date and time at which she/he learnt about the alleged commission of the offence and date and time at which she/he took the victim to the Magistrate.
- **Medical examination report** - A copy of the medical examination report should also be immediately handed over to the Magistrate recording the statement of the victim under Section 164 of the CrPC.

4.3. Jurisdiction of Magistrates under POCSO Act

4.3.1. Does the statement of a child victim have to mandatorily be recorded by a Magistrate?

The POCSO Act does not mandate the recording of statements of a child under Section 164 of the CrPC. However, the Criminal Law Amendment Act, 2013 introduced Section 164(5A) as per which in cases punishable under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E and 509 of the IPC, the Judicial Magistrate *should* record the statement of the victim as soon as the commission of the offence is brought to the notice of the police. The Supreme Court's direction in *State of Karnataka v. Shivanna*¹¹ mandates the police to take the victim of a sexual offence within 24 hours to any Metropolitan/preferably lady Judicial Magistrate for the purpose of recording his/her statement under Section 164 of the CrPC. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the

¹¹ <http://indiankanoon.org/doc/2622362/>

same to the Magistrate.

4.3.2. Can a Magistrate try offences under the POCSO Act?

No, a Magistrate cannot try offences under the POCSO Act. The power to try offences under the POCSO Act has been vested only with a Special Court. The Magistrate has a very limited role to play – they can only record statements of the victim under Section 164 of the CrPC. A Magistrate can record statements of the victim of any offence including the offences under the POCSO Act. As the Special Court has been given the power to take direct cognizance of cases under POCSO Act, there is also no requirement of committal by the Magistrate to the Special Court.

4.3.3. Does Section 25(2), POCSO Act imply that the police has to file its report before a Magistrate?

Under Section 25(2) of the POCSO Act, the Magistrate is required to provide to the child and his or her parents or representatives a copy of the document specified under Section 207, CrPC ‘upon the final report being filed by the police under Section 173...’ Under Section 173, CrPC, upon the completion of investigation, the officer in charge of the police station is required to forward the police report to the Magistrate. In *Kum. Shraddha Meghshyam Velhal v. State of Maharashtra*¹², the Bombay High Court considered this provision and observed:

Though Section 25(2) ... specifies that the Magistrate shall provide such copy, it does not thereby signify that the final report therefore must be filed before the Court of such Magistrate. The concerned Magistrate would sufficiently comply with the provision of law under Section 25(2) ... by having the copy of the report sent to the Children Court for being served on the child and the parents through the concerned Investigating Officer who is required to file the final report before the Special Court under the Act.

From the above ruling, it is clear that the police should not file the report in POCSO cases before the Magistrate. The jurisdiction vests only with the Special Court and no other forum.

4.4. Purpose and value of a statement under Section 164, CrPC

4.4.1. What is the value of a statement recorded under Section 164, CrPC?

A statement under Section 164 of the CrPC can be used to corroborate or contradict the

¹² Criminal Application No. 354 of 2013, decided on 03.07.2013.

statement of a witness in a criminal trial.¹³ It is not a piece of substantive evidence.¹⁴ The prosecution can rely on it to corroborate the evidence tendered by the victim in court, while the accused could use it to show contradictions. The High Court of Madras in *R. Palanisamy v. State*¹⁵ made the following observation on the objective of Section 164 statements:

The objective behind recording of statement of a witness under Section 164 Cr.P.C. is that it is for an assurance that the investigation is going on in right direction, it is going against a right person and, a belief that it will instill a sense of feeling in the mind of the deponent that later he should not resile from it. A feeling that he has been tied down to his such earlier statement.¹⁶

4.4.2. What is the nature of a statement recorded under Section 164 of the CrPC? Is the accused entitled to a copy of this document?

The statement recorded by a Magistrate under Section 164 of the CrPC, is a public document and the accused is entitled to a copy of it. The Allahabad High Court in the 1932 in the case of *Bashiruddin & Anr. v. Emperor*¹⁷ held that:

Statements recorded under S. 164, Criminal P.C. are public documents, being the acts of a Judicial Officer done under the provisions of the Criminal Procedure Code, and the public servant in whose custody those documents were, was bound to issue copies thereof. An accused is undoubtedly entitled to inspect statements of prosecution witnesses recorded under S. 164, Criminal P.C. Such statements can be used by the prosecution for the purpose of corroborating the witnesses. They can likewise be used by the defence for the purpose of contradicting such witnesses...

The Madras High Court had occasion in the case of *State of Madras v. G. Krishnan*¹⁸ to deal with the above question comprehensively and held that:

(1) The statements recorded under Section 164, Cr. P. C., would be public documents falling under Section 74(1)(iii) of the Indian Evidence Act. (2) The accused will be entitled to copies of the same as a person interested; (3) but his right to obtain such copies before the filing of the charge-sheet has been taken away by implication by the provisions of Section 173(4) of the Cr. P. C., and that he will be entitled to the copies of the documents only in accordance therewith.

¹³ *Ram Kishan Singh v. Harmit Kaur*, AIR 1972 SC 468.

¹⁴ *ibid.*

¹⁵ CrI.A.No. 158 of 2013 decided on 23.04.2013.

¹⁶ *ibid.* at para 33.

¹⁷ AIR 1932 All 327.

¹⁸ AIR 1961 Mad 92.

The above ruling has been followed by other High Courts as well. Recently, the Kerala High Court in the case of *Shakkeer v. State of Kerala*¹⁹, upheld the above view and held the accused was not entitled to a copy of the statement recorded by the prosecution witness in rape cases under Section 164 before the charge sheet/final report was filed. In holding this opinion, the Kerala High Court also relied upon the Supreme Court's order in the case of *State of Karnataka v. Shivanna*²⁰ where it was held that:

Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement under S.164 CrPC. A copy of the statement under S.164 CrPC should be handed over to the Investigating Officer immediately *with a specific direction that the contents of such statement under S.164 CrPC should not be disclosed to any person till charge sheet/report under S.173 CrPC is filed.* (Emphasis added)

4.4.3. Can the statement recorded under Section 164 of the CrPC be admitted as examination-in-chief by the Special Court?

At present there is no clear statutory directive permitting a Section 164 of the CrPC statement to be admissible as an examination-in-chief before the court for sexual offences. Section 164(5A)(b) of the CrPC currently only permits this for woman victims of sexual offences, who are temporarily or permanently physically or mentally disabled.

4.4.4. Does the Magistrate who recorded the statement under Section 164 of the CrPC have to necessarily be examined by the Special Court?

No, the Magistrate does not necessarily have to be examined by the Special Court. In *Guruvindapalli Anna Rao v. State of A.P.*,²¹ the Andhra Pradesh High Court held that “when a Magistrate, discharging his official functions as such, records the statement of any witness under Section 164 Cr.P.C, such statement is a ‘public document’ and it does not require any formal proof.”

4.4.5. Where a victim has turned hostile, can a statement under Section 164 CrPC form the basis of a conviction?

No, a statement under Section 164 of the CrPC cannot be the basis of a conviction when a witness turns hostile. In *T. Diwakara v. State of Karnataka*²², the Karnataka High Court held:

19 CrI. MC. No. 2627 of 2014 decided on 13.08.2014.

20 2014 STPL(Web) 334 SC.

21 ibrd

22 2006 CRI.L.J. 4813.

While convicting the accused the statement recorded under Section 164 of Criminal Procedure Code does not have any better legal status than the one recorded under Section 161(3) of Criminal Procedure Code. At the most, if the deponent whose statement is recorded under Section 164 of Criminal Procedure Code turns hostile, he/she could be prosecuted for perjury but on the strength of such statement no conviction can be placed.²³

It is also possible that the statement made before the Special Court is true, while the one made before the Magistrate is false. In this context the observation in *Emperor v. Ningappa Ramappa*,²⁴ is relevant:

No doubt, a man making a statement on oath before a Magistrate under Section 164, Criminal P.C., should speak the truth but if he does not, the least he can do is to tell the truth when subsequently he goes in the witness box. To prosecute a man who has resiled from a false statement, made under Section 164 is to encourage him in the belief that it pays to tell a lie and stick to it. It is far better that a man should escape punishment for having made a false statement under Section 164 than that he should be induced to believe that it is to his interest, however false the statement may have been to adhere to it, and thereby save himself from prosecution. The danger of such a course leading to the conviction of innocent person is too great to be risked.

4.4.6. Can a second statement be recorded under Section 164, CrPC, if some facts are left out in the first statement?

A second statement under Section 164 of the CrPC statement would amount to an improvement over the previous statement and detract from the value of the earlier statement. It will also make the child vulnerable during cross-examination as the defence is likely to dwell on the contradictions. Instead, efforts must be made by Support Persons as well as the Magistrate to make the child comfortable before the statement is recorded so that the child can speak freely.

²³ *ibid* at para 1

²⁴ I.L.R. (1942) Bom. 26, A.I.R. (28) 1941 Bom. 408 <http://indiankanoon.org/doc/1796076/>

Chapter 5. Functions of CWCs under POCSO Act¹

5.1. Functions of the Child Welfare Committee under the JJ Act and Rules

The Child Welfare Committee (CWC) is a statutory body constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) functioning under the provisions of the parent statute as well as the JJ Model Rules, or State Rules notified pursuant to it. It comprises of a Chairperson and four members of whom at least one should be a woman and one, an expert on matters concerning children.² The JJ Act requires State Governments to establish one or more CWCs for every district, to decide matters concerning children in need of care and protection.³ CWCs are vested with the “final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children, as well as to provide for their basic needs and protection of human rights.”⁴ CWCs function as “a Bench of Magistrates” and have the powers vested by the Code of Criminal Procedure (CrPC) on a Metropolitan Magistrate or a Judicial Magistrate of the first class.⁵ The decisions of the CWC are binding and an appeal against their order will lie before the Sessions Court.⁶

According to Rule 25 of the JJ Model Rules⁷, CWCs should perform the following functions:

- a. take cognizance of and receive children produced before the Committee;
- b. decide on the matters brought before the Committee;
- c. reach out to such children in need of care and protection who are not in a position to be produced before the Committee, being in difficult circumstances, with support from the District Child Protection Unit or State Child Protection Unit or the State Government;
- d. conduct necessary inquiry on all issues relating to and affecting the safety and well-being of the child;
- e. direct the Child Welfare Officers or Probation Officers or non-governmental organisations to conduct social inquiry and submit a report to the Committee;
- f. ensure necessary care and protection, including immediate shelter;

1 This chapter was authored by Swagata Raha, Shruthi Ramakrishnan, and Geeta Sajjanashetty. Feedback was received from Anuroopa Giliyal. It was reviewed externally by Dr. Shantha Sinha, Nina Nayak and Dr. Kaveri Haritas and edited by Arlene Manoharan.

2 Section 29(2), JJ Act, 2000.

3 Section 29(1), JJ Act, 2000.

4 Section 31(1), JJ Act, 2000.

5 Section 29(5), JJ Act, 2000.

6 Section 52(1), JJ Act, 2000.

7 Juvenile Justice (Care and Protection of Children) Rules, 2007.

- g. ensure appropriate rehabilitation and restoration, including passing necessary directions to parents or guardians or fit persons or fit institutions in this regard, in addition to follow-up and coordination with District Child Protection Unit or State Adoption Resource Agency and other agencies;
- h. direct the Officer-in-charge of children's homes to receive children requiring shelter and care;
- i. document and maintain detailed case record along with a case summary of every case dealt by the Committee;
- j. provide a child-friendly environment for children;
- k. recommend 'fit institutions' to the State Government for the care and protection of children;
- l. declare 'fit persons';
- m. declare a child legally free for adoption;
- n. keep information about and take necessary follow-up action in respect of missing children in their jurisdiction;
- o. maintain liaison with the Board in respect of cases needing care and protection;
- p. visit each institution where children are sent for care and protection or adoption at least once in three months to review the condition of children in institutions, with support of the State Government and suggest necessary action;
- q. monitor associations and agencies within their jurisdiction that deal with children in order to check on the exploitation and abuse of children;
- r. co-ordinate with the Police, Labour Department and other agencies involved in the care and protection of children with the support of District Child Protection Unit or State Child Protection Unit or State Government;
- s. liaison and network with corporate sector and NGOs for any of the above functions including for social inquiry, restoration and rehabilitation, as and when required
- t. maintain a suggestion box to encourage inputs from children and adults alike and take necessary action.

Under the JJ Act, State Governments have been vested the authority to formulate State Rules to give effect to the provisions of the Act. Some States may have modified the functions prescribed in the Model Rules (issued by the Central Government). Therefore State Rules, where notified, should be referred to in order to understand the functions of the CWCs applicable in that State.

Any child who falls within the purview of the CWC under the JJ Act (Section 2(d)), is defined as a "child in need of care and protection". Such a child would include one:

- (i) who is found without any home or settled place or abode and without any

ostensible means of subsistence,

- (ia) who is found begging, or who is either a street child or a working child,
- (ii) who resides with a person (whether a guardian of the child or not) and such person—
 - (a) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or
 - (b) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person,
- (iii) who is mentally or physically challenged or ill children or children suffering from terminal diseases or incurable diseases having no one to support or look after,
- (iv) who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child,
- (v) who does not have parent and no one is willing to take care of or whose parents have abandoned [or surrendered] him or who is missing and run away child and whose parents cannot be found after reasonable inquiry,
- (vi) who is being or is likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts,
- (vii) who is found vulnerable and is likely to be inducted into drug abuse or trafficking,
- (viii) who is being or is likely to be abused for unconscionable gains,
- (ix) who is victim of any armed conflict, civil commotion or natural calamity;

A child victim of sexual abuse as defined under the POCSO Act could fall well within the definition of a “child in need of care and protection,” particularly in cases of incest, the child may have a parent or parents who may not only be ‘unfit’ but may as well be the alleged perpetrator of the abuse.

While dealing with cases of child sexual abuse, the CWC will not only have to abide by and rely upon the JJ Act and Rules while discharging their functions but also on the POCSO Act and Rules, which provides for specific powers and functions on this body.

Refer to Section 1.8 on Rights of Children, Chapter I: Overview of the Legal Framework relevant to Sexual Offences against Children in India for a detailed explanation of rights and the corresponding duties of actors within the criminal justice system.

5.2. Functions of the CWCs under the POCSO Act and Rules

5.2.1. What are the functions of CWCs under the POCSO Act?

With the passage of the POCSO Act and Rules, the CWC's mandate has expanded to include the responsibility to ensure the provision of care and protection to child victims/victims of sexual offences where required. Under the POCSO Act and Rules, the CWC has been entrusted with the following roles:

A. Receiver of information

- The Special Juvenile Police Unit (SJPU) or local police, have to submit a report about the commission of a sexual offence or an apprehension that it is likely to be committed, within 24 hours of the receipt of such information.
- In cases where a child is in immediate need of care and protection, the report must indicate reasons for this assessment and steps taken by the police or SJPU to ensure such care and protection.

B. Determination of Placement

- The SJPU or police should produce a child before the CWC if the child has been or is likely to be sexually abused by a person living in the same household as the child, or the child is living in a child care institution and is without parental support, or the child does not have a home or parental support.
- Upon receiving a report from the SJPU or police, the CWC should, within three days, determine whether or not a child must be removed from the custody of her/his family or shared household or the institution that is the place of residence, and be placed in a Children's Home or Shelter Home under the JJ Act.

C. Providing a Support Person

- Based on its own assessment or request, the CWC can, for all cases reported to it by the SJPU or the police, provide a Support Person to assist the child and family during the investigation and trial of the case.
- The CWC can also terminate the services of a Support Person based on such a request by the child and her/his parent, guardian, or person whom the child trusts.

Box No. 12: Key Features of a Child-friendly CWC

- Ambience should be child-friendly.
- As far as possible, a waiting room for children with facilities for recreation, drinking water, food, toilets, etc should be available.
- Language used should be child-friendly. Avoid speaking in harsh tones in the presence of the child.
- Avoid probing the child about the details of sexual abuse.
- Avoid speaking to the police in the presence of the child and vice-versa.

- Avoid questioning the child in the presence of persons unconnected to the child or the child's care and protection.
- Members should decide beforehand who will lead the conversation with the child.
- Interaction with the child should be by one or two members preferably with child psychology or counselling experience. The interaction should be held in a quiet place.
- Child should be spoken to in the presence of a person of her/his choice if she prefers to have somebody with her.
- Child should not be compelled to give a statement and/or undergo medical examination.
- Support person should be appointed to interface between family/ guardian and the legal and judicial system.
- Ensure that the privacy of the child is maintained at all times.

5.2.2. Is a child victim of sexual offences necessarily a “child in need of care and protection” under the JJ Act?

No. Based on the provisions in the JJ Act and POCSO Act, not every child victim of sexual offences would necessarily fall within the definition of a ‘child in need of care and protection’ under Section 2 (d), JJ Act. If a child has a supportive family that is capable of safeguarding the child's interest, intervention by the CWC may not be required. Requiring every child victim to be presented before the CWC may in turn aggravate their trauma and lead to secondary victimization. While all incidences of child sexual abuse must be reported to the CWC by the SJPU,⁸ many victims of child sexual abuse may have adequate parental support and access to services deeming it unnecessary for the assistance of the CWC.

However, for child victims without such support or children who are sharing household with perpetrators, the role of the CWC becomes important. POCSO Rule 4(3) provides for situations in which a child *must* be produced before a CWC:

Where the SJPU or the local police receives information under sub-section (1) of section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or the child is living in a child care institution and is living without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned Child Welfare Committee (hereafter

⁸ Section 19(6), POCSO Act, clearly indicates the responsibilities of the CWC in to receive the report of the SJPU in child sexual abuse matters.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court, including need of the child for care and protection and steps taken in this regard.

referred to as “CWC”) within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of section 19 of the Act, and with a request for a detailed assessment by the CWC.

Based on these provisions, it is clear that the conditions under which the police are required to produce the child before the concerned CWC are as follows:

- a. where an offence under the Act has been committed, attempted or likely to be committed by a person living in the same or shared household with the child, or
- b. where a child is living in a child care institution and is without any parental support, or
- c. where a child is found to be without any home and parental support.

This rule is in sync with Section 2(d)(ii) of the JJ Act, which envisages a child who has been abused or is likely to be abused by a person she or he is staying with, to be in need of the State’s protection.

The Rules clearly do not envisage *every* child victim of sexual abuse to be produced before the CWC, but instead authorizes the police to take such a decision. The Act and Rules also provide that such decision should be accompanied by reasons provided in writing to the CWC in a Care and Protection Report. The legislative intention seems to be the prevention of secondary victimization of child victims by limiting the circumstances under which they must be produced before various authorities.

Therefore, though the law envisages CWC to have specialized knowledge and training in dealing with vulnerable children, the CWCs need to bear in mind that unnecessary State intrusion could prevent or delay healing that needs to take place in such situations of abuse. This interpretation of the CWC’s role is in consonance with the UN Convention on the Rights of the Child, 1989, which requires the State to respect the child’s right to preserve his or her family relations (Article 8) and extend special protection to a child “temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment” (Article 20).

The UNCRC and the JJ Act and JJ Model Rules, 2007 all acknowledge the important role of the family for a child’s development, care and protection. Principle V(c), Rule 3 of the JJ Model Rules state:

The family –biological, adoptive or foster (in that order), must be held responsible and provide necessary care, support and protection to the juvenile or child under their care and custody under the Act, unless the best interest measures or mandates dictate otherwise.

From a conjoint reading of the relevant provisions, the following conclusions can be

arrived at:

- (a) A CWC can intervene in a case concerning a child victim of sexual abuse in circumstances specified under Rule 4(3) of the POCSO Rules, read with Section 2(d) of the JJ Act.
- (b) Where the family is present and according to the police is capable of providing care and protection, the child should not be produced before the CWC.
- (c) The police or SJPU must submit all reports received under Section 19(1) to the CWC pursuant to their obligation under Section 19(6). The CWC can demand that the police submit reports to them in a timely manner.
- (d) Based on a scrutiny of the police report, if the CWC is convinced that it must intervene, it can exercise its power under Rule 27(3) of the JJ Model Rules, 2007 which provides that the CWC may take *suo motu* cognizance of cases and reach out to children in need of care and protection. The fear that the discretionary powers of the police will end up depriving abused children of their entitlement to State care and protection is unfounded, as the law provides for an in built safeguard, requiring *every* case to be reported to the CWC.
- (e) Section 2(d)(vi) of the JJ Act cannot be read in isolation to suggest that each and every child being or likely to be sexually abused should be produced before the CWC. Insistence on the presentation of a child who is adequately supported by the family to the CWC could amount to an arbitrary interference with the child's privacy and family that is prohibited under Article 16 of the UNCRC. The best interest of the child must be carefully weighed with the right to privacy and family.

5.2.3. What information is the CWC entitled to receive from the SJPU or local police?

The SJPU or police are obligated to inform the CWC in the jurisdictional area about all POCSO cases within 24 hours of receiving information about the same. Where applicable, they also need to record reasons why they believe that a child victim is in need of care and protection and provide details of steps they have taken to ensure the same at their level.

It follows that along with a copy of the report prepared as mandated under Section 19(1) POCSO Act, the FIR, medical reports, and report on immediate steps, if any, taken by the police or SJPU will also have to be submitted to the CWC. For instance, if the child requires urgent medical services, then arrangements for shifting the child to the hospital needs to be made by the SJPU/police and this must subsequently be reported to the CWC. The CWCs must ask for a 'Care and Protection' report from the police/SJPU when they produce a child before them. A Proforma that may be used by

the CWC in such situations is given in Box No. 6 below.

**Box No. 13: Suggested Proforma for Cases received under Rule 4(3),
POCSO Rules**

Child Welfare Committee, District

Case No:-

Year of Registration of the case:

1. Time and date as to when the child was produced: (Or the time and date when the report was submitted along with the photograph of the child if the child was undergoing medical treatment or child is below 2 years of age)
2. Sex of the child:
3. Age of the child:
4. Name of the child:
5. Class and school (if the child is studying)
6. Name, address and designation of the complainant:
7. Circumstances under which the child was found:
8. Is the child:
 - i. Living in the same or shared household as the alleged perpetrator:
 - ii. Living in a child care institution and is without parental support:
 - iii. Without any home and parental support:
9. Submissions:

Copies of the following reports appended:

1. FIR, if produced by the Police
2. Medical reports, if any, furnished by the Police
3. Care and Protection Report of the Police
4. Counselling report/s
5. Social Investigation Report
6. Request for seeking Support Person made by the child or the family
7. Report(s) by Support Person(s)

5.2.4. What steps can the CWC take to address delays or refusal on the part of the police or SJPU to submit the reports?

The CWC could write to the senior most officer-in-charge of law and order, crime and training of police personnel in the jurisdiction, stating that it has not been receiving information about cases under the POCSO Act from the police in a timely manner. The CWC could also consider intimating the State Commission for Protection of Child Rights (SCPCR) about this lapse, as they have been entrusted with the responsibility of

monitoring the implementation of the POCSO Act.⁹

It is important to note that the failure on the part of the police to inform the CWC about cases under POCSO Act will not prevent the CWC from taking *suo motu* cognizance of the matter under Rule 27(3) of the JJ Rules, 2007, if the CWC has reason to believe that the child is likely to be a child in need of care and protection under Section 2(d) of the JJ Act.

5.3. Production of child victims before the CWC

5.3.1. Should the police produce all child victims of sexual offences before the CWC?

No, the POCSO Act and Rules do not require the production of all child victims before the CWC. According to Rule 4(3) of the POCSO Rules, the SJPU/police need to produce the child victim before the CWC within 24 hours only if:

- The child is living in the same house or shared household with the person who allegedly committed or attempted to commit a sexual offence against him/her.
- The child is living in the same house or shared household with the person who is likely to commit a sexual offence against him/her.
- The child is staying in a child care institution and does not have any parental support.
- The child is without a home and parental support.

It may be noted that even under the provision of the JJ Act in Section 32(1) “[a]ny child in need of care and protection *may* be produced before the Committee by one of the following persons”. This means that even all CNCs under the JJ Act, need not be produced before the CWCs.

Please also refer to Section 5.2.2. above.

5.3.2. Can the production of a child victim by the SJPU or the police before the CWC be exempted under any ground?

In accordance with Rule 27(2) of the JJ Model Rules, the production of a child below two years who is medically unfit before the CWC can be dispensed with till such time as the child is fit to be produced. In the interim, a written report along with photograph of the child can be submitted to the CWC by the SJPU or the police. Upon regaining health, the child must be produced before the CWC along with a medical certificate to that effect.

Further, Rule 25(c) of the JJ Model Rules requires the CWCs to be proactive and reach out to children who are not produced before them. For instance, a 10 year-old child who

⁹ Section 44(1), POCSO Act.

has been brutally raped and has undergone surgery will not be in a position to physically appear before the CWC or to even be brought to the CWC. The Rules encourage the CWC to reach out to such children, rather than requiring them to approach or be produced before the CWC.

The CWC should thus refrain from insisting upon the production of a child below two years who may be in need of urgent medical care before them in person. The intention behind this provision is to minimize discomfort and ensure the child's well-being and safety.

Section 47 of the JJ Act authorizes the CWC to dispense with the attendance of the child during inquiry, if it is satisfied that the presence of the child is not essential. This provision must also be borne in mind while dealing with all child victims of sexual abuse if their production is likely to aggravate trauma or hinder healing.

5.3.3. Can the CWC require all child victims to be produced before it for the purpose of counselling?

As stated in Answers 5.2.2 & 5.3.1, the POCSO Rules limit the situations in which a child victim under the POCSO Act must be produced before the CWC. Children other than those who fall under the specified circumstances referred to in Rule 4(3), POCSO Rules, cannot be compelled to appear before the CWC. Furthermore, the CWC is a quasi-judicial authority and *is not meant to provide counselling services*. The CWC's function is to assess the needs of child victim of sexual offences and refer the child for need based services

The CWC should maintain a database of government facilities and credible non-governmental organisations that offer counselling to children so that a reference can be made to them if required. This database should be shared with the police and the SJPU as they are under an obligation under Rule 4(2)(e) of the POCSO Rules to inform the child and her/his family about the availability of counselling services. Children produced before the CWC can be informed about the availability of counselling services directly and those who are not produced before the CWC could be informed about through the police. In any case, no child can be compelled to appear before the CWC solely for the purpose of ensuring counselling. Instead, information about the availability of counselling services and that of a Support Person should be conveyed to the child/family/guardian directly or through the SJPU or police. Production of all child victims before the CWC only for the purpose of counselling will unnecessarily put the child victim and the family at discomfort and will inevitably result in secondary victimization.

5.4. Powers of the CWC in cases of child sexual abuse

5.4.1. What are the powers of a CWC?

Section 29(5), JJ Act states:

The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class.

The above provision does not specify the type of Magistrate that the CWC shall function as. Section 3(4) of the Code of Criminal Procedure, 1973 distinguishes between Judicial and Executive Magistrates and states that:

- (4) Where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters-
- (a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or
 - (b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.

In relation to the nature of functions discharged by the CWC under Section 31¹⁰ of the JJ Act, it is clear that the CWC functions as a quasi-judicial authority that is vested with the power of a Judicial Magistrate, relating to conducting an inquiry solely for the need to assess care and protection needs¹¹ and not for other purposes such as conducting a trial or imposing punishment.

5.4.2. Can the CWC order medical examination where consent is withheld by or on behalf of the child victim?

Medical examination is a key step for gathering evidence in the investigative process and is distinct from medical 'treatment'. The objective of 'medical treatment' is therapeutic, while that of 'medical examination' is forensic. Please refer to Section 3.1, Chapter 3 - Medical examination and Emergency Medical Care: Procedures and

10 31. Powers of Committee.- (1) The Committee shall have the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights.

11 Section 2(g) of the Code of Criminal Procedure, 1973 defines an 'inquiry' as "every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;"

Responsibilities. The CWC may often be requested by the SJPU or police to order the child to undergo medical examination when consent is withheld by or on behalf of the child.

The POCSO Act and CrPC both require that the consent of the victim be taken before medical examination is carried out. Rule 45 of the JJ Model Rules provides that children produced before the CWC need to be sent for medical examination. However, prior to any medical examination, consent of the child needs to be sought. If the child and the child's family are reluctant to undergo medical examination, the CWC can explain to them the purpose of the examination, its implication on the investigation and trial, availability of a Support Person, and the child-friendly courtroom procedures prescribed under the law. The CWC and the Support Person can play a vital role in alleviating the fears that the child and the family may have about the legal process and judicial system. However, the CWC cannot compel the child to undergo a medical examination against his or her/his will under the garb of protecting the best interests of the child. To do so, would amount to a breach of the child's right to physical integrity and bodily autonomy, that could instead hinder the emotional healing of the child, and one that is to be protected since it is an obligation of the CWC to ensure 'care'.

The Guidelines and Protocols on Medico Legal Care for Victims/Victims of Sexual Violence issued by the Ministry of Health and Family Welfare¹² also specifically states that “[c]onsent should be taken for the following purposes: examination, sample collection for clinical and forensic examination, treatment.”¹³ It further states that consent has to be taken from parents in case the child is below 12 years of age. Where the child victim is above 12 years of age, her/ his informed consent will have to be taken.¹⁴

5.4.3. Can the CWC order medical treatment where the child and the child's family withhold consent?

No. The CWC cannot compel a child to undergo any medical treatment against his or her/his will or that of the parents or guardian when the child is below 12 years of age. Rule 45(n) of the JJ Model Rules specifies that no surgical treatment can be done without the prior consent of the parents or guardians and the only exception is that if in the opinion of the doctor any delay could endanger the life of the child. In such circumstances, the written consent of the Superintendent of the Home where the child is residing would suffice. The CWC also needs to bear in mind the fundamental principle of family responsibility which requires that “all the decision making for the child should involve the family of origin unless it is not in the best interest of the child

12 Ministry of Health and Family Welfare, “Guidelines and Protocols – Medico-Legal Care for Victims/ Victims of Sexual Violence”, 19 March 2014.

13 *ibid* at pp. 24

14 Section 90, IPC.

to do so.”¹⁵

The Supreme Court has also clearly emphasized the obligation on doctors to obtain consent from their patients before administering treatment. In the case of *Samira Kohli v. Dr. Prabha Manchanda*¹⁶, it held the following:

- i. A doctor has to seek and secure the consent of the patient before commencing a ‘treatment’ (the term ‘treatment’ includes surgery also). The consent so obtained should be real and valid, which means that: the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what he is consenting to.
- ii. The ‘adequate information’ to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the Doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.
- iii. Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure.

In the light of the above, the significance of consent cannot be overemphasized. In the exceptional circumstance that the child’s life is in danger for which the child is in need of urgent medical intervention, and the family is not available or is unwilling to consent for treatment, the CWC can indeed order medical treatment.¹⁷

¹⁵ Rule 3, Principle V (b) enunciated under the Juvenile Justice (Care and Protection of Children) Rules 2007
¹⁶ (2008) 2 SCC 1.

¹⁷ Rule 45(n), JJ Model Rules, 2007.

Box No. 14: Consent for Medical Treatment and Medical Examination

- Informed consent must precede any kind of medical examination, sample collection for forensic and clinical examination.
- Informed consent of the child has to be taken if the child is above 12 years of age.
- *Informed consent of parents/guardians needs to be taken if the child is below 12 years of age.*
- Informed consent of parents is required for initiating any kind of treatment or operation.

5.4.4. Can the CWC pass an order directing the termination of pregnancy against the wishes of a pregnant child victim of sexual offence, and/or the child's parent/guardian?

Section 3(4)(a) of the Medical Termination of Pregnancy Act, 1971 authorizes only the parents/guardians to consent for the termination of pregnancy of a minor. In such cases even if the child victim is above 12 years, the consent of parents/guardians is required. Where the parents withhold consent, the CWC cannot authorize a termination. In such a case, it may not even have the jurisdiction to entertain the matter, as the child may not necessarily be in need of care and protection. If, however, no parent or guardian is present, the CWC needs to ascertain the wishes of the child and enable a child who is mature and capable of forming a decision to arrive at one. At a minimum, the CWC must ensure that professional counselling services are made available to the child to enable her to make a decision.

In fact, forcible termination of pregnancy will constitute an offence under Section 313 of the IPC, and will render the doctors liable for prosecution. Please also refer to Section 3.4. in Chapter 3.

5.4.5. Does the CWC have a role to play when the wishes of the child victim in respect of abortion is at variance with that of her family?

In cases where the child victim who is in need of care and protection has a divergent view from that of the family on the issue of termination of the pregnancy, respecting the fundamental principle of child participation, the CWC should not only allow but enable the child to express her opinion, seeking reasons for the same. The CWC could also enable counselling for a pregnant female victim to arrive at a decision on her pregnancy and whether or not she wants to keep the baby. Such counselling might help resolve a conflict of opinion about termination between such a child and her parents. Where the conflict persists, the CWC should not only take into account the findings in the Social Investigation Report, Individual Care Plan, opinion of the counsellor and other experts, but also independently ascertain the views of the child and the family.

5.4.6. Can the CWC order the DNA test of an unborn child?

In cases under the POCSO Act involving a pregnant child, the CWC may receive a request from the police to issue an order to conduct a DNA test so as to aid the investigation of the case. Such requests should not be entertained by the CWC as they lack jurisdiction in this context. The police should be directed to approach the jurisdictional Special Court with such a request.

5.4.7. Can the CWC record the statement of a child victim under Section 164 CrPC?

No, they cannot. The JJ Act, confers the CWC with powers available to Metropolitan Magistrate/Judicial Magistrate of the First Class.

Section 29(5) of the JJ Act, empowers the CWC to function as a *Bench* of Magistrates. It states:

The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the CrPC on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class.

This power is held as a bench collectively and is not available to the Chairperson or to individual members.¹⁸

Under the JJ Act, the CWC has “the final authority to dispose of cases for the care, protection, treatment, development and rehabilitation of the children as well as to provide for their basic needs and protection of human rights.”¹⁹ It has the “power to deal exclusively with *all proceedings under this Act relating to children in need of care and protection*”.²⁰ If the child is found to be in need of care and protection of the State and/or is without family or ostensible support, the CWC can pass an order directing the child to be sent to a Children’s Home or suitable orders for rehabilitation²¹. The powers vested upon the CWC should be exercised in order to enable it to inquire into whether a child is in need of care and protection and the measures necessary to ensure rehabilitation.

Section 29(5) has to be interpreted in this context and cannot be stretched to allow the CWCs to go beyond their mandate and record a statement under Section 164, CrPC. This view derives its strength from the judgment of the Supreme Court in *State of Uttar Pradesh v. Singhara Singh*²², in which it considered the admissibility of a confession recorded by a Magistrate not empowered under Section 164, CrPC and held that:

18 Report on “Child Welfare Committees in India” by the National Commission for Protection of Child Rights, March 2013

19 Section 31(1), JJ Act, 2000.

20 Section 31(2), *ibid.*

21 Section 33(4), *ibid.*

22 AIR 1963 SC 358.

When a statute confers a power on certain judicial officers, that power can obviously be exercised only by those officers. No other officer can exercise that power, for it has not been given to him.

Since the power to record a statement under Sections 164(1) and 164(5A), CrPC can only be exercised by those named in the provision i.e., “Metropolitan Magistrate or Judicial Magistrate”, it follows that the CWC that has been “conferred” with the powers of a Metropolitan Magistrate or Judicial Magistrate cannot record the statement. Upon conferral of powers, the CWC cannot be equated or conflated with Magistrates for all purposes. The law envisages only a trained Metropolitan or Judicial Magistrate to record a statement under Section 164, CrPC.

Further, in the recent case of *State of Karnataka v. Shivanna*²³, the Supreme Court has given the following directions to the police in the context of statements of victims of rape under Section 164, CrPC:

- i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to *any Metropolitan/preferably Judicial Magistrate* for the purpose of recording her statement under Section 164 Cr.P.C. A copy of the statement under Section 164 Cr.P.C. should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr.P.C. should not be disclosed to any person till the charge sheet/report under Section 173 Cr.P.C. is filed.
- (ii) The Investigating Officer shall as far as possible take the victim to the *nearest Lady Metropolitan/preferably Lady Judicial Magistrate*.²⁴
(Emphasis added)

Statements recorded by the CWC are for the purpose of inquiry into the need for care and protection under Section 33, JJ Act. Unlike the statement recorded by a Judicial Magistrate under Section 164(5), CrPC, the statement recorded by the CWC cannot be used for corroboration or contradiction. The objectivity of the CWC may also be questioned by the Court as the CWC is required to function based on the best interest of the child.²⁵

Besides, it is in the best interest of the child that secondary victimization is avoided, and so the CWCs should take all precautions to prevent this as far as is reasonably possible within the scope of their functions. In fact by preventing the child victim making statements to multiple authorities and ensuring that the statement is recorded

23 <http://indiankanoon.org/doc/2622362/>

24 Id. at para 9.

25 “Study on recording of Victim Witness Statement under Section 164 CrPC”, <http://www.impactpartner.org.in/images/resources/Human-Trafficking.pdf>

by the Judicial Magistrate – the authority that is vested with this particular power, as prescribed by law, the CWCs will be not only protecting the rights of the said child, but also preventing the possible contamination of evidence that may occur, due to the lack of adherence to procedures under the CrPC which in itself could impede successful prosecution. Multiple statements made by the victim can be used by the defence to highlight inconsistencies and contradictions and should therefore be avoided.

In conclusion, based on the ruling of the Supreme Court in *State of Uttar Pradesh v. Singhara Singh*²⁶, a statement under Section 164, CrPC can only be recorded by a Metropolitan Magistrate or a Judicial Magistrate. Unless the law expressly authorizes the CWC to record statements under Section 164, no such power can be inferred or interpreted as flowing from Section 29(5). As far as practice goes, no court has thus far accepted statements recorded by the CWC as a statement recorded under Section 164, CrPC.

5.5. Determination of placement

5.5.1. Is there a time frame within which the CWC must decide the placement of a child produced before it under Rule 4(3), POCSO Rules?

Yes, Rule 4(4) of the POCSO Rules, 2012 requires the CWC to determine the placement of a child produced before it under Rule 4(3) of the POCSO Rules within three days. An inquiry must be conducted expeditiously without any unnecessary delay.²⁷

In cases where a child who has been temporarily placed in a Shelter Home and is released in the interim custody of his/her family, this time period of 3 days may not be strictly applicable. A decision to adhere to the time prescribed must not be taken in isolation and in a hasty manner which may be at the cost of a just and fair proceeding.²⁸

5.5.2. Do the POCSO Rules, 2012, authorize the CWC to decide on custody of a child victim between disputing parents?

No. The CWC does not have authority to decide on child custody, which is outside the scope of the JJ Act and the POCSO Act and comes within the purview of family law. Civil Courts and Family Courts have the sole jurisdiction to deal with custody and guardianship matters and the CWCs cannot determine the custody or guardianship of children produced before them. Rule 4(4) of the POCSO Rules allows the CWC to exercise its powers under the JJ Act for the limited purpose of determining whether a child found in circumstances referred to in Rule 4(3) should be temporarily taken out

²⁶ *Supra* n. 14.

²⁷ NCPCR Guidelines, p. 41.

²⁸ *ibid.* p. 40

from the custody of the family or shared household and placed in a Children's Home or Shelter Home, pending a decision on long term placement for care and protection, not amounting to according the right of custody by one parent over the other. In order for the CWC to exercise this authority, the circumstances specified in Rule 4(3) must be established. For instance, where the alleged offender is the father, after an assessment of relevant factors the CWC could decide that the child should be removed from the family home and placed in a Children's Home for her/his safety.

5.5.3. What are the steps that the CWC must follow while determining whether a child should be taken out from the custody of her/his family or shared household?

As per the provisions of Rule 5(4) of the POCSO Rules and other applicable law, the CWC must take the following steps while determining whether a child should be removed from the custody of her/his family for the purpose of care and protection:

- a. Inform the child and her/his parent/s, guardian, or other affected persons, that an inquiry to enable such a determination is underway.
- b. Enable the child to express his/her views, and take into account the preferences and opinions of the child on the matter, while making a determination as to what is in the best interests of the child.
- c. Ensure that the child is not inconvenienced or exposed to injury during the inquiry.
- d. Take into account the following factors:
 - i. The capacity of the parent/s/person whom the child trusts and has confidence in, to provide for the immediate care, protection and, medical needs and counselling of the child;
 - ii. The child's need to remain in the care of her/his family and maintain a connection with them;
 - iii. The gravity of sexual offence committed on the child
 - iv. The age, maturity level, gender, and social and economic background of the child;
 - v. The presence of a disability and/or chronic illness, if any;
 - vi. History of family violence, if any;
 - vii. Any other relevant factor that has a bearing on the best interests of the child.
- e. Ensure that the determination is completed within three days.

While exercising this power, the CWC should bear in mind the Fundamental Principles outlined in Rule 3 of the JJ Model Rules, particularly the principles of best interest, safety, and last resort. The Guidelines issued by the National Commission for Protection

of Child Rights (NCPCR)²⁹ also caution that the power to remove the child from his or her/his habitual place of residence should be used in “rarest of rare cases”.

**Box No. 15: Suggested Proforma for Recording Decisions made by the
CWC under Rule 4(4), POCSO Rules**

Child Welfare Committee, District _____

Case No:-

Year of Registration of the case:

1. Name of child:
2. Age
3. Details of offence:
4. Date of production:
5. Date of decision:
6. Details of the Social Investigation Report (to be attached):
7. Details of Individual Care Plan (to be attached)
8. Details of Mental Health Care plan (to be attached)
9. Name and Contact Details of Support Person:
10. Factors considered while determining the temporary custody or placement of the child:
11. Decision on placement of the child:
12. Duration of custody/institutionalization:
13. Financial support (if any) ordered:
14. Any other orders:
15. Review of placement order:

Copies of the following reports should be appended to the file:

1. FIR, if furnished by the Police
2. Medical reports if any furnished by the Police
3. Care and Protection Report of the Police
4. Counselling reports
5. Social Investigation Report
6. Application, if any, for Support Person made by the child or the family
7. Report by Support Person
8. Any other important document in relation to the care and protection of the child.

²⁹ NCPCR, Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders – Child Welfare Committees/Support Persons and Health Professionals, available at <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=406&lid=843> According to the NCPCR, in cases of following circumstances the child victim could be removed from her or his home: a. “there is strong evidence that the child is totally unprotected in its home from being subjected to further assault or threats of such assault from the alleged perpetrator; and b. it is not possible for the alleged perpetrator to be prevented from accessing the child in the said home.”

5.5.4. Can a child be removed from the custody of the family based on the fear that she/he may turn hostile in court due to pressure from the family or others?

The child's best interest would be the primary consideration for removing her/him from the custody of the family. A child cannot be removed from custody of the family if the accused is a neighbour or lives in the same locality, unless the parents are declared unfit or incapacitated by the CWC to care for her. The mere fact that the investigation may be hampered is not sufficient ground for removal of a child from the custody of family and placing her/him in institutional care.

A balance will have to be struck between the objectives of ensuring 'care' with that of ensuring 'protection'. Factors stated in Rule 4(5) of the POCSO Rules will also have to be considered by the CWC before passing orders. For instance, the child's *need* to remain with her/his parents may override the concern that he/she may be forced to alter his/her statement in court. The child's preference will also have to be considered. The principle of last resort which states that "Institutionalization of a child...shall be a step of the last resort after reasonable inquiry and that too for the minimum possible duration"³⁰ should also be applied.

Even if the child is institutionalized, but does not receive effective counselling, there is every possibility that the child could turn hostile in court. A Support Person could help them in accessing counselling services and navigating through the legal maze. The CWC could also assign a Support Person and could also instruct him or her to ensure that the accused person's bail is opposed if he lives in close proximity to the victim and the possibility of threats or intimidation by the accused is high. If bail is granted, care should be taken to ensure that a no-contact clause, i.e., a clause prohibiting the accused from approaching or communicating with the victim or her/his family is included.

In order to secure the statements of the victims of sexual abuse, in the case of *State of Karnataka v. Shivanna*³¹, the Supreme Court has directed the police to ensure that a statement is recorded under Section 164, CrPC by the nearest lady Metropolitan/ preferably lady Judicial Magistrate. The CWC could confirm if this has been done and if not, the police should be directed to facilitate the recording of the statement immediately.

5.5.5. With whom can a child produced before the CWC under Rule 4(3) be placed?

The CWC must consider all options of permitting the child victim to continue staying with the immediate family or to place her/him with relatives before deciding

³⁰ Rule 3(2), Principle XII, JJ Model Rules, 2007.

³¹ <http://indiankanoon.org/doc/2622362/>

on institutionalization of the child. Though Rule 4(4) of the POCSO Rules suggests that the CWC can either allow the child to remain in the custody of the family or shared household or place the child in a Children's Home or Shelter Home, the CWC must adhere to and draw from the JJ Act, 2000 while making this determination. The principle of institutionalization being the last resort must be borne in mind and alternate care arrangements should be explored. In this respect, the NCPCR Guidelines are instructive, as they specify the order of preference for placement where many relatives are involved or available. It states that:

Where parents are both accused under POCSO or dead and untraceable and there are competing Claimant Relatives, the order of preference for grant of custody shall be as follows:

- (a) Mother of non-accused parent;
- (b) Father of non-accused parent;
- (c) Maternal grandmother;
- (d) Paternal grandmother;
- (e) Adult female sibling;
- (f) Maternal aunt;
- (g) Paternal aunt;
- (h) Maternal grandfather;
- (i) Paternal grandfather;
- (j) Adult male sibling;
- (k) Other Relative not listed above.³²

Foster care options could also be explored as provided for under the JJ Act and JJ Model Rules ³³. If the child has any relatives who could be certified as 'fit persons', the child could be placed with them instead of placement in a child care institution. If the accused parent is jailed, arrangements can be made to send the child back to her/his residence with the rest of the family. The CWC should also explore fit institutions that allow family members to reside with the child. This would help ensure that a traumatized child is not separated from the other non-offending parent or removed from familiar home surroundings where she/he is comfortable.

5.5.6. Where a child has been removed from the custody of the family or shared household, can the family members be prevented from meeting the child?

A child's desire and need to be with the non-offending parent/s/guardian/s/family is natural and is crucial for recovery in the period following abuse. JJ Model Rule 58(1) provides that the parents/guardians/relatives should be allowed to meet the child once

³² NCPCR Guidelines, p. 36.

³³ Section 42, JJ Act 2000 and Rule 34, JJ Model Rules 2007.

a month or more frequently at the discretion of the Superintendent or the officer-in-charge of such institution. The NCPCR Guidelines state that the child should “have widest possible regular access to non-accused parents, sibling and relatives”.³⁴

However, if the parents/guardians/relatives are allegedly responsible for the assault, or, knowing about the assault fail to safeguard the interests of the child, then implications of allowing them to have access to the child should be carefully considered. Such contact could be allowed in the presence of a trained counsellor or Probation Officer or Support Person. The child should also be offered psychological support to deal with separation from the family.

The CWC must also document all requests made by parents or relatives to meet the child and record reasons for either allowing or refusing access, or permitting access in the presence of a counsellor or Probation Officer or Support Person.

In *Delhi Commission for Women v. Delhi Police*³⁵, the Delhi High Court issued guidelines to enable authorities to deal with child victims of sexual abuse. Regarding access to child victims placed in foster care, it indicated that such access should only be in the presence of a Support Person and that the staff of the Home should ensure that “the meeting is not used as an opportunity for the family member to pressurize or influence the victim to change her statement.”³⁶

5.5.7. What steps must be taken by the CWC to provide support, care and protection to the child victim who has been removed from parental custody or from her/his usual place of residence?

Upon institutionalization, care must be taken to ensure that the child is not inconvenienced or traumatized further. The NCPCR has laid out the following detailed guidelines in this regard.³⁷

- a. The parents/guardians shall be informed of the following
 - i. given weekly reports as to the physical and emotional state and developmental and educational progress of the child;
 - ii. informed immediately in case the child falls ill or suffers any injury; and
 - iii. given access to the medical records and doctors engaged by new custodians of the child in case of any injury or health issues in the child. The parents/guardians shall be also informed about the living conditions, food and sleeping arrangements made for the child and the experience of the care givers who are

³⁴ NCPCR Guidelines, p. 39.

³⁵ W.P (CRL) 696/2008 order dated 23.4.2009 passed by the Delhi High Court at http://www.ncw.nic.in/PDFFILES/Delhi_High_Court_judgement_on_guidelines_for_dealing_rape_cases_by_various_authorities.pdf

³⁶ *ibid.*

³⁷ NCPCR Guidelines, p. 39.

taking care of the child.

- b. The parents/guardians will have the right to seek alternative medical advice in case of any surgery, medical procedure or any medication has been prescribed for the child survivor
- c. If the child survivor is breast fed, the mother shall be allowed to breast feed the child at all times if the mother prefers to do it.
- d. If the child survivor is below 10 years the usual routine of the child such as giving bath, making hair, dressing up the child and putting to sleep shall be done [by] the non-accused parent/guardian as the presence of a stranger would cause more stress to the child survivor
- e. In case the child survivor is below 10 years of age, the new care givers will have to collect information about feeding preferences, toys, etc., so that the child survivor is not uneasy and adapts well to the new surrounding
- f. As far as possible the child survivor shall be placed within close distance of his or her home.
- g. No disruption should be caused to the schooling of the child and access to doctors and such other care or services which the child was accustomed to.
- h. Mother/relative or person (non-accused) whom the child trusts shall be allowed to accompany and live with the child wherever it is placed
- i. Child survivor shall have widest possible regular access to non-accused parents, sibling and relatives
- j. Steps need to be taken to foster child survivors bonds with family/guardians
- k. Care must be taken to sensitively handle emotions and/or negative feelings that the child expresses during the visit of the parents/guardians, as the child is bound to express its dismay at being kept away from the family
- l. In case the mother is alleged as co-accused or accomplice and is not the main perpetrator in such cases care needs to be taken that the child survivor and the mother get access to each other as much as is permitted to women prison inmates.
- m. CWC needs to seek the assistance of a child psychiatrist/specialist to minimise the confusion and emotional trauma of the child survivor
- n. The religion and culture of the child shall be fostered and nurtured and child shall be enabled to be with the family on festival days.

Adherence to these guidelines proposed by NCPCR may help minimize the child's discomfort in the new environment and prevent alienation from the family or its culture. It will also help ensure that the family ties are preserved.

The CWC must also monitor the progress of the institutionalized child at regular intervals. Rule 28(5), JJ Model Rules requires a quarterly report on the progress of the child to be filed if the child is institutionalized. Further, Rule 56 (6)(b) mentions that

quarterly progress of the child shall be put in the case file by the officer-in-charge or the Child Welfare Officer and submitted to the District Child Protection Unit (DCPU) and the CWC. In *Delhi Commission for Women v. Delhi Police*³⁸, the Delhi High Court stated that the CWC should monitor the condition of the child closely and ensure that rehabilitation facilities, educational and vocational training in cases of prolonged stay, and necessary medical and psychological aid are provided.

5.5.8. Can a CWC pass an order restraining the accused from meeting the child?

The CWC can restrain the accused from meeting a child when the child is in the custody of the State. However, it cannot pass such an order when the child is not institutionalized. For instance, if the accused is a school teacher and the child is living at home, the CWC cannot pass an order restraining the teacher from meeting the child as it has not been empowered to do so. Such an order can only be passed by the Special Court. If, however, it is feared that the teacher may threaten or pressurize the family, the CWC should alert the police and directly or through the Support Person record and submit its concerns in writing to keep the Special Public Prosecutor and the Special Court informed.

5.6. Restoration of a child victim/victim

5.6.1. What factors must the CWC consider before restoring the child to the family or shared household?

The CWC should revisit their order of removal of a child from the family based on either a request from the family or on its own. Though the law is silent on the time frame, it is recommended that an order under Rule 4(4) of the POCSO Rules, is reviewed on a quarterly basis. This should be done bearing in mind the intention of the JJ Act that a child must preferably be living in family based care and restored to the family/adopted parents/foster parents/guardian/fit person/fit institution.³⁹

Rule 65(1) of the JJ Rules emphasizes that an order of restoration should be based on a “fair hearing” of the child and his or her/his parents, as well as on the reports of the Child Welfare Officers or NGOs appointed by the CWC to conduct a home study/Social Investigation Report. In cases of child victims of sexual abuse, the decision for restoration should be considered based on an up to date home inquiry report,⁴⁰ to ascertain whether there has been any material change in the circumstances that led to the removal of the child from the family home and whether current conditions at home are conducive for restoration.

38 W.P (CRL) 696/2008. Order dated 23.4.2009 passed by the Delhi High Court.

39 Section 39(3), JJ Act.

40 Section 33 of the Juvenile Justice (Care and Protection of Children) Act 2000

In *Delhi Commission for Women v. Delhi Police*⁴¹, the Delhi High Court issued guidelines on similar lines on the point of restoration of custody of a child to the family. The Court required CWCs to “conduct an inquiry to assess the suitability of the victim being restored to the family” and to restore custody “only after consultation with stakeholders”.

Based on the circumstances mentioned in a current home inquiry report, the factors that would affect the safety of the child victim should be taken into consideration. Keeping in mind the wishes of the child, the opinion and capacity of the parents/guardians, and the best interest of the child, the CWC could decide on restoration or continued placement in the Children’s Home. The CWC must record its decision in writing and substantiate it with reasons.

5.6.2. Is the CWC required to follow up after a child is restored to her/his family?

Yes, the CWC should follow-up on the situation of the child post restoration under Rule 65 of the JJ Rules. The individual care plan prepared by the Child Welfare Officer (CWO) or NGO assigned to assist in restoration⁴² should be updated based on the review and presented to the CWC. The CWC can take the assistance of the DCPU or an NGO for following up on children if a CWO is not available and ensure that quarterly follow-up reports are submitted to the CWC with a copy to the officer-in-charge of the institution for a period of two years from the date of restoration.⁴³ The report should indicate the situation of the child post restoration and the needs of the child that must be met by the State to reduce further vulnerability.⁴⁴ These reports must be filed and placed before the Management Committee of the institution and also be shared with the DCPU.⁴⁵

5.7. Extending Care and Protection

5.7.1. What support can the CWC extend to child victims of sexual abuse and their families?

The CWC can ensure that state provides a wide array of supportive services to child victims and their families. This could be in the form of sponsorship (financial) support and residential care in a Children’s Home. Sponsorship⁴⁶ can enable the family to

41 W.P (CRL) 696/2008. Order dated 23.4.2009 passed by the Delhi High Court.

42 Rule 65(8), JJ Model Rules, 2007.

43 Rule 65(9), JJ Model Rules, 2007.

44 Rule 65(10), JJ Model Rules, 2007.

45 Rule 65 (11 & 12), JJ Model Rules, 2007.

46 Under JJ Model Rule 37 CWC can provide sponsorship for a child victim in order to take care of the child’s health, education, nutrition and other developmental needs, this would ease the family burden and also help the child victim to remain within the confines of the family environment.

afford counselling, medical treatment, or other rehabilitative and therapeutic services. Institutionalization of the child victim should be offered as a last option by the CWC to provide care and protection, as efforts should be aimed at keeping the child victim within the family environment. Where there is no family or guardian, adoption and foster care with a related or non-related family can also be considered.

CWCs should also maintain a list of service providers, hospitals, doctors, and crisis intervention centres, lawyers, and NGOs, that can be shared with the child and the family to enable them access such services if required. The CWC can also appoint a Support Person under the POCSO Act to help the child during the pre-trial and trial process. The CWC should also maintain a resource directory of governmental schemes and services to inform families and enable them access those relevant to their situation.

Where the alleged perpetrator is a family member, other members and siblings of the child may also be deeply affected and in such cases, it is also important to extend support to them to safeguard their rights. The CWC could refer the family members to organisations and experts who can offer counselling and therapeutic services to the family and to organizations who could offer facilities that allow the child to live with the family.

5.7.2. Can the CWC offer any financial support to a child victim to meet medical expenses?

As mentioned above, the CWC can order for sponsorship support to be provided to enable the family of the child victim meet medical expenses, as well as mental health, nutritional, educational and other needs of the child.⁴⁷ Each State Government is required to set up a Juvenile Justice Fund⁴⁸ to enable such support. In addition, the CWC with support from the DCPU can enable support from the corporate sector and other relevant Government agencies.

5.7.3. What steps can CWC take to provide address mental health concerns of the child victim/victim?

Studies have shown that child sexual abuse has a devastating impact on the mental health of the child. The child victim may show the following symptoms:

“In the short-term (upto 2 years) victims may exhibit regressive behaviours (eg thumb sucking, bed wetting in younger children) sleep disturbances, eating problems, behaviour and /or performance problems at school and unwillingness to participate in school or social activities. Long term effects may be wide ranging to include anxiety related, self-destructive behaviour such as alcoholism or drug abuse, anxiety attacks and insomnia. Victims may show fear and anxiety in response to people who share

47 Section 43, JJ Act

48 Section 61, JJ Act.

characteristics of the abuser”⁴⁹

Where necessary, the CWCs should ensure that the child receives counselling as also therapeutic/psychiatric treatment at government hospitals or recognised private hospitals. CWCs should also maintain a resource directory of government facilities and credible non-governmental organisations that offer counselling to children so that a reference can be made to them when required. This should be shared with the police and the SJPU as they are under an obligation to inform the child and her/his family about the availability of counselling services, even if they are not produced before the CWCs.

Where child victim residing in an institution is physically, sexually or emotionally abused by an individual responsible for their care and protection, the CWC should provide access to counselling⁵⁰ and also transfer the child to another institution or Place of Safety, or place the child in the custody of a “fit person”, who is an individual with the necessary credentials and found fit and willing by the CWC, to temporarily provide care and protection to the child.

5.7.4. What kind of mental health services and facilities should be made available at Children’s Home?

A child having faced sexual abuse would normally experience pain, trauma, shame, humiliation, low self-worth etc. Such child would require medical attention and other services to overcome anxiety, grief, self-destructive behavior, etc, while being supported to arrive at closure and healing. The Children’s Home has to make available milieu based interventions and individual therapy and maintain the mental health record of every child.⁵¹ The Children’s Home should therefore have the services of a trained counsellor and should have a tie up with a child guidance centre, psychiatric department of a government hospital or NGO that offer such specialised services.

A mental health care plan for every child should be developed by the Child Welfare Officer/Probation Officer in consultation with the counselor or the psychiatrist and this should be integrated with the individual care plan of the child. The recommendations of the mental health experts should be maintained in every case file. All the care plans should be produced before the CWC every quarter and before the Management Committee of the institution, every month. No medication should be provided to the child without proper psychological assessment and evaluation by trained mental health experts.⁵²

49 <http://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/effects-of-csa-on-the-victim>

50 Rule 60 (iv), JJ Model Rules

51 Rule 46 JJ Model Rules

52 Rule 47 (1) to (7) JJ Model Rules

5.7.5. In cases where a child in conflict with law is involved in a POCSO case, how can the CWC ensure that she or he gets the required care, protection and rehabilitation?

In such cases, the CWC can work with the Juvenile Justice Board to ensure that the needs of the child in conflict with the law are taken care of. Rule 25(o) of the JJ Model Rules provides that one of the powers and functions of the CWC is to liaise with the Juvenile Justice Board (JJB) in respect of cases needing care and protection. However, the CWC does not have to directly assume responsibility as the JJB is required to ensure the care and protection of children in conflict with the law.

5.8. Appointment of Support Person

5.8.1. What is meant by a 'Support Person'?

A person who assists a child during the investigation and trial of sexual offences is known as a 'Support Person'. This person could be appointed by the CWC or by the child and her/his parents/guardian/person and should be a person whom the child trusts. The role of a Support Person can be discharged by an organisation or individual working in the field of child rights or child protection, or an official of a Children's Home or Shelter Home having custody of the child, or a person employed by the DCPU.

5.8.2. When can the CWC appoint a Support Person for a child victim?

A CWC can appoint a Support Person for a child, if it is of the view that a child victim needs assistance during the investigation and trial process. The child does not have to be produced before the CWC only for this purpose. The decision to appoint a Support Person can be taken:

- a. When the CWC is considering the report filed by the SJPU/police at the time of referral, or
- b. When the CWC is assessing whether a child should be removed from the custody of her/his family or shared household.

The CWC must try and ensure that the services of the Support Person is made available to the child victim and her/his family on a continuous and timely basis, right from the time of registration of the case till the conclusion of trial.. The CWC could request the DCPU to provide the services of a Support Person and also put together a panel of credible organisations and individuals that could effectively perform this role.

The CWC should ensure that information about the Support Person appointed for a child, is sent to the SJPU/Police, who in turn is obliged to provide this information to the Court. It is recommended that this information is provided in writing.

Box No. 16: Suggested format for intimation by the CWC about the appointment and terms of engagement of a Support Person

To,
Special Police Juvenile Unit
.....Police Station

Date

Ref: Appointment of Support Person

Dear Smt/ Shri,

This is to certify that the CWC, as per the requirement under POCSO Rule 4 (7), has appointed Ms/Mr. to be the Support Person for the childin the case bearing number before the Hon'ble Court.

Ms/Mr..... will be the point of contact person for matters relating to the coordination of the case and she/he will be responsible for the following with regard to the aforementioned case:

- 1) Informing and updating the child and the family about the proceedings of the case
- 2) Informing the child and the family about detention and bail of the accused, filing of chargesheet etc,
- 3) Informing about the services (medical, psychological, counselling)available
- 4) Informing about the potential outcome of the case
- 5) Informing about the availability of victim compensation scheme
- 6) Conducting a guided tour of the Court premises for the child and the family
- 7) Addressing any concerns the child and the family may have
- 8) Any other work related to the case that may come up

Details of the Support Person

Name:

Address:

Mobile number:

It is hereby informed that you may please intimate the appointment of Ms/Mr..... as the Support Person for the child to the Hon'ble Court..... as mandated under 4(9) of POCSO Rules on or before the next date of hearing. Kindly extend the necessary cooperation to the Support Person in order to enable the discharge of the above duties,

Thanking you,

Chairperson

Members

CC:- Inspector ,

.....Police Station

5.8.3. What are the qualification criteria and experience that the CWC should take into account while appointing a Support Person?

Considering that the Support Person is expected to assist the child and the non-offending members of the family during pre-trial and trial processes, it is essential that she or he also has an understanding of the legal process.

The Model Guidelines recommend that the following persons could be appointed as support persons:

- i) Persons working in the field of child rights/ child protection
- ii) NGO or other organisation working in the field of child rights/ child protection, including Childline and its support organisations
- iii) Officials of a children's home or shelter home
- iv) Persons employed by the DCPU, including:
 - (a) Legal-cum-Probation Officer
 - (b) Social worker
 - (c) Outreach worker
 - (d) Counsellor

The Guidelines for the Use of Professionals and Experts under the POCSO Act issued by the Tamil Nadu government prescribe the following eligibility criteria for Support Persons, Interpreters, Special Educators and Translators:

- (i) Any person not below the age of 21 years
- (ii) Reference letters from three persons who shall endorse the conduct, character and competency of Support Persons (this includes communication skills in the required field etc).
- (iii) Should have clear communication skills. Knowledge of the unique modes of communication for children with disability shall be an added advantage.
- (iv) Should not have been convicted by a court for any criminal offences (This will exempt minor traffic fines etc.)
- (v) Should furnish a self declaration by such person confirming the foregoing eligibility criteria.
- (vi) The services of the support person may be terminated upon request by the child or his parent or guardian or person in whom the child has trust and confidence and the child or the above said person requesting the termination shall not be required to assign any reason for such request.
- (vii) District Child Protection Units should prepare and maintain a list of Support Persons, interpreters, special educators and translators, with names, addresses, qualifications, experience and other contact details. The list shall be made

available to the Child Welfare Committee, Special Juvenile Police Unit, Local Police, Magistrate or Special Court or other authority concerned as and when required. The list has to be reviewed once in every two years.

- The list should have Persons of all genders.
 - o Persons who have special skills in handling children with different disability. Person having health issues that make him/her difficult to perform as support person should not be selected.
 - o Support Person cannot be a person who could be called as an expert to give evidence/ advice to the court.
 - o Support Person shall be nominated with the consent of the child and his parents or guardian or other person in whom the child has trust and confidence.

As per the NCPCR guidelines:

A support person should preferably have a minimum of four years' work experience on issues related to violence against children/women. It is advised that Support Persons comprise of people with the following qualifications:

- Persons with legal or para-legal qualifications;
- Persons who can offer counselling and emotional support;
- The Support Person must comprise of an individual who is conversant in the mother tongue of the child and the family to help them fully participate in the CWC proceedings.
- The DCPU's and CWC's must hold training workshops every year with the Support Persons to upgrade their skills in dealing with victims.⁵³

It is also recommended by the NCPCR that the Support Persons are drawn from the pool of free legal aid lawyers empaneled by the State Legal Services Authority as they will have the requisite legal background. The CWC should maintain a list of persons and organisations who can serve as a Support Person, and even urge the concerned Department to organise an orientation for Support Persons on the applicable law and also on other psycho-social aspects related to dealing with traumatized children, given that mere legal knowledge is not adequate to fulfill the requirements of this very crucial and sensitive role, aimed at enabling both justice and healing of a child victim of sexual abuse.

5.8.4. What Terms of Reference (TOR) should a CWC formalize for a Support Person?

The NCPCR guidelines mentions the following responsibilities for the Support Person and these could be part of the TOR for the Support Person.

⁵³ NCPCR Guidelines, p. 42.

The Support Person should

- Accompany the child and be present with the child during the recording of FIR;
- Accompany the child for the medical examination;
- Create a report of the child's case, noting the details of the crime as well as the child's personal information.
- Record compensation and/or rehabilitation requirements and forward the same to the Public Prosecutor for presentation of an application before the Special Court; Provide the child through the CWC or DCPU, immediate requirements, such as, food, clothing or medicines, etc;
- Intimate the lawyer associated with the court about the case and arrange to forward all the documents including the medical examination report, FIR, and other relevant documents;

The Investigating Officer (IO) conducting the investigation will be required to update the Support Person about the progress of investigation at least once a week

The Support Person must be present in the court room during the course of the trial, and should accompany the child to the witness stand. However, the Support Persons cannot prompt, sway, or influence the child during his/her testimony.”

The Support Person is required to keep all matters pertaining to the child victim and the case confidential at all times. Support Persons can also help the child and the family in accessing compensation if awarded by the Court.

Box No. 17: Checklist for Support Persons

This checklist is based on the POCSO Rules, 2012

- a. The Support Person must be appointed with consent of the child and the family.
- b. The Support Person must maintain confidentiality of all information pertaining to the child victim.
- c. The Support Person must keep the child, parents/ guardians/ person whom the child victim trusts informed about the proceedings of the case, including available assistance (legal, medical, counselling, etc.), the stage of the case and the potential outcome, the role he or she will be playing in supporting the child victim and the family, etc.
- d. The Support Person must address any concerns that the child victim/family may have.
- e. Information as to the safety of the child victim in relation to the accused, and the manner in which the child victim would like to depose before the Court in order to ensure such safety must be provided by the support person to concerned authorities such as the Special Public Prosecutor (SPP).
- f. The SJPU/police must inform the Court about the appointment of the Support Person.

- g. The services of the Support Person may be terminated by the CWC, upon request by the child victim or the family. There is no need for the child victim or the family to give any reason for their request for such termination of service.
- h. The Support Person must also not only inform the family about the availability of victim compensation but can help move an application for this through the prosecutor or a private lawyer in the Special Court.
- i. The Support Person must provide the following information:
 - i. Availability of public/private emergency and crises services,
 - ii. Procedures of the criminal case,
 - iii. Availability of victim compensation
 - iv. Status of investigation of the crime,
 - v. Arrest of a suspected offender/offenders,
 - vi. Filing of charges against the accused,
 - vii. Schedule of Court proceedings,
 - viii. Status of the accused, whether he/she has been released on bail, has been released or is placed in detention,
 - ix. Verdict, and
 - x. Punishment given to the accused.

4. Parents/Guardian Details

Father's/ Guardian's Name ----- Age -----

Qualification ----- Occupation -----

Address -----

Mother's Name----- Age -----

Qualification ----- Occupation -----

Address -----

Guardian's nameAge.....Occupation.....Relationship with child (if any).....

Address -----

5. Need Assessment done by the Support Person-----

6. Medical Treatment Details:

Mental condition (Present & past) -----

Physical condition (Present & past) -----

Habits, interests (recreational) -----

Medical report/s (if any) -----

7. Status of the case:

8. Details of services provided:

S. No	Date	Details of service (eg., accompanied to hospital, counselling, court, DLSA, followed-up on compensation order, etc.)	Remarks (difficulties faced, applications made on behalf of the child, concerns etc.)

9. Views of the Child:

10. Immediate needs of the Child Victim:

11. Recommendations for Individual Care Plan:

12. Comments:

Signature of the Support Person

Date -----

5.8.5. Does the Support Person have to report to the CWC?

Yes, the Support Person must inform the CWC about the progress in the case and if the child and the family require any additional support or services from the state. For instance, the Support Person should inform the CWC if the child has been facing threats or pressure from the accused to retract her/his statement, and therefore needs additional protection. The NCPCR guidelines recommends that the Support Person submit weekly updates to the CWC.⁵⁴

Box No. 18. Reports of the Support Person to the Child Welfare Committee

Adapted from the *Guidelines for the Use of Professionals and Experts under the POCSO Act* issued by the Tamil Nadu government in 2015.

1. Case

Case No -----

Under the following Section/s of the POCSO Act, 2012 -----

Cause Title-----

Police Station-----

FIR number -----

2. Case History

Type of sexual assault:

Place of assault:

Date & Time of the assault:

Relationship (if any), between the accused and the child:

3. Details of the Child victim:

Name of the child victim -----,

Age ----- Date of Birth -----

Sex -----,

Educational status:

Student/dropout -----

Religion -----, Caste -----

Disabilities, if any -----

Permanent Address: -----

Any relationship between the child/victim and the Support Person

Yes/No []

⁵⁴ Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders Child Welfare Committees/Support Persons and Health Professionals- p. 39

5.8.6. Can a translator/interpreter be appointed along with Support Person if the language of the child/family and the Support Person is not the same?

It is advisable that the Support Person be able to speak the mother tongue of the child victim and efforts must be made to appoint a Support Person who can communicate in the child's preferred language. Where this is not possible and the language spoken by the Support Person is not the preferred language of the child victim, the services of a translator needs to be sought to ensure the support offered is effective.

5.8.7. Do the CWCs need to review the work done by Support Persons?

In order to enhance the quality of services provided to children and their families and to ensure that the Support Person is discharging his or her duties, the CWCs should definitely review the performance of Support Persons at regular intervals. They could also consider obtaining feedback about the assistance provided by the Support Person from each and every child and his/her family in a sensitive and non-threatening manner. Some pointers for the review could be accessibility, child friendliness, timeliness of information, whether the person is competent to provide psycho-social and legal services, maintenance of confidentiality, etc.

5.8.8. What is procedure for terminating the services of a Support Person?

Rule 4(11) of the POCSO Rules states that based on a request made by the child victim, the CWC could terminate the services of the Support Person. The child is not required to assign any reasons for seeking such termination. Additionally even the parent or guardian of the child may request for the termination of a Support Person.

5.9. Role of CWCs in the Investigation and Trial of POCSO offences

5.9.1. What is the role of the CWC in the investigation and trial of cases under the POCSO Act?

The main role of the CWC under the POCSO Act is to ensure that care, protection and rehabilitation services are provided to children who are victims of sexual assault. In addition, where applicable and necessary, the CWC is also required to ensure supportive services are provided to the child and the family while they go through the criminal justice system. Although the CWC does not have a formally recognized role in terms of investigation and trial, it must ensure that the child's best interest continues to be protected during the investigation and trial.

The Support Person assigned by the CWC is expected to strengthen and supplement

the role of the CWC. If the services of Support Person are not sought by the family, the CWC could empower the child and the family by sharing details of child friendly court procedures under the Act along with other relevant IEC material. Where required, the CWC should extend its cooperation to the Special Court during trial in the larger interest of child victim. Care should be taken to ensure that no evidence is contaminated.

5.9.2. Can the CWC direct the police to add provisions to the FIR or chargesheet?

Yes, this can be done by the CWC, if it has gathered, either directly or through the CWO handling the case, information related to the sexual abuse of the child that has not been captured in the FIR. It can forward this information to the SJPU or the police and urge them to rectify the statements in the FIR before framing of the chargesheet. However it can only forward information it has gathered and make recommendations to the SJPU or the police, as it cannot issue any directions.

5.9.3. If a CWC Chairperson or member records a statement, will she/he have to testify in court as a witness?

If the prosecution is of the opinion that the statement recorded by the CWC is relevant, the court may summon a Member or Chairperson of the CWC as a witness. However, it may be noted that the provisions of the POCSO Act that deal with recording the statement of the child focus on recording by the police and the magistrate. Therefore, while a CWC member can record a statement of the child victim, it is not akin to a statement recorded by the police or a magistrate. Please refer to Section 5.4.5 above for more details.

5.9.4. What can the CWC do if the statement of the child before it regarding the sexual offence is at variance with what it reported to the police?

The CWC's role is not to ascertain and confirm whether or not the offence actually occurred or who the perpetrator is, as that role has been ascribed to the Special Court conducting a criminal proceeding. The role of the CWC *vis a vis* the proceedings of the Special Court is primarily to ensure that the child receives services of a Support Person, if required. Therefore, in cases where there is a variation in the statement of the child victim, it is the role of the Special Court and not the CWC to examine such variance and determine how to proceed with the case. The CWC should in fact be cautious not to interfere with the proceedings of the Special court which will base its decision on evidence that is collected as per legal procedures.

5.9.5. Can the CWC insist that the statement of the child be recorded by the police in its presence?

Under the POCSO Act, the statement of the child should be recorded in a place of her/his choice. It must be recorded in the presence of a parent, guardian or a person whom the child trusts or has confidence in. For instance, a CWC member could be present when the police are inquiring into a case involving a child living in the Children's Home. However, the child's comfort is of importance and if she/he is not comfortable in recording the statement in the presence of the CWC, it cannot be insisted upon.

5.9.6. Can the CWC ensure that assistance is provided to the child victim to receive compensation ordered by the Special Court?

Yes, the CWC can assist the family in receiving compensation from the State Government. It can instruct the Support Person to follow-up with the State Legal Services Authority (SLSA) or District Legal Services Authority (DLSA). Rule 7(6) of the POCSO Rules also permits the child or parent to seek other reliefs under other rules or schemes of the Central Government or State Government. The CWC can also assess what other reliefs could be beneficial for the child to ensure his/her speedy emotional healing and rehabilitation and safety, either on its own or with the assistance of the Support Person.

In cases involving a child in need of care and protection, the CWC can also inform the parents of any schemes or services of the government available to the child – including sponsorship under Section 43 of the JJ Act,⁵⁵ which provides for financial support to be given to families, Children's Homes and Special Homes to meet the medical, nutritional, educational and other needs of children.

5.9.7. What can the CWC do if a child or a person on behalf of the child informs them that the police have refused to register a case under the POCSO Act, citing lack of hard evidence?

In such a case, the CWC can write formally to the police to register the FIR.⁵⁶ Failure of the police to record a report is an offence under Section 21(1) of the POCSO Act. The CWC can also place the matter directly before the Special Court.⁵⁷ When the CWC places the matter directly before the Special Court it will be treated as the complainant

55 43. Sponsorship.—

(1)The sponsorship programme may provide supplementary support to families, to children's homes and to special homes to meet medical, nutritional, educational and other needs of the children with a view to improving their quality of life.

(2)The State Government may make rules for the purposes of carrying out various schemes of sponsorship of children, such as individual to individual sponsorship, group sponsorship or community sponsorship.

56 Rule 27(9)

57 Section 33(1)

in the case and will have to appear in court to testify.

The Standard Operating Procedures for CWC issued by the Department of Women and Child Development, Government of Maharashtra, 2009⁵⁸ lays down the following do's and don'ts for CWCs regarding administrative procedures.

Do's for CWC	Don'ts for CWC
The CWC functions as a Bench. The CWC should function out of the assigned sitting place and not from their home or other locations. At least two members should sign the order. Final order should be signed by at least three members. All members present should sign the order passed at that particular sitting.	Avoid keeping seal of the CWC at home. However, as a member you can keep the stamp of "Member, CWC of the District".
Display the days, time and place of sitting of the CWC. The names and telephone numbers of the CWC members should be available in the CWC office.	Avoid calling people at home to collect orders etc.
Roznama to be maintained of every sitting or interaction with the child.	Do not sign the attendance register or muster without attending the CWC.
Confidentiality to be maintained at all times.	For the purpose of final restoration, avoid giving child's custody between sunset and sunrise.
Conduct internal monthly meetings and maintain minutes of all the meetings.	Do not issue verbal orders, they are not valid.
Ask PO or District DWCD Officer to maintain list of professionals like counsellors, psychiatrists/residential institution, Home for HIV/Special children and other non-institutional services in the district.	
Ensure that PO or the district officer maintains list of Government departments and the schemes available with them to support the child or her/his family.	Avoid neglecting the order of other CWCs
CWC may seek legal assistance when needed. For a child: A public prosecutor etc For itself: An advocate	Avoid discussing or disclosing the details of the cases to people who are not concerned with the case.

58 Available at: <http://wcd.nic.in/icps/SOPdtd01072011.pdf>

In cases where courts' (Session and High Court) order for release of a child, the CWC after completing the proceedings and mentioning in the case file regarding the release should discharge the child as per the orders of the court.	Avoid encroaching or intervening in the roles of other stakeholders.
Child's photograph can be published only for tracing of his family and should not be misused for media publicity.	The Committee cannot order for HIV test of the child without the child's consent and only on the advice of the medical Doctor.
If there is a long holiday, the CWC must make arrangements for operating like a vacation bench, to avoid pendency of matters and unnecessary delays.	
A case summary is to be made which would include interim orders, discussions with the child or any other facts relevant to the case. This would ensure continuity and would save time.	

Additionally:

- CWCs should display at its premises the names and contact details of Support Persons, legal aid lawyers, NGOs, counsellors, psychologists and psychiatrists who could be contacted by children/families for advice or assistance. If resources permit, a pamphlet containing these details should be handed to the children/families.
- CWCs should not direct children to undergo medical examination against their will.
- CWCs should not record statement of a child under Section 164, CrPC

5.10. Other Issues

5.10.1. How should CWCs deal with cases involving 'consensual' relationships with a child where charges of kidnapping, sexual assault and rape are levied against the accused?

The CWCs often receive cases wherein the victim claims to be in a consensual relationship with the accused. For instance, the parents of a girl may file a case of kidnapping and rape when she elopes. Upon apprehension, the man may be taken into police custody. The girl may be produced before the CWC owing to her reluctance to live away from the accused. She may even submit that she is above 18 years of age. Like in any other case, the CWC should determine the age of the girl within 30 days of the child being presented before the CWC based on standards specified in Rule 12,

JJ Model Rules⁵⁹ and also make a determination whether or not she/he is a “child in need of care and protection.” The CWC should assess whether there is a reasonable likelihood that if the child returns to her/his parents or guardians she/he may be abused or her/his life may be put in danger owing to their disapproval of the relationship. Based on the findings of the Social Investigation Report, the wishes of the child and that of the parents, a decision should be made that accords primacy to the best interests of the child.

In *Sohan Pal v. State*⁶⁰, the Delhi High Court awarded compensation to the petitioner for his wife Neelam’s death while in custody of the State. Neelam’s father claimed that she was 15 years and 4 months old when she was kidnapped by Sohan and married to him. He submitted a fake birth certificate in support of his claim. Neelam claimed that she was 20 years old. Even though an ossification test confirmed this, the CWC placed her under State custody. Neelam was pregnant at the time and was detained in the Nari Niketan for eight months. She subsequently died due to complications after childbirth. The High Court was critical of the delay on the part of the CWC to determine her age and held that Neelam’s detention in the Nari Niketan violated her right to life under the Constitution.

The CWCs are required to hear cases of children presenting a wide range of issues such as child marriage, trafficking, and/or kidnaping, all of which present complexities and pressures of the kind specified above. The CWCs need to ensure that procedural rules including the principle of natural justice are not compromised. The age inquiry, Social Investigation Report, wishes of the child, wishes of the parents or guardian, and likelihood of further harm are factors that must be considered while dealing and passing orders related to such cases.

5.10.2. How should CWCs deal with cases where both the parties to a marriage are children?

The Prohibition of Child Marriage Act, 2006 (PCM Act) prohibits the solemnization of marriages of girls below the age of 18 years and boys below the age of 21 years. However, where there is an incident of child marriage, these marriages do not automatically become void but are only voidable by petitioning the court. A charge under the POCSO Act can also be levied as sexual intercourse with a child by a person

59 *Jarnail Singh v State of Haryana*, AIR 2013 SC 3467 - “Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix.”

60 WP (CrI) 1672/2010 decided on 29.05.2014 by the Delhi High Court. Available at <http://indiankanoon.org/doc/63754612/>

related to the child by marriage constitutes aggravated penetrative sexual assault. If the husband and wife are both below 18 years, technically they will be seen as perpetrators of a sexual offence qua each other. However, they may both require care and protection and that is the lens that the CWC will have to adopt if it intervenes. CWCs should also ensure that in such cases, counselling services are offered to enable both the children to cope with the trauma that comes from criminalizing consensual relationships.

In complaints regarding child marriage, the CWC is required to first determine the age and then ascertain whether the marriage has actually taken place or not.

The Standard Operating Procedures (SOPs) published by the Ministry of Women and Child Development recommends the following with respect to child marriage:

The CWC will pursue all cases of child marriage from the standpoint of the care and protection issues facing the child, keeping in mind the best interests of the child and her protection within and outside the marriage (matters of maintenance and custody of her child)...After determining that the person in the marriage is a child i.e below 18 years and in need of care and protection, the CWC should take custody of the child, especially where the marriage is void. In a voidable marriage, especially where the child may be almost 18 years, the CWC through the PO may call the parents who should be counseled and through community processes with the involvement of the NGOs and panchayat, and through the signing of a bond, the families can be brought to agree that the child will stay with her family till she completes the age of 18 years.⁶¹

5.10.3. What can the CWC do if rehabilitative services are unavailable or inadequate?

In such cases, the CWCs could write to the State Commission for Protection of Child Rights (SCPCR) if established or to the NCPCR if such SCPCR is not established and highlight this as an issue, so that it can make recommendations to the State Government to put in place rehabilitative measures as required.

Additionally, the CWC can direct the District Child Protection Units (DCPU) to review services listed in the Resource Directory which it is expected to prepare and make available to the CWCs and JJBs. If rehabilitation services suited to the needs of child victims are unavailable, it could write to the government and ask it to arrange for the same. CWCs could also proactively network and coordinate with civil society organizations working under the Act⁶² and motivate and encourage them to make such services available.

⁶¹ *ibid*, pp 34 - 35.

⁶² Rule 81(2)(j), JJ Model Rules

5.10.4 What should the CWC do if the accused offers to marry the child victim? Can they pass an order of compromise?

Such an order of compromise cannot be passed by the CWC as it has no jurisdiction in this regard. Further, marriage of a minor is prohibited under the PCM Act. The Supreme Court has clearly stated that cases of rape cannot be compromised in *Shimbu v. State of Haryana*⁶³. The relevant text of the judgment is as below:

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

Religion, race, caste, economic or social status of the accused or victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute. (Para 21)

5.11. Interaction and Coordination with other authorities

5.11.1. Does the CWC have to submit reports on POCSO cases to the SCPCR or NCPCR?

The SCPCR and NCPCR have, under the Commissions for Protection of Child Rights Act, 2005 (CPCR Act), been vested with the responsibility of monitoring the implementation of the POCSO Act. Pursuant to this, it can call for reports on any specific case of child sexual abuse being dealt with by a CWC. The CWC should cooperate with the SCPCR or NCPCR and provide the information requested for by the Commission to enable it to perform its statutory obligations as provided for in the CPCR Act and specific provisions in the POCSO Act.

5.11.2. What can the CWC demand from the police/SJPU?

The police/SJPU are under an obligation to report to the jurisdictional CWC information received about the commission of offences under the POCSO Act. They also need to

⁶³ (2013) 10 SCALE 595.

submit a Care and Protection Report regarding steps taken to provide immediate care and protection of a child. In this regard, the police could be requested to adhere to the format contained in Box No. 2 in Chapter 2.

5.11.3. What can the CWC expect from the District Child Protection Unit (DCPU)?

The CWC can require the employees of DCPU to serve as a Support Persons.

Chapter 6: Role of the Special Court under the POCSO Act, 2012¹

6.1. Duties of Judges under the POCSO Act, 2012

The POCSO Act 2012 has prescribed special procedures to try cases of child sexual abuse, in view of the special needs of children. Special Courts are mandated to keep the best interests of the victims in mind during all proceedings under the POCSO Act² as well as the UN Convention on the Rights of the Child (UNCRC). As per Article 3(1) of the UNCRC, “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

In the landmark decision of *Sakshi v. Union of India*³, the Supreme Court recognized the impact of traditional criminal proceedings on the victim and observed:

The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident, which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the question put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner, that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given, as and when required.

The POCSO Act and the CLAA have incorporated the guidelines laid down by the Supreme Court in *Sakshi* to be followed in trials of child sex abuse. The special procedures stipulated under the POCSO Act and the CrPC further justice as much as they advance the rights of children. A child’s testimony is a crucial ingredient

1 This chapter was authored by Swagata Raha and Shruthi Ramakrishnan. Feedback was received from Anuroopa Giliyal and Geeta Sajjanshetty. It was reviewed externally by Dr. S.B.N. Prakash and Dr. Kaveri Haritas and edited by Arlene Manoharan.

2 “And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child...” Preamble, POCSO Act

3 AIR 2004 SC 3566.

of the trial and its quality principally depends on a judge's ability to create a safe, comfortable and supportive environment within the courtroom. Research has shown that the conduct of the interviewer significantly impacts the child's anxiety level which in turn affects the quality of information given by children.⁴ Children interviewed by supportive interviewers, are less anxious and less likely to answer misleading questions incorrectly while those interviewed by non-supportive interviewers are more prone to suggestibility.⁵ Judges play a "pivotal"⁶ role in the trial of sexual offences against children, and "judicial leadership" can positively alter "the culture of the courtroom to offset the imbalance between professional lawyers and child witnesses."⁷ The POCSO Act evinces recognition of these factors and thus requires the judge to play a proactive role in creating a child-friendly atmosphere. One important way for the judge to enable this is to ensure that questions are not put directly to the child by prosecutors and defence lawyers, but to screen the questions and put them across to the child victim, using developmentally appropriate and child friendly language and means of communication.

The POCSO Act reflects an appreciation of the best interest principle by modifying existing procedures to make them child-friendly. It requires judges of Special Courts to:

- Take direct cognizance of matters and not require cases to be committed to them by a Magistrate's Court.
- Conduct the trial *in camera*.
- Ensure that a child-friendly atmosphere is maintained in the court and that the dignity of the child is respected.
- Ensure that the child is able to participate effectively in the trial. Children with disabilities should be provided the services of a special educator or expert.
- Ensure that the child is not exposed to the accused at the time of recording of the evidence. The judge must however ensure that the accused is in a position to hear the statement of the child and communicate with his or her advocate.
- Ensure that all questions are put to the child by the judge himself/herself, and not directly by the prosecutor or the defence lawyer.
- Ensure that the child is not repeatedly called to testify.
- Ensure that the identity of the child is protected during trial, unless disclosure of identity is in the best interest of the child.

4 Almerigogna, *et.al.*, "A State of High Anxiety: How Non-Supportive Interviewers can Increase the Suggestibility of Child Witnesses", *Appl. Cognit. Psychol.* 21: 963-974 (2007).

5 *ibid.*, p. 970.

6 Judy Cashmore, "Child Witnesses: The Judicial Role", para 21, http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/cashmore-child_witnesses-the_judicial_role.html

7 *ibid.*, para 23.

- Record the evidence of the child within 30 days and complete the trial within 1 year of taking up the matter, as far as possible.
- Inform the child of his/her right to take assistance of a legal practitioner.
- Apply the presumptions under Sections 29 and 30 of the POCSO Act.
- Order interim or final compensation for physical trauma or mental trauma in appropriate cases.

What the above also implies is that judges of the Special Court under the POCSO Act must:

- Consider the age, maturity, verbal skills, and developmental needs of the child while appreciating the evidence tendered by them. Judges must equip themselves with an understanding of child development so that they can appropriately extract and appreciate the evidence being tendered by children. They must take the assistance of experts, where necessary, to ensure that evidence is obtained in an effective manner, without causing discomfort or humiliation to the child.
- Order interim compensation without any delay if the child needs medical intervention or any other services that can hasten the recovery or healing. They must not wait for an application for compensation to be moved by the prosecutor or anyone on behalf of the child.
- Minimize delays and adjournments.
- Prevent exposure of the child to the accused outside the courtroom as well. For instance, the child could enter the courtroom through the judge's entrance so as to avoid the risk of encountering the accused or other accused persons within the court complex. A waiting room could be designated to allow the child and her/his family or Support Person.
- Extend necessary support and protection to the child and key witnesses so that they are able to tender their evidence without any fear.
- Alert the Child Welfare Committee (CWC), if the child requires the services of a Support Person to assist him or her during pre-trial and trial processes.
- Verify that a Support Person or a lawyer has briefed the victim and the victim's family about the court procedures.
- Verify that the victim and the victim's family have been informed about the availability of Support Person, counselling services, and have exercised their right to take assistance of a legal practitioner.

Please also refer to Section 1.7. Rights of Children, Chapter 1. It details the rights that the Special Court must bear in mind while dealing with children under the POCSO Act.

6.1.2. In what ways are sexual offences against children different from other offences?

Judges must bear in mind that child sexual abuse is distinct from other criminal offences because of several factors:

- It is likely, in several cases, that the injury is more mental/psychological, or sometimes even less tangible, than physical - 'It [sexual assault] is often not accompanied with the kind of 'violent' criminal activity envisaged in the criminal law. Consequently, in contrast to the three primary categories of loss and injury available in the schemes, the typical effects of sexual abuse suffered by victims are not visible physical injuries or the kind of psychiatric injury that might result from a shocking, violent and unexpected event. Instead, they are best described as interpersonal, social, behavioural, or vocational.'⁸
- Sexual abuse is usually committed over an extended period of time and involves different forms of coercion or manipulation. Also, child victims are not victims of an indirect act arising out of negligence, but of intentional direct harm.⁹
- Child sexual abuse does not neatly fit into our conception of an offence with a start and end date or a number of incidents – "rather than in the context of an ongoing relationship with the perpetrator, in which multiple offences are likely to be the norm."¹⁰
- Harms of the abuse might not completely manifest themselves, until years after the abuse.¹¹

6.2. Competence of Child Witnesses

6.2.1. Are child witnesses competent to testify?

According to Section 118 of the Indian Evidence Act, 1872, (IE Act), all persons are considered to be competent to testify unless the court is of the opinion that due to tender years, extreme old age, disease, "they are prevented from understanding the questions put to them, or from giving rational answers to those question." In *Golla Yelugu Govindu v. State of Andhra Pradesh*¹², the Supreme Court observed that the IEA, "does not prescribe any particular age as a determinative factor to treat a witness to be a competent one," and pinned the responsibility to determine competence on the

8 Christine Forster, "Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions", *U.W. Austl. L.R.*, (2005) 32(2) 264 at 283-84, <http://www.austlii.edu.au/au/journals/UWALawRw/2005/8.html>.

9 *ibid*, p. 284.

10 Christine Forster & Patrick Parkinson, "Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework", (2000) 23(2) *UNSWLawJl* 172.

11 *ibid*, p. 190.

12 (2008) 16 SCC 769.

trial judge:

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, *but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.*¹³ (emphasis added)

Following the above ruling, several Supreme Court judgments have not only reiterated the competence of children to testify, but have also proceeded to place great reliance on their testimony, (See Section 6.2.3 for more details).

Research has also shown that children can “remember and retrieve from memory large amounts of information, especially when the events are personally experienced and highly meaningful.”¹⁴ The quality of their testimony is heavily dependent on the interviewing method.¹⁵ In sum, “[d]one poorly, interviews undermine the ability to protect children and raise the specter of false allegations. Done well, interviews help children reveal their memories.”¹⁶ In fact, recent research shows that adult testimony can also be unreliable, their memories fragile, and prone to suggestions and misinformation.¹⁷

6.2.2. How accurate are children’s memories or recollections about the offence?

One must remember that testimonies, whether by a child or an adult can be inaccurate. Given this, a decision as to the accuracy or lack of accuracy of a child’s testimony has to be made based on the limitations that children face in relating events even under

13 *ibid.* at para 9

14 *ibid.* at para 14. 20 citing S Ceci & M Bruck 'Suggestibility of the child witness: A historical review and synthesis' (1993) 113 *Psychological Bulletin* 403, 434.

15 *ibid.*

16 John E.B. Myers, “Adjudication of Child Sexual Abuse Cases”, *The Future of Children*, Sexual Abuse of Children, Vol. 4, No. 2 – Summer/Fall 1994 at p. 87.

17 Australian Law Reform Commission, “Seen and heard: priority for children in the legal process”, ALRC Report 84, Para 14. 19, <http://www.alrc.gov.au/publications/14-childrens-evidence/children-reliable-witnesses>

normal circumstances. Children suffer limitations of vocabulary and language to a comparatively greater extent than do adults. Research reveals that children can be more accurate in acting out a scene, as compared to relating the events.¹⁸ Research shows that children can usually give an accurate but sparse account, and “are more likely to make errors of omission than commission.”¹⁹

In *Amrit Sharma v. The State*²⁰, a two-judge bench of the Delhi High Court reflected on the memories of children and whether or not they are capable of accurate recall of events. They relied on scientific studies to conclude that children’s recollections are more reliable than that of adults. They made the following observation based on an article in a scientific journal:

16. As per ‘Science Daily (Mar. 17, 2008)’: “Scientists found that humans exhibit two types of memory. They call one “verbatim trace”, in which events are recorded very precisely and factually. Children have more “verbatim trace”, but as they mature, they develop more and more of a second type of memory: “gist trace”, in which they recall the meaning of an event, its emotional flavour, but not precise facts. Gist trace is the most common cause of false memories, occurring most often in adults. Research shows that children are less likely to produce false memories, because gist trace develops slowly. As a result, children’s recollections could be more reliable than those of adults, and this could lead to ramifications in the courtroom.

In *State of U.P. v. Krishna Master*,²¹ the Supreme Court held:

There is no principle of law known to this Court that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago... This Court is of the firm opinion that it would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life.²²

18 Dahmen-Zimmer, Katharina and Sandra Loohs. “Is there Truth in the Eye of the Beholder? Causal Illusions in Children and Adults”, in G. Davies et al., *Psychology, Law and Criminal Justice: International Developments in Research and Practice*, (1996) p. 81. For a discussion on child testimony see: Haritas, Kaveri (2008) ‘Preserving Wellness and Personhood: A Psycho Social Approach to the Child’, in Kalpana Kannabiran and Ranbir Singh (eds.) 2008, *Challenging the Rule(s) of Law: Colonialism, Criminology And Human Rights In India*, India: Sage Publications, p. 203-210.

19 Steward, et.al, “Implications of Developmental Research for Interviewing Children”, *Child Abuse & Neglect*. Vol. 17, 1993 pp. 25-37, at 30.

20 CRL.A.122/2011 decided on 18.10.2012 by the Delhi High Court.

21 AIR 2010 SC 3071.

22 AIR 2010 SC 3071 at para 13.

6.2.3. Can a conviction be based entirely on the testimony of a child?

As a general rule in rape cases, corroboration of a rape victim's statement is not mandatory. In *State of Punjab v. Gurmit Singh*²³, the Supreme Court stated,

Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime, but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.²⁴

In *Dattu Ramrao Sakhare v. State of Maharashtra*²⁵, the Supreme Court considered the credibility of a 10-year-old witness and whether or not conviction could be based on her testimony. It held:

The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness, is that the witness must [be a] reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence, the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.²⁶

With specific reference to child victims, in *Ranjit Hazarika v. State of Assam*,²⁷ the Supreme Court held that the testimony of a 14-year-old rape victim was sufficient for convicting the accused. The court held that this is no reason for an acquittal and stated that, "the prosecutrix of a sex offence is a victim of a crime and there is no requirement of law, which requires that her testimony cannot be accepted unless corroborated"²⁸ Similarly in other parts of the world the need for corroboration of child witness evidence has been done away with, especially with new evidence revealing the accuracy of children's evidence.²⁹

23 AIR 1996 SC 1393, available at <http://indiankanoon.org/doc/1046545/>

24 *ibid*, para 9.

25 (1997) 5 SCC 341.

26 *ibid*, para 6

27 (1998) 8 SCC 635 available at <http://indiankanoon.org/doc/905384/>

28 *ibid*, para 6

29 The UK abolished the need for corroborative evidence in accepting the evidence of a child witness through the Criminal Justice Bill of 1987. In New South Wales, the need for corroboration was abolished for cases of sexual assault in 1981. Kate Warner, "Child Witnesses: Evidentiary Reform", in Julia Vernon (ed.), *Children as Witnesses*, Proceedings of a Conference held on 3-5 May 1988. Available online at www.aic.org.

6.2.4. Are judges required to exercise caution before relying on the testimony of a child witness?

The Supreme Court has prescribed a cautious approach towards child witnesses as it has perceived them to be susceptible to suggestion and felt the need to look for corroboration as “a rule of practical wisdom, than of law.”³⁰ In *Suryanarayana v. State of Karnataka*,³¹ the Supreme Court observed that:

Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. *In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not* (emphasis added)

6.2.5. How should competency of a child witness be assessed?

Section 118 of the IEA requires the court to be satisfied that the witness can understand questions being put to him or her and can provide rational answers to those questions. Even while testing the competence of the child, judges must take care to ensure that questions are framed appropriately and put to the child sensitively. While testing the competence of a child, the judge needs to see if the child possesses “basic cognitive and moral capacities.”³² Since this requires expert knowledge, a child psychiatrist/mental health professional may be consulted to make an informed decision on these capacities. Further, “the child must be able to observe and remember events, must understand the difference between truth and falsehood, and must appreciate the duty to tell the truth in court.” Research indicates that even younger children, such as those between three and four years of age have the capacity to recount events and distinguish between truth and falsehood.³³

gov.au/publications/proceedings/08/warner.pdf, accessed on 2 2008. Goodman, Gail S. 1984. ‘Children’s Testimony in Historical Perspective’, *Journal of Social Issues*, 40: 9–31.

30 *Panchhi v. State of Uttar Pradesh*, AIR 1998 SC 2726.

31 AIR 2001 SC 482.

32 *Supra* n. 15 at p. 85.

33 *ibid*.

Box No. 19: Assessing Children's Language Competencies

Extracted from Saywitz and Camparo, "Interviewing Child Witnesses: A Developmental Perspective", *Child Abuse and Neglect*, Vol. 22., No. 8, 1998, pp. 825-843 at 827.

Before asking critical questions, talk to children about recent events (e.g., "What did you do this morning? What are some of the things you do after school?"). Listen to their language. Take note of the following characteristics:

- Is the child's speech intelligible?
- How many words in a sentence on average?
- How many syllables per word on average?
- How complex is the grammar?
- Does the child use the correct tense? Does the child use pronouns correctly?
- How sophisticated is the child's vocabulary?

In *Rahul v. State*³⁴, the Delhi High Court took strong objection to the nature of questions posed by a trial judge, despite the knowledge that the child was not going to school and did not have a TV. The examination of the child was as follows:

Q. What is your age?

Ans. My aunt Baby knows it.

Q. For how many years you are going to school?

Ans. For the last one year.

Q. Do you know how to read Hindi or English?

Ans. I know to read Hindi only.

Q. Whether one should speak truth or false?

Ans. Truth.

Q. Why one should speak truth or false?

Ans. Silence, as she does not reply.

Q. Whether one should speak truth in the court or not?

Ans. Yes, one should speak truth.

Q. Do you watch T.V.?

Ans. No, we do not have T.V.

Q. Do you know who is prime minister of India?

Ans. No.

Q. Who are your family members?

³⁴ 2013 IVAD (Delhi) 745.

Ans. We are four sisters living with our *Bua* as our mother had already and my father is missing for long time.³⁵

The Delhi High Court emphasized that the socio-economic background, age, and education will have to be borne in mind while assessing competence.³⁶ It observed that "...the questions put to the child as to whether she watches television and her disclosing that she does not have television was certainly not circumstance appropriate. Given the level of her education as well as her background, the further question as to who was the Prime Minister of India was wholly unwarranted."³⁷

The Delhi High Court also referred to an article by Sherrie Bourg Carter, titled "Child Witness Competency: When Should the Question be Raised?," which offers guidance on questions that can be put to the child to assess competence. Relevant extracts from the article referred by the High Court are mentioned below:

For determining Intelligence and Memory - For a young child, questions about family, school, counting, and knowledge of the alphabet and colors can provide sense of the child's intelligence and memory. With older children, more difficult intellectual skills determining their literacy level would provide information about their intelligence and memory.

- II. Ability to Observe, Recall and Communicate - Examples of recent experiences about which child can be questioned should include what the child ate or who the child saw that day. An example of the distant past events should include what happened say on the child's birthday or memorable holiday or a field trip or a vacation. Further questioning could be about [who] attended, and what gifts were received. (Of course, these questions are required to be put, keeping in view the socio-economic background and literacy of the child, especially in our country).
- III. Understanding of Truth and Lie - To assess a child's understanding of these concepts, questions about right and wrong, real and make-believe, truth and lie are typically asked.³⁸

Further,

...it is important to recognize that some types of questions are more developmentally appropriate than others. For example, when assessing children's understanding of these dichotomies, interviewers routinely ask children if they know the difference between them. However, asking children to explain the difference between two concepts is a more developmentally difficult task than asking what each concept means. In other words, questions such as, — 'What does it mean to

35 *ibid.*, para 38.

36 *ibid.*, para 57.

37 *ibid.*, para 42.

38 *ibid.* at para 29

tell the truth?’ and — ‘What does it mean to tell a lie?’ are more developmentally appropriate for young children than asking, —What is the difference between the truth and a lie? It is also important to recognize that very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. In one study, researchers found that none of the four-year-olds in their sample were able to define either truth or lie whereas 87.5% of the eight-year-olds were able to define both concepts (Michelle Aldridge and Joanne Wood, *Interviewing Children: A Guide for Child Care and Forensic Practitioners*, 1998). This does not necessarily mean that four-year-olds do not understand the meaning of truth and lies. It also does not mean that the open-ended questions should not be asked. Some developmentally advanced children may be able to answer in a narrative form, but if not, there are acceptable alternative questions to help determine if and how much a child understands these concepts. For example, young children usually have an easier time answering multiple-choice questions, such as —If I said my hair is brown, is that the truth or a lie? In fact, it is quite common for interviewers or legal professionals to ask several of these basic questions. While there is nothing wrong with doing this, such questions really are not sufficient for several reasons. First, although most children can correctly answer these types of basic questions, they do not provide an answer to the real question of whether the child understands what it means to tell the truth and what it means to tell a lie. While they may be appropriate preliminary questions, the standard —If I said my hair is brown ... type of questions mostly establishes whether a child knows his or her colors and can provide a correct or incorrect answer. Secondly, such questions do not place children in scenarios similar to what judges are ultimately considering when determining witness competency. The pertinent question is, whether a child who is placed in a particular situation (the courtroom) and asked questions about an event they either witnessed or experienced (the alleged incident), can distinguish what is the truth and what is a lie. Therefore, in addition to the relatively simple questions, more situationally relevant questions should be asked when assessing a child’s competency to testify, such as:

If I told your mom that you just yelled at me, would that be the truth or a lie?

If you told your mom that I hit you, would that be the truth or a lie?

If you told your teacher that something bad happened to you, but it really didn’t happen - you were making it up - would you be telling the truth or a lie?

Competent children should be able to consistently provide correct answers to these multiple-choice questions.

IV. Meaning of Taking an Oath -

Children usually are not familiar with the word, oath, but most recognize the word, promise. Because taking an oath and making a promise are similar concepts, it is more developmentally appropriate and more productive to ask children if they know what it means to make a promise. Furthermore, substituting the word, promise, for the word, oath, when swearing in child witnesses has become increasingly more common and accepted throughout the legal system (Task Force on Child Witnesses, American Bar Association Criminal Justice Section, *The Child Witness in Legal Cases*, 2002). Still, as with other open-ended, definition-type questions, young children may not be able to readily answer the question, —What does it mean to make a promise? If this is the case, follow-up questions also should be asked to better assess the child’s appreciation, such as:

If you promise your mom that you are going to eat your lunch, what should you do? and —Why?

If you promise to tell the truth today, what should you do? and —Why?

Children also should be asked what might happen, both to the child and the person being lied about, if they said something happened to them and it was not true.

Examples of such questions are:

- When you get caught telling a lie, what usually happens to you?
- If you said that your classmate hit you and it was not true - you were making it up - what could happen to you for lying?
- If you said that your sister hit you and it really didn’t happen, but your dad believed you, what could happen to your sister?

In cases where a child witness struggles with responding appropriately to questions about promising, the issue of competency may need to be raised.

Box No. 20: Testing competence of child witnesses

Extracted from Judy Cashmore, “Child Witnesses: The Judicial Role”, available at http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/cashmore-child_witnesses-the_judicial_role.html#d5e14043

[30] It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between the truth and a lie. Attempts to ask more concrete questions may, however, raise other difficulties.³⁹ For example:

- *Would it be the truth or a lie if I said (if asked by a judge/magistrate)?* There are two problems with this question. First, it asks the child to call the judge/magistrate a liar. Secondly, asking children whether a given statement matches reality (for example, colour of clothing) does not indicate whether they know the difference between a truth and a lie. A lie requires the *intention* to deceive or mislead.
- *If I said there were eight people in the room, and if there were only ...?* This question requires the child to keep in mind two conditional or hypothetical statements, in addition to the problem alluded to above.
- *Have you ever told a lie? No.* Children are likely to be very uncomfortable admitting that they have lied, especially in court to a judge or lawyer.
- *What would happen to you if you told a lie here today?* A child who answers by saying “nothing” may be seen as not understanding the consequences of lying but some children do not accept the premise of the question — they have no intention of lying — so they may say “nothing”.
- For example, one exchange between an adult and a child: *If you tell a lie, will you get into trouble? No.*

[31] *You won't get into trouble? No ... But I am not going to tell a lie.*

[32] Since some children may not elaborate and give a reason for their answer, it would therefore be better to ask — *“If your brother/sister/friend broke a plate and said you broke it to save getting into trouble, would that be the truth or a lie?”*

6.3. Jurisdiction of Special Courts

6.3.1. Which Courts can try offences under the POCSO Act?

Offences under the POCSO Act cannot be tried in regular courts. Each state government must designate a Sessions Court as a ‘Special Court’ for each district, for the purposes of trying offences under the POCSO Act.³⁹ This designation must be made in consultation with the Chief Justice of the High Court, by notification in the Official Gazette.

If a Children’s Court has been notified under the Commissions for Protection of Child Rights Act, 2005 (CPCR Act), or any other Court of Sessions has been designated as a Special Court for a similar purpose, then that court may be deemed as a Special Court for

³⁹ Section 28 of the POCSO Act.

the purposes of the POCSO Act. For eg., in Tamil Nadu, certain Courts of Session were designated as ‘Mahila Courts,’ for speedy trial of cases relating to offences committed against women, both under the IPC and other social laws enacted by the Central and State governments for the protection of women. In 2009, these Mahila Courts were additionally designated as Children’s Courts to try offences against children under the CPC Act. Thus, these courts can try offences under the POCSO Act as well and no committal is required.⁴⁰

6.3.2. Do cases have to be committed to the Special Court by the Magistrate?

No, cases do not have to be committed to the Special Court by a Magistrate. Section 33(1), of the POCSO Act expressly dispenses with the requirement for committal and empowers the Special Court to take cognizance of any offence, based on a police report or complaint. Pursuant to this provision, the designated Sessions Court will serve as a court of original jurisdiction and a complaint or a charge-sheet can straight away be placed before it.

Section 33(1) also states: “A Special Court may take cognizance of any offence, *without the accused being committed to it for trial*, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.” This is in furtherance of the objective of facilitating speedy trial of sexual offences against children as committal proceedings will delay trial and frustrate the objective of the Act.

6.3.3. Will the Special Court have the jurisdiction to try offences under other Acts that the accused is charged under, in addition to the POCSO Act? Will offences under other Acts have to be committed to the Special Court by the Magistrate?

Yes, the Special Court has the jurisdiction to try offences under other Acts pursuant to Section 28(2) of the POCSO Act, which authorizes the Special Court to “also try an offence...with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.” The Special Court can try other offences only “while trying an offence under” the POCSO Act. The Special Court cannot try other offences if no charges are framed under the POCSO Act against the accused.⁴¹

40 Section 33(1) of the POCSO Act. See *P. Shanmugavel Raj v. State*, 2015(1) Crimes 536 (Madras High Court, Madurai Bench) available at <http://indiankanoon.org/doc/172191438/>.

41 *State through CBI New Delhi v. Jitender Kumar Singh*, AIR 2014 SC 1169. This case involved interpretation of provisions concerning the jurisdiction of the Special Courts under the Prevention of Corruption Act, 1989 (PCA Act). Section 4(3) of the states: “When trying any case, a special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.” The apex court held: “under sub-section (3) of Section 4, the special judge could try non-PC offences only when “trying any case” relating to PC offences. In the instant case, no PC offence has been committed by any of the non-public servants so as to fall under Section 3(1)

If the accused has been charge sheeted under the POCSO Act as well as the IPC or any other law, committal proceedings are not warranted, provided that the other offences occurred during the course of the same transaction as the POCSO offence. Where for instance, a person has been charged with sexual assault of a minor under Section 7, of the POCSO Act, as well as assault with the intent to disrobe a woman under Section 354B of the IPC, the Special Court can try the accused for both offences.

6.3.4. What is the nature of offences described under the POCSO Act?

The POCSO Act does not expressly specify the nature of the offences as to whether they are bailable, cognizable, or compoundable. However, the NCPCR guidelines state that,

reliance ... must be placed exclusively on Part II (Classification of Offences against Other Laws), First Schedule of the Code of Criminal Procedure, 1973. Whenever the punishment is less than 3 years of imprisonment, the offence would be non-cognizable and bailable. Any higher term of imprisonment beginning from 3 years and above would make such offence cognizable and non-bailable. Hence all sections are cognizable, with the exception of section 21 and section 22 which are non-cognizable and bailable offences.⁴²

6.3.5. Who has the authority to remand the accused or grant bail?

Pursuant to Section 33(1), POCSO Act, the Special Court can take cognizance of any offence as a court of original jurisdiction, upon receiving a police report or a complaint of facts which constitute an offence under the Act. Upon taking cognizance, it is the Special Court that will have the authority to remand the accused and decide on bail.⁴³

It is important to note that the POCSO Act envisages the Special Court as the key judicial body in every step of the criminal justice procedure – including the authorization of remand. Police officers or the SJPU must bring such matters only before the Special Court and not before regular Magistrates. In *Kum. Shraddha Meghshyam Velhal v. State of Maharashtra*,⁴⁴ the Bombay High Court considered whether a remand application could lie before a Magistrate. In this case, the complainant-petitioner took exception to the consideration of remand by the Magistrate. The Magistrate rejected the complainant's plea on the ground that since remand pertained to a pre-cognizance stage he had the jurisdiction to deal with remand. The High Court considered the Statement

of the PC Act... The trying of any case under the PC Act against a public servant or a non-public servant, as already indicated, is a sine-qua non for exercising powers under sub-section (3) of Section 4 of PC Act.”
See also, Vivek Gupta v. CBI, (2003) 8 SCC 628.

42 NCPCR, *Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders – Police, Special Courts and Special Prosecutors*, p. 13, <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=407&lid=844>

43 Section 309(2), CrPC, 1973.

44 Criminal Application 354 of 201. Decided by the Bombay High Court on 03.07.14.

of Objects and Reasons of the POCSO Act, particularly the objective of protecting the well-being and interest of the child “at every stage of the judicial process”. It held that:

*The Special Court is required to act under the Act following the special procedure from the very inception of the criminal prosecution which may be upon a private complaint or a police report. Its purpose is for safeguarding the interest of the child at every stage. It is required to act even without the accused being committed to it for trial. It is required to take cognizance of the offence and proceed with the stage of inquiry and trial. The very first stage of the trial which is the production of the accused for remand is no exception set out in the legislation.*⁴⁵

It also observed that “only the Court which can take cognizance of the offence can perform the functions even at the pre-cognizance stage, as there cannot be more than one court exercising jurisdiction in respect of a single criminal prosecution.”⁴⁶ It instructed all police officers and Magistrates to produce and direct the accused for remand to the Special Court.

6.3.6. Where there are two Special Courts established, which court will have jurisdiction over a case that involves offences under the POCSO Act as well as the law under which the other Special Court was established?

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (POA Act), also provides for a Sessions Court in a district to be a Special Court for the purpose of trying offences under the Act. A case involving penetrative sexual assault of girl belonging to a Scheduled Caste will therefore constitute an offence under Section 4 of the POCSO Act as well as Section 3(1)(x) of the POA Act. The matter will, however, lie before the Special Court under the POCSO Act.

On 24 September 2013, the Rajasthan High Court (Jodhpur Bench) decided a reference under Section 395, CrPC on this issue - “Where two special courts constituted under two different Acts, have jurisdiction, to try the offender, who in one transaction had committed offences, pertaining to two Acts, which court should try the offender?”⁴⁷ It held that the Special Courts under the POCSO Act would have the jurisdiction based on Section 28(2) of the Act which authorizes the courts to try offences for which the accused may have been charged under the CrPC. It observed:

Sweep of Section 28(2) of the Protection of Children from Sexual Offences Act, 2012, is too wide and comprehensive. Legislature in its wisdom has intentionally used words under section 28(2) of the Act or 2012 “with which the accused may

⁴⁵ *ibid*, para 11.

⁴⁶ Para 18.

⁴⁷ *In re: A ref u/s 395(2) CrPC by S. J. V. Unknown*, S.B. Criminal Reference Petition No. 1/2013, High Court of Judicature for Rajasthan at Jodhpur. Decided by Justice Kanwaljit Singh Ahluwalia on 24.09.2013.

under the Code of Criminal Procedure, 1973 be charged at the same trial” to vest jurisdiction in courts notified under the Act of 2012, otherwise, legislature would have limited by saying charges to be framed qua offences under Indian Penal Code or offences committed under any other Act.⁴⁸

The only exceptional case in which the Special Court would not have the jurisdiction is in cases where the accused person is under the age of 18 years, in which case the JJ Act shall apply and the case heard by the Juvenile Justice Board (JJB). (See Section 6.3.8)

6.3.7. Where a breach of confidentiality constitutes an offence under Section 21 of the JJ Act as well as and Section 23(4) of the POCSO Act, which authority will have jurisdiction to try the offence – the JJB or the Special Court under the POCSO Act?

Section 21 of the JJ Act prescribes penalty for un-authorized disclosure of the identity of a juvenile alleged or found to be in conflict with law or a child in need of care and protection. According to Rule 18(1)(a) of the JJ Model Rule, the JJB can take cognizance of violation of Section 21 by print or electronic media and can pass orders. The JJB will continue to have jurisdiction where the breach concerns a juvenile in conflict with law. However, if the breach takes place in case of a child survivor of a sexual offence, who is also a child in need of care and protection, it is the Special Court that can deal with the matter, as the POCSO Act is the special law occupying the field. A joint reading of Sections 28(2) and 42A of the POCSO Act, 2012 will enable the Special Court to try the breach under the POCSO Act as well as the JJ Act where the breach concerns a child victim.⁴⁹

6.3.8. Which court will have jurisdiction over the matter when the perpetrator of a sexual offence against a child is a person below 18 years of age?

In accordance with Section 34(1) of the POCSO Act, the provisions of the JJ Act, 2000, will apply in cases where an offence under the Act has been committed by a child, i.e., a person below 18 years of age on the date on which the offence was allegedly committed. The JJB will therefore have the authority to deal with the case and not the Special Court.

Under Section 34(2), the Special Court can inquire whether a person is a child or not and its order on the question cannot be deemed invalid, even if subsequently proof is furnished that the age of the person as determined by the Court was not the correct

48 *ibid.*

49 Section 42A, POCSO Act: Act in derogation of any other law.- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

age.⁵⁰

6.3.9. How should the Special Court determine the age of the child victim/survivor?

The Special Court should rely on Rule 12 of the JJ Rules, 2007 (Model Rules) while determining the age of the victim. Rule 12(3) lists in order of preference the evidence that must be considered:

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

In the absence of any of the above documents, the court can ask for a medical opinion from a duly constituted Medical Board. In case an exact assessment of the age cannot be done, the Court, for the reasons to be recorded, may, if considered necessary, give benefit to the child, by considering his/her age on the lower side, within the margin of one year.⁵¹

While the above rule is relevant for determining the age of juveniles in conflict with the law, the Supreme Court has held that it “should be the basis for determining age, even for a child who is a victim of crime.”⁵²

However, while conducting such age-determination, it is important to note that the judge cannot go into the correctness of the documents provided. Where documents such as the matriculation certificate or other such certificate is available, the court will have to accept such documents at face-value. The Supreme Court in this regard has provided that:

There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination.⁵³

50 Section 34(3), POCSO Act.

51 Rule 12(3)(b), JJ Model Rules, 2007.

52 *Jarnail Singh v. State of Haryana*, AIR 2013 SC 3467.

53 *Ashwani Kumar Saxena v. State of Madhya Pradesh*, AIR 2013 SC 553.

Under Section 34(2) of the POCSO Act, the Special Court can inquire whether a person is a child or not and its order on the question cannot be deemed invalid even if subsequently proof is furnished that the age of the person as determined by the court was not the correct age.⁵⁴

6.4. Presumption under the POCSO Act

6.4.1. Applying the presumption under the POCSO Act

The general rule regarding presumption is that an accused is presumed to be innocent unless proven guilty. This places the burden of proof on the prosecution to prove the guilt of the accused, while the accused would only have to defend the claims of the prosecution.

However, the POCSO Act incorporates an exception to this general rule and provides for two types of presumptions;

- (a) Presumption as to certain offences: where a person has been prosecuted for committing, abetting or attempting the following offences:
 - a. Penetrative sexual assault,
 - b. Aggravated penetrative sexual assault,
 - c. Sexual assault, or
 - d. Aggravated sexual assault;

then the Special Court shall presume that such person has committed, abetted or attempted the offence unless the contrary is proved.⁵⁵ This provision shifts the burden of proof to the defendant to prove that he is innocent.

- (b) Presumption of culpable mental state: The presumption against the accused also exists for all offences, where a culpable mental state of the accused is required. In such cases, the court can presume that the mental state required existed.⁵⁶ A culpable mental state would mean a mind that has criminal intention to commit the crime. According to the Explanation to Section 30 of the POCSO Act “culpable mental state” includes “intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.” For eg., the offence of sexual assault in Section 8 of the POCSO Act, requires that there is touching of private parts of the victim *with a sexual intent*. Where an accused is being tried for this offence, the court will presume that there was sexual intent on the part of the accused unless he/she rebuts this presumption. According to Section 30(1) of the POCSO Act, “a fact is said to be proved only when the Special Court believes it to exist

⁵⁴ Section 34 (3), POCSO Act.

⁵⁵ Section 29, POCSO Act.

⁵⁶ Section 30, POCSO Act

beyond reasonable doubt, and not merely when its existence is established by a preponderance of probability.”

Section 30 of the POCSO Act is identical to Section 35⁵⁷ of the Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act). In *Noor Aga v. State of Punjab*, the constitutional validity of Sections 35 and 54 of the NDPS Act, 1985, was challenged. Section 35 provides for the presumption of existence of the mental state of an accused whereas Section 54 presumes the commission of an offence for the mere possession of an illicit substance. Holding that the aforementioned Sections were not *ex facie ultra vires* the Constitution, the court further stated that this presumption is only raised when certain foundational facts are established by the prosecution.⁵⁸ This necessity of establishing merely the foundational facts has been recognized in several other judgments pertaining to different provisions that give rise to such reverse onus clauses.⁵⁹

While the standard of proof employed in most reverse onus clauses is one of preponderance/balance of probabilities, certain statutes prescribe the standard to be proof beyond reasonable doubt such as the POCSO Act, NDPS Act, the Essential Commodities Act, and the Wealth Tax Act, 1957.⁶⁰

In *Ritesh Chakravarty v. State of Madhya Pradesh*, another case pertaining to Sections 35 and 54 of the NDPS Act, it was held ‘...a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift... If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the *actus reus* which is possession of contraband by the accused cannot be said to have been established.’⁶¹

In *Pentapati Venkata Satyanarayana v. State of Andhra Pradesh*⁶², the Andhra Pradesh High Court held:

57 Section 35, NDPS Act - Presumption of culpable mental state.-(1) In any prosecution for an offence under this Act which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.-In this section "culpable mental state" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact.

(2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

58 *Noor Aga v. State of Punjab*, 2008 (56) BLJR 2254.

59 *State of Punjab v. Iqbal Singh*, AIR 1991 SC 1532; *Surjit Biswas v. State of Assam*, Criminal Appeal no. 1323 of 2011 (<http://judis.nic.in/supremecourt/imgs1.aspx?filename=40439>), *Dinesh v. State of Haryana*, Criminal Appeal no. 578 of 2011 (<http://judis.nic.in/supremecourt/imgs1.aspx?filename=41467>)

60 Juhi Gupta, “Interpretation of Reverse Onus Clauses”, 5 *NUJS L. Rev.* 49 (2012), 51. at footnote 14.

61 *Ritesh Chakravarty v. State of Madhya Pradesh*, JT 2006 (12) SC 416.

62 1999 CriLJ 4190.

18. The provisions of Section 35 of the NDPS Act would be attracted where in the first place the prosecution has succeeded in proving all the ingredients of the offence against the accused beyond reasonable doubt except the requisite culpable mental state. Section 35 of the Act cannot be invoked to dispense with proof of the offence by the prosecution. Section 35 of the Act would come into play when the prosecution has established the ingredients of the offence but the accused seeks to displace the influence of guilt by pleading a fact or circumstance which has the effect of disproving a fact which constitutes an ingredient of the offence.

Thus, the burden of proof that rests on the prosecution for this presumption to apply is that of proving the factual matrix under which the prosecution has been brought. If one or more of the ingredients of the offence are not conclusively proved, then the court could acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.⁶³ Reverse burden clauses dilute the prosecution's legal burden to the extent that the prosecution is required to prove only a minimum threshold, (also referred to as the basic or predicate fact), which is the *actus reus*.⁶⁴ For instance, if a person is accused of committing aggravated sexual assault as enshrined under Section 9 of the POCSO Act, the aggravating factor as well as the act of sexual assault will have to be established. If the case involves an allegation of penetrative sexual assault by a police officer, it will have to be established that the accused is a police officer and that the alleged act took place before the presumption is applied.

6.4.2. Is a Juvenile Justice Board required to apply Sections 29 and 30 of the POCSO Act while dealing with juveniles alleged to have committed offences under the POCSO Act?

No, the JJB cannot apply the presumptions under Sections 29 and 30 of the POCSO Act while dealing with children who have allegedly committed offences under the POCSO Act. Section 34(1), POCSO Act clarifies that children accused of offences under the POCSO Act will be dealt with under the JJ Act, The fundamental principles to be followed in administration of juvenile justice have been specified in Rule 3 of the JJ Model Rules. The first principle under Rules 3 is on the presumption of innocence –

- (a) A juvenile or child or juvenile in conflict with law is presumed to be innocent of any mala fide or criminal intent up to the age of eighteen years.
- (b) The juvenile's or juvenile's in conflict with law or child's right to presumption of innocence shall be respected throughout the process of justice and protection,

⁶³ *Dahyabhai Chhaganbhai Thakker v. State of Gujarat*, AIR 1964 SC1563.

⁶⁴ Byron Sheldrick, "Shifting Burdens and Required Inferences: The Constitutionality of Reverse Onus Clauses", 44(2) *U. Toronto Fac. L. Rev.* 179, 180 (1986).

from the initial contact to alternative care, including aftercare.⁶⁵

Further, Article 40(2)(b)(ii) of the UNCRC recognizes the right of juveniles “to be presumed innocent until proven guilty according to law”. Having ratified the UNCRC in 1990, the State is bound to respect all the rights contained therein.

6.5. Proceedings of the Special Court under the POCSO Act

6.5.1. *In camera* trials

6.5.1.1. What is the objective of an in-camera trial

It is important to understand and appreciate the need for *in-camera* trials for cases under the POCSO Act. The Law Commission’s 84th Report laid down the foundation for *in-camera* proceedings in rape and allied offences. The Commission aptly justified *in-camera* trials for sexual offences in the interest of justice:

...in the case of sexual offences, there is an overriding consideration which justifies an exception being made to the general rule of public trial. Certain details of an intimate character may have to be narrated in court in such trials. It is not only embarrassing for the victim to narrate them in the full glare of publicity. Often, by reason of such embarrassment, she may not be able to give all the factual details, and the cause of justice may ultimately suffer. It is, therefore, on the wider ground of interests of justice that would recommend that in the absence of special reasons to be recorded by the Court, a trial of rape or allied offences must be held *in camera*.⁶⁶

6.5.1.2. What is the statutory framework on in-camera trial?

The Criminal Law (Amendment) Act, 1983 (CLAA), that was influenced by the Law Commission’s 84th Report, led to the insertion of clause (2) of Section 327 of the CrPC, that prescribed *in-camera* trials and inquiries for rape and allied offences. Section 327(2) of the CrPC, however, confers discretion upon the court to allow any particular person to have access to or remain in the room or building used by the court, on its own or based on an application by either party. Emphasizing the need to adhere to the statutory prescription under Section 327(2) of the CrPC, in *State of Punjab v. Gurmit Singh*⁶⁷, the Supreme Court held:

The expression that the inquiry into and trial of rape “shall be conducted in camera” as occurring in sub-section (2) of Section 327 Cr. P.C. is not only significant but very important. It casts a duty on the Court to conduct the trial of rape cases etc., invariably

65 Rule 3(I), Rules under the Juvenile Justice (Care and Protection of Children) Act, 2000.

66 Law Commission of India, “Eighty-fourth Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence,” 1980, Para 5.5, p. 28.

67 AIR 1996 SC 1393.

“in camera”. The Courts are obliged to act in furtherance of the intention expressed by the Legislature and not to ignore its mandate and must invariably take recourse to the provisions of Section 327 (2) and (3) CrPC and hold the trial of rape cases in camera. It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood.⁶⁸

In *Sakshi v. Union of India*⁶⁹, the Supreme Court directed that the inquiry or trial of offences under Sections 354 and 377 IPC should also be held *in camera* under Section 327(2) of the CrPC.

Section 37 of the POCSO Act mandates the Special Court to “try cases *in camera* and in the presence of the parents of the child or any other person in whom the child has trust or confidence.” It also allows the court to take into account the needs of the child by issuing a commission under Section 284 of the CrPC, if it is of the opinion that the child needs to be examined in a place other than the court. Unlike Section 327(2) of the CrPC, this provision does not allow the court to receive applications from the accused seeking the presence of any particular person in court. The trial must be conducted *in camera* and in the presence of a parent or a person who the child trusts. It is irrelevant whether the parties demand a public trial or do not expressly ask for an *in camera* trial, as the statute clearly prescribes an *in camera* trial. For instance, the Special Court cannot conduct the trial in an open court because the prosecutrix is considered old enough to testify in the presence of others.

6.5.1.3. What is the duration of an in-camera trial

A question arises as to whether the trial must be held *in camera* for the entire duration of the trial or only when the evidence of the child is being recorded. A literal interpretation of Section 37 of the POCSO Act suggests that it is not confined to the evidence stage but extends to the entire proceedings. Hence, the trial cannot cease to be held *in camera* after the child has tendered evidence. The Special Court has not been vested with any discretion in this regard and will have to conduct the entire trial *in camera*.

6.5.1.4. What is the prohibition on media?

Clause (3) of Section 327, CrPC, which was introduced by way of the Criminal Law (Amendment) Act, 1983, prohibits the publication or printing of any matter in relation to proceedings in rape and allied offences, except with the permission of the court.

⁶⁸ *ibid* at para 26

⁶⁹ AIR 2004 SC 3566.

Disclosure of the identity of the victim, without the permission of the court, is punishable under Section 228A, IPC with imprisonment which may extend to two years and fine. Section 21(1) of the JJ Act prohibits identification of a juvenile in conflict with law or a child in need of care and protection in any newspaper, magazine, news-sheet or visual medium. Breach of this provision attracts a penalty of upto INR 25,000.

Section 23(2) of the POCSO Act prohibits the media from disclosing the identity of a child including the name, address, photograph, family details, school, neighbourhood or any other particulars that may lead to the disclosure of the identity of the child. However, the Special Court can permit such disclosure, if it is of the opinion that it is in the best interest of the child. Breach of the prohibition is punishable with imprisonment for a minimum term of six months which may extend to one year or fine or both, as provided under Section 23(4), POCSO Act.

Section 228A of the IPC, Section 23(4) of the POCSO Act, and Section 21 of the JJ Act may all be attracted if a newspaper publishes the identity of a child survivor in a case of sexual offence. Upon being found guilty, the defendant can be sentenced under all three provisions. In cases involving a child in conflict with the law, Section 21 of the JJ Act will apply and the JJB will have the jurisdiction to try the offence. The breach of identity can be reported by anyone to the police or SJPU. If the breach takes place while the trial is on, the prosecution can bring it to the attention of the Special Court.

6.5.2 What is the legal framework regarding the identification of an accused person by a child witness?

The POCSO Act and Rules do not lay down the procedure to be followed in respect of identification of the accused person/s by the child. However, it is clear from the object of the Act that all proceedings in respect of child survivors must be conducted in a child-friendly manner and must not in any way lead to the secondary victimization of the child.

The Delhi High Court in the case of *Rakesh Kumar v. State*⁷⁰ laid down the following guidelines in respect of children below 12 years of age identifying accused persons:

- a) In every case where witness is a child below the age of 12 years TIP proceedings shall be held in one of the court rooms attached with the main Tihar Jail so that the child does not enter the main Jail Complex to reach the Test Identification Parade room.
- b) Installation of semi reflective screen or any other screen or mechanism in a room where TIP proceedings will be conducted so that the child witness is not confronted face to face with the criminals participating in the TIP proceedings.
- c) A person accused of the offence and the others who may be participating in the

⁷⁰ CrI. A. 513/1998 decided on 30.05.2014 by the Delhi High Court.

TIP will be explained the procedure and the manner of TIP proceedings to be held in a case of child witness.

- d) No officer below the rank of Deputy Superintendent of Jail shall accompany the child witness at the time of TIP proceedings and endeavour shall also be made by the Jail Superintendent that, so far as possible only female officer is deployed wherever witness happens to be a girl child for the purposes of identifying the accused person.
- e) No police official shall be seen in a uniform right from the stage when the child enters the TIP Room and till he/she leaves the premises after the completion of TIP proceedings. The child witness shall be entitled to accompany his parents/guardians or any of his close relatives so as to make the child comfortable before participating for identifying the accused in the Test Identification Parade.
- f) Endeavour shall be made by Director General (Prisons)/Jail Superintendent that a lady officer who is more humane, sensitive and compassionate is given duty to accompany the child witness.
- g) The child friendly atmosphere will be created in a room where the child is brought first and the stay of the child will be made most comfortable so that the child finds the place to be attractive and conducive to his/her requirements.
- h) Necessary arrangements for light refreshment to the general liking of children below the age of 12 years shall also remain in place to keep the mood of the child upbeat.⁷¹

The Law Commission of India, in its 198th report on “Witness Identity Protection and Witness Protection Programmes,”⁷² formulated recommendations in respect of evidence and identification of accused by victims during trial, through a two-way closed-circuit television or video link and two-way audio link. The Commission proposed two models based on whether or not the accused was known to the victim. Where the victim is known to the accused, she or he will have to be protected from trauma. To avoid trauma, the model would require the Presiding judge, the court-master and the stenographer, the accused and the technical personnel to be present in Room A and the victim, the public prosecutor and the pleader for the accused and technical persons in Room B.⁷³ The camera will be focused on the accused only when the victim has to identify her/him. After the identification, the image of the accused will not be visible in the screen, in Room B.⁷⁴ The victim will be examined and cross-examined in Room B, while the judge and the accused can view it from Room A. This model has been adopted by the Special Courts established under the POCSO Act in Karkardooma and

71 *ibid.*

72 Law Commission of India, “198th report on Witness Identity Protection and Witness Protection Programmes”, August 2006, available at <http://lawcommissionofindia.nic.in/reports/rep198.pdf>

73 *ibid.*, p. 7.

74 *ibid.*, p. 7.

Saket, both in Delhi.

Where the victim or witness is not known to the accused, their identity needs to be protected. In this scenario, the Law Commission proposed that the threatened witness remain in Room A with the judge, public prosecutor, stenographer and the technical personnel, while the accused be placed in Room B, with her/his pleader and the technical persons operating the system. The threatened witness will be examined by the public prosecutor in Room A and be asked to identify the accused *via* video-link. While the accused will not be able to see the victim/witness, cross-examination will take place through the two-way video and audio system.⁷⁵

6.5.3. What are the means to prevent exposure of the child victim to the accused?

Section 36(1) of the POCSO Act obligates the Special Court to ensure that the child is not exposed to the accused at the time of recording of the evidence. They must however also ensure that the rights of the accused are not compromised during the trial and that the accused is in a position to hear the child's statement and communicate with his/her lawyer. Section 36(2) suggests the means by which the exposure can be avoided. This could be done through video-conferencing, utilizing single visibility mirrors or curtains or any other device.

Section 273 of the CrPC also protects a victim of rape or sexual offence from exposure to the accused while also guaranteeing the right of cross-examination of the accused. The Special Court should take measures to ensure that exposure does not take place before the evidence is recorded. For instance, exposure often takes place when the child is waiting outside the courtroom on the day of the evidence. The child is exposed not just to the accused, but several other accused persons who may be in shackles and accompanied by police personnel in uniform. This will inevitably have an intimidating impact on the child and shake her/his confidence to testify in court. The child could be allowed to access the judge's entrance to the courtroom so as to avoid the crowds and accused persons. Wherever possible, a room closer to the courtroom should be designated as the waiting room for children and their families. Efforts must also be made to ensure that the child witness is not kept waiting. This will not only affect the quality of the testimony but also increase the risk of exposure to accused persons. To avoid this, children should not be summoned to court at 9.30 am when it is known that the court will record evidence only after lunch.

⁷⁵ *ibid*, p. 6.

6.5.4. What are the factors to be considered before scheduling the testimony of a child victim?

Box No. 21: Illustrative Checklist for Scheduling Testimony of a Child Victim of Sexual Abuse

- | | |
|---|---|
| <ul style="list-style-type: none">• Is it the nap time of the child?• Is it the mealtime of a child?• Has the child missed a meal?• Has the child missed a nap?• Is it exam time in school? | <ul style="list-style-type: none">• Is it after school hours?• Is the child in good enough health to make a testimony?• Is the child on medication of any kind, the effects of which could impede his/her ability to testify? |
|---|---|

The age and developmental stage and needs of the child must be considered while scheduling evidence. For instance, the evidence of the child should not be kept at a time when the child is usually napping. Care must be taken to determine if the child has missed a meal or a nap, as that can affect the behavior of the child and consequently the quality of the testimony. Recommendations by the Texas Centre for Judiciary on scheduling testimony of a child are instructive: “In criminal cases involving school-aged children, it may be best to schedule testimony during school hours. Children who are required to testify after being in school all day, may be tired and stressed from worrying about court while in school. By considering the developmental needs of child witnesses in scheduling cases, courts can easily improve the quality and coherence of their testimony.”⁷⁶

6.5.5. Can the child victim/survivor be examined in a place other than the court?

Yes, the Special Court has the discretion to examine the child in a place other than the court. If it is of the opinion that the child needs to be examined in a different place, it can issue commissions under Section 284, CrPC.⁷⁷ For instance, if the child feels uncomfortable within the courtroom, her/his evidence can be recorded in any other room within the court complex. If the child and her/his family have relocated to a different city, she/he need not be compelled to travel in order to appear in court. Instead, a commission can be directed to the Special Court in whose jurisdiction she/he resides, to record the statement.

⁷⁶ Texas Center for the Judiciary, “Child-friendly Courtrooms: Items for Judicial Consideration”, p. 21, <http://www.yourhonor.com/assets/ic/BenchAid.pdf>. The Texas Center for the Judiciary is a non-profit organization whose objective is “to provide outstanding judicial education to Texas judges so that a qualified and knowledgeable judiciary and staff may administer justice with fairness, efficiency, and integrity.”

⁷⁷ Proviso to Section 37, POCSO Act, 2012.

6.5.6. Should an oath be administered to children before their testimony is recorded?

The proviso to Section 4(1) of the Oaths Act, 1969, provides guidance on the age above which children can be asked to take an oath. It states: "Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation", then she or he may not be asked to make an oath or affirmation.

6.5.7. Is an unsworn statement admissible as evidence?

The proviso to Section 4(1) of the Oaths Act, 1969 clarifies that "the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth." Further, Section 7 also states that omissions to take an oath or make an affirmation or any irregularity in its administration will not "invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

In *Rameshwar v. State of Rajasthan*,⁷⁸ the Supreme Court examined the admissibility of the evidence of an 8-year-old girl who had been raped by the appellant. The Sessions Judge who recorded her testimony had certified that she had not been administered an oath as she did not understand its sanctity. The judge did not, however, indicate whether the child understood the duty of speaking the truth. The issue before the court was whether the opinion of the judge on this matter must be formally recorded or can it be inferred. The apex court placed reliance on Section 118 of the IE Act, 1872, which pertains to the competency of a witness, and observed that Section 118 will prevail over the Oaths Act, as the latter does not prescribe any grounds of incompetency of witnesses. The court also held that evidence of a child who has not been administered oath is admissible. The court, however, advised judges and magistrates to "always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the magistrate or judge really was of that opinion can ... be gathered from the circumstances when there is no formal certificate."⁷⁹

6.5.8. Should leading questions be permitted during the examination-in-chief of a child survivor?

According to Section 142, IEA, if an objection is raised by the adverse party, leading

⁷⁸ AIR 1952 SC 54.

⁷⁹ AIR 1952 SC 54 at para 14

questions⁸⁰ must not be posed in an examination-in-chief, except with the permission of the court. Further, the “Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.”

The IEA cautions against the asking of leading questions during the examination-in-chief with a view to safeguard the accused persons’ right to a fair trial. In *Varkey Joseph v. State of Kerala*,⁸¹ the Supreme Court held that

...Section 142 does not give such power to the prosecutor to put leading questions on the material part of the evidence which the witness intends to speak against the accused and the prosecutor shall not be allowed to frame questions in such a manner to which the witness by answer merely says “yes” or “no” but he shall be directed to give evidence which he witnessed. The question shall not be put to enable the witness to give evidence which the prosecutor wishes to elicit from the witness nor the prosecutor shall put into witness’s mouth the words which he hoped that the witness will utter nor in any other way suggest to him the answer which it is desired that the witness would give.

However, in the best interests of children, Special Courts may consider allowing leading questions during examination-in-chief as “[s]tudies on children’s memories show that children are “less skillful than adults in reproducing events and using free recall,” and that “when there are errors in children’s memories, they are more likely errors of omission (i.e. forgetting) than commission (i.e. adding new or inaccurate information).” Recent research by Valerie Reyna and Chuck Brainerd, professors of human development and law from Cornell University, distinguishes memories of children from that of adults and states that children’s minds record “what actually happened,” while adults record “the meaning of what happened,” thus making the latter “more susceptible to false memories”.⁸² The use of leading questions may counter the problem of poor recall in children and assist the child in remembering and vocalizing the events that took place. Further, “[a]lthough young children have excellent memories they often need suggestive questions to trigger their memories.”⁸³ Moreover, leading questions may be permitted to overcome a child’s difficulty in testifying due to fear,

80 Section 141, IEA: Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

81 AIR 1993 SC 1892.

82 Anon, “Research suggests that children’s memory may be more reliable than adults’ in court cases”, 06 March 2008, at <http://phys.org/news124040343.html>; Association for Psychological Science, “New Research Shows Children Less Prone to False Memories than Adults, Challenging Assumptions About Eyewitness Testimony”, 30 April 2007, <http://www.psychologicalscience.org/index.php/news/releases/new-research-shows-children-less-prone-to-false-memories-than-adults-challenging-assumptions-about-eyewitness-testimony.html>

83 *Supra* n. 15 at p. 87.

timidity, embarrassment, confusion or reluctance, and may help the court obtain more meaningful testimony in situations where a child responds with a simple “yes” or “no.”⁸⁴

6.5.9. Should the testimony/statement of the child be recorded in the absence of the parent/guardian?

The Special Court has been vested with the obligation of creating a child-friendly atmosphere in the courtroom. Section 33(4) of the POCSO Act requires the court to allow a family member, guardian, friend, or a relative, whom the child trusts or has confidence in to be present in court in order to ensure a child-friendly atmosphere. In the event that the parent/guardian/accompanying person is also a witness, the court could examine such person before recording the testimony of the child.

6.5.10. Who can put questions to the child during the trial?

Section 33(2) of the POCSO Act prohibits the Special Public Prosecutor and the defence lawyer from putting questions to the child directly. All questions during the examination-in-chief and cross-examination must be routed through the Special Court. It is the judge of the Special Court who can pose the questions to the child. Under no circumstances, can the questions be posed by the Special Public Prosecutor, defence lawyer, or the Investigating Officer.

If the child is very young, the court could seek the assistance of an expert in child development or child psychology to frame the questions in a developmentally appropriate manner. The Act and Rules are enabling in this respect. Rule 2(1)(c) of the POCSO Rules defines “expert” to mean “a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability.” For this purpose, the Special Court should maintain a list of such experts who could be called upon for assistance. It must also ensure that there the appointment of a particular expert does not involve any conflict of interest.⁸⁵

84 Texas Center for the Judiciary, “Child-friendly Courtrooms: Items for Judicial Consideration”, p. 19, <http://www.yourhonor.com/assets/ic/BenchAid.pdf>. “The Texas Rules of Evidence state that leading questions may be used on the direct examination of a witness when it is necessary to develop the testimony of the witness. The legislative notes to Rule 611(c) further clarify that leading questions may, in the court’s discretion, be used on direct examination for: (1) preliminary matters; (2) refreshing memory; and (3) questioning ignorant or illiterate persons or children.”

85 Rule 2(9), POCSO Rules, 2012.

Box No. 22: Questioning a Child in Court – Suggested Do's and Don'ts for a Special Court Judge

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The questioning of children for forensic purposes needs to follow a format so that the children can give accurate information to the best of their ability. Given below are some do's and don'ts for the interview procedure as well as questions that can be posed to child victims or witnesses. These have been adapted from a number of interview protocols including The Cornerhouse Forensic Interview Protocol (Anderson *et al*, 2010), Forensic Interviewing Protocol (Governor's Task Force on Children's Justice and Department of Human Services, State of Michigan, 2003), National Institute of Child Health and Human Development Investigative Interview Protocol (Lamb *et al*, 2007) and the Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act (POCSO) 2012 Ministry of Women and Child Development, Government of India, 2013. These would apply to interviews by the police in the course of investigation as well as examination and cross-examination during trial.

Do's and Don'ts

Atmosphere

- The atmosphere must be child friendly and relaxed. This can be done by having a specific room specially designed to interview children. The room should be away from traffic, noise and other potential distractions like phones, fax machines, computers, typewriters, etc. The room should be bright and well lit. It should have a toilet facility. It should have tables and chairs and a cupboard to keep materials out of view. The cupboard can have a few toys and drawing material (such as papers, crayons, colour pencils,) which can be used, if necessary. It should preferably have a one-way mirror and a video recording facility so that the interview can be recorded. The environment should be relaxed but not too distracting.
- Avoid having police personnel in uniform, the accused or any other person in the room when the interview is being conducted

Scheduling Interviews

- Interviews must be scheduled after the child has used the toilet and has had something to eat. It should not be scheduled during the child's nap time. It should be scheduled preferably in the morning. If the child is on medication, (for example, anti-seizure medication which can cause drowsiness), the interview should be scheduled for a time when the child is most alert.

Interview Guidelines

- The judge/police personnel conducting the interview must introduce themselves. Their tone must be relaxed and easy-going. Sometimes children think that they have

done something wrong and are in trouble and therefore are being interviewed by the judge/police personnel. It is important to allay their fears. The following is a brief example of how one can introduce one's self at the beginning of the interview. "Namaste, my name is Srinivas. I am a judge in this court. Part of my work here is to talk to children about events that have happened to them." Or, - "Hello, my name is Raju and I am a police officer here. I talk to a lot of children in Hoskote (example of name of place where police station is located) about things that have happened to them. We will talk for a while and then I will take you back to the other room where your mother is waiting for you. Okay?"

- If the interview is video-recorded, verbal consent of the child must be taken prior to the interview. A statement such as the following can be made. "I have a video recorder in this room. It will record what we say. It is there so that I can listen to you without having to write everything down. Is that okay?"
- The child's personal space must be respected. By this it is meant that there must be adequate space between the interviewer and the child. More often than not, these children are talking about difficult issues which they may or may not have confided in others, events that are painful, shameful, embarrassing and guilt inducing and thus it can be quite disconcerting to have someone, especially a person in authority staring/looking at them directly at all times. Sitting at an angle of 45 degrees is helpful, as the child can look in front and talk if they don't wish to look at the interviewer, but the interviewer can see the child at all times.
- As these children have been abused in some form or the other (physical, sexual) they often misinterpret touch. It is important therefore not to touch the child. Even if it is a small child, it is important not to tousele their hair, pinch their cheeks or demonstrate affection using touch.
- If the interviewer is unable to hear the child, he/she should not guess what the child might have said. This is important, because if the interviewer has misunderstood the child, in most cases the child is unlikely to correct the interviewer. It is therefore always better to ask the child again as to what he/she had said. For example, "Could you repeat what you just said?" or "I did not hear what you just said, so could you repeat it again please"
- If the child is talking very softly and the interviewer is unable to hear the child clearly, this should be communicated to the child. The interviewer could give the child an explanation such as -"I am unable to hear you, so it would help me if you can look at me and talk a little louder. Thanks" or, - "I have some difficulty hearing, so could you look at me and talk a little louder. Thank you"
- Do not volunteer information that the child has not yet revealed in the interview. For example, if the child has not told you that the father lay down on top of the child it is important not to introduce this information before the child has revealed it himself/herself. For example, "Did he have his pants off or on when he laid down on top of you?" If leading questions have to be asked then it is suggested that the following style be adopted - "Did he have his pants on or off?". Based on the

child's answer, the follow up question can be- "Tell me what happened after he took off his pants?" or "Tell me what happened then?"

Language and Communication

- It is important to talk to the child in a language well understood by the child. If the interviewer does not speak the child's preferred language or dialect a translator must be present.
- Do not use baby or childish language while talking to children. Use a normal adult tone and pronunciation. The words that the child uses to describe certain body parts or names of alleged perpetrators or others need to be used when referring to these body parts or persons.
- Actively listen to the child using minimal encouragers, such as "Go on, I am listening," or "Hmmm," or "Then what happened?," or "Tell me more about what happened."
- If the child uses a kinship term like "uncle" or "Grandpa" it is useful to clarify their name. For example, "Can you tell me this uncle's name?" Or, the interviewer can ask- "Do you have one grandpa or more than one grandpa? Which grandpa was this?" Thereafter during the interview the alleged perpetrator's name must be used. For example, if the child says "Rakesh Mama" or "Dada" then subsequent questions must contain his/her name.
- It is also important not to use the pronouns 'he' or 'she' as they can be quite ambiguous. For example, "What were you doing when he came home?" Instead the question can be framed as "What were you doing when Rakesh Mama came home?"
- Do not propose feelings by saying things such as- "I know that you probably hate your father". Feelings that children have for the perpetrators can be rather ambivalent. Sometimes it can be quite confusing for the child. The perpetrator may otherwise be pretty affectionate and caring and the child may have difficulty reconciling the different experiences shared with the perpetrator, both positive and negative experiences including the sexual abuse itself. The above statement regarding whether the child hates her/his father need not be made at all, as it is irrelevant legally to whether sexual abuse has indeed occurred or not.
- Do not make promises such as- "I will lock him up in prison and you will never have to see him again". This is not ethical, as one cannot predict what is likely to occur during the trial. Making false promises can therefore even result in secondary victimisation.
- Do not ask questions which convey judgements such as -"Why didn't you tell your mother about it that very night?" It is essential to be non-judgmental, as in all probability, the child is feeling guilty about the same fact and this can make the child more guarded which may impede further evidence gathering by the interviewer.
- Do not use the words such as "abuse", "rape" or "bad" etc., when asking about the experiences as these are adult interpretations.

- Do not display affection and bonhomie such as “I am like your father, you can tell me anything,” or “We are friends, aren’t we?”. This might be quite confusing for the child whose trust in adults and perhaps in close friends/relatives has been destroyed – which may therefore make him/her more wary and guarded.
- If the interviewer does not understand a particular word or phrase, she/he can ask the child to elaborate by showing it on an anatomical drawing and explaining the same. For example, if the child says “pee pee” for the male/female genitalia, then the interviewer must ask- “Can you tell me what a pee pee is?” or “On this diagram can you show me where the pee pee is? As explained earlier, it is also important that the child’s words be used subsequently in the interview, when referring to the genitalia
- If there is inconsistency, then the interviewer must ask the child for clarifications in a non-confrontational and non-accusatory manner. At no point should the questioning style suggest dis-belief in the story of the child. For example conversations questions with statements such as the following should be avoided- “You said that your father kissed you on your mouth yesterday and then you said that you had stayed at your uncle’s place yesterday. I am confused. Can you tell me again what happened”.

Questioning Children

- Children are quite concrete in their thinking, and thus open ended questions must be asked. Questions such as “Did he touch you?” are not very good questions as they are unclear and misleading. Some children may answer negatively as in their experience, they were kissed not touched. Children are often literal beings and may be extra careful while answering in an interview of such nature and thus may not equate touch and kiss.
- Questions which are ambiguous must not be asked, such as -“How were your clothes?” Instead, concrete questions such as- “What were you wearing when this happened?” must be asked.
- In the hierarchy of questions that can be asked during an interview of a child victim, open ended questions and prompts are most often preferred. Specific but non-leading questions can be asked for soliciting further details. Closed questions are used to confirm specific details through the use of a multiple choice question or a yes/no question. Leading questions can be asked after certain facts have already been established/revealed by the child.
- Examples for the above mentioned question types are given below.
 - Open-ended questions are as follows. “Tell me everything you can about it,” or “Tell me what you know about what happened”. Open-ended prompts are used in the following manner: If the child stated that the uncle hit her, an open-ended prompt would be- “You said your uncle hit you. Tell me what happened,” or “You said your uncle hit you. Tell me everything about that”.

- Specific, non-leading questions are as follows. It focuses on details the child has already mentioned. Questions of this kind are as follows - "You said you were at home alone. Tell me what happened then?" or "You called this person Bittu. Who is Bittu?," or "You said you were sleeping. Then what happened?"
- An example of a closed question would be as follows "Where did this happen? In your room, the bathroom or another place?," or, "Were you wearing your pajamas, or wearing something else?"
- Leading questions must not be asked or, if at all, should be used sparingly, as they assume facts or suggest an answer, which the child has not yet given. Questions such as - "He touched you, didn't he?," should not be asked. If a leading question is required to be asked, the question should be framed as follows, "Did Uncle Ravi touch you?," then follow it up with an open-ended prompt such as - "Tell me everything about that."
- Do not ask the child to "pretend or imagine". For example, "Imagine what happened and tell me". This is not a good practice, as it removes the child from the direct experience and can lead to incorrect or/and inaccurate answers.
- Most children do not understand the concept of time until they are 8-10 years of age. Even if they do understand the concept of reading time, they may or may not be able to relate it to events that have occurred. Children less than 4 years have difficulty with times of the day. Children less than 7 years also do not understand prepositions such as "before" and "after" clearly. It is essential to keep these facts about the developmental stages of children in mind while questioning children. Words such as 'yesterday', 'day after tomorrow,' etc., should also not be used. Clock times should not be included in questions. Instead, events should to be tied to meal times and other activities in the child's day, (for example, to the time that he/she goes to school or comes back from school, attends singing class, etc.,) which can be used as reference points. For example, -"You came back from school and then what happened?" or "You said you ate lunch. Then what happened?"
- Young children also often have difficulty with numbers. Children should not be asked "Tell me how many times it happened?" Instead the question should be framed as "Did it happen once or more than once?" followed by questions such as "Can you tell me about the first/last time that this happened?"
- Multiple questions should not be asked at the same time. For example, "Where were you and what were you doing?" Instead, if the child stated previously that the event occurred after the uncle came home, then the questions must be framed as follows- "Where were you when Rakesh Mama came home?" After the child has answered the first question, the next question can be -"What were you doing when Rakesh Mama came home?" If for instance, the child said he/she was doing his/her homework, then the follow up question thereafter can be -"Tell me what happened after Rakesh Mama came home and found you doing your homework?"

Making the Child Comfortable

- Do not correct the child's behaviour. For example, if the child rocks in his/her seat, or shakes his/her legs, as long as the interviewer can hear the child and it is not interfering with the interview procedure, it should be allowed, as these are often nervous or soothing behaviours. The child should, in no circumstance, be told to stop acting in these ways or any other such manner, as the range of such self-soothing behaviours may not always be all known. For example, some children may tap on the desk, hum, make noises with their mouth; rub their hands, sing, etc. An effort should be made to understand such behaviours, (however disturbing they may be to the interviewer), as possibly self-soothing behaviours, which in itself may actually contribute to a conducive and enabling environment for the child in making a clear testimony.
- It is also important to convey a non-judgmental attitude. Do not display shock, disbelief or disgust when the child says something. If a translator is present, try and confine your communication with the translator to understanding the child. Do not engage in conversation beyond this as it could distract and prevent the free flow of thought and recall of painful memories.
- Do not promise rewards or gifts by making statements such as- "I will give you a chocolate, if you tell me what happened?"
- Do not withhold basic needs as a form of reinforcement, by making statements such as- "I will allow you to go the bathroom/drink water if you tell me what happened?" Children are then not only compelled to concentrate more on holding in their bowel/bladder, rather than answering the interviewer's questions, which is counterproductive, but also feel disrespected and unimportant.
- Uses of reinforcements as stated in the above two examples are viewed as improper interview techniques, as they tend to coerce and compel the child into stating events and making disclosures in an incorrect manner. This will undermine the quality of the interview and the accuracy of the facts collected which can have negative consequences for the case in court.
- Acknowledge the child's feelings. For example, if the child is demonstrating a feeling of being upset, sad, embarrassed or scared, acknowledge these feelings. For example, "I talk to many children about these kinds of things, it's okay to feel that way, don't worry. Now, would you like to tell me what happened?"

6.5.11. Can a statement of a child recorded by a Magistrate under Section 164 of the CrPC be admitted as examination-in-chief?

According to the proviso to Section 164(5A)(b) of the CrPC, statements of victims of sexual offences under the IPC who are temporarily or permanently disabled, can be admitted as examination-in-chief. This procedure also spares such victims the trauma of having to repeat the statement before the Special Court. They can however be cross-examined on the statement they made before the Magistrate. Unfortunately, no such benefit is currently available to children without disabilities.

6.5.12. Is a child victim entitled to legal assistance, apart from the assistance provided by the Special Public Prosecutor?

Yes, under Section 40 of the POCSO Act, the child and her/his family can take the assistance of a lawyer of their choice. If they are unable to hire a lawyer, they can seek the services of a free legal aid lawyer from the panel of lawyers appointed by the Legal Services Authority. The private lawyer can assist the Public Prosecutor and also make additional submissions on behalf of the child.

6.5.13. What should the judge do if she/he is of the opinion that the child needs counselling and mental health support services?

The judge can inquire with the jurisdictional Child Welfare Committee, (CWC), if any services have been extended to the child. Under Section 19(6) of the POCSO Act, the police or SJPU are duty-bound to report every case to the CWC. Rule 4 of the POCSO Rules requires the CWC to take steps to ensure the care and protection of children who have been abused or face of threat of abuse within their family or in an institution. In the event that the CWC is not functional, the judge can direct the District Child Protection Unit (DCPU) to facilitate the provision of these services. Interim compensation can also be ordered so that where such services are provided by private entities, they can be accessed by the family easily.

6.5.14. What measures can the judge take to ensure the safety of the child, while granting bail to the accused?

Where the accused is known to the victim or the victim's family or lives in the same vicinity and is likely to threaten or influence the victim or her/his family, the judge must consider including a no-contact clause in the bail order. Such a clause should expressly prohibit the accused from contacting the victim or the victim's family through physical or electronic means. The victim and the victim's family should also be assured of their safety and encouraged to report intimidation or threats by the accused to the court, through the Special Public Prosecutor.

6.5.15. Can a judge pass a sentence lower than the minimum prescribed under the Act?

Where a minimum sentence has been prescribed by a statute, courts do not have the discretion to pass lower sentences. The Supreme Court of India has, in this regard clearly held that:

“Where the mandate of law is clear and unambiguous, the court has no option but to pass the sentence upon conviction as provided under the statute...

...The mitigating circumstances in a case, if established, would authorise the court to pass such sentence of imprisonment or fine which may be deemed to be reasonable but

not less than the minimum prescribed under an enactment.”⁸⁶

Some statutes have in-built exceptions for courts to provide lower sentences, but only for ‘special reasons’ which need to be recorded by the court. The POCSO Act does not contain any provisions which allow for such exceptions and hence a judge is not empowered to pass sentences lower than the minimum sentence prescribed under the Act.

6.5.16. What is the legal framework concerning conversion of charges?

Where the prosecution has failed to prove a charge against the accused, dismissal is not the only option available to the judge. Section 222 of the CrPC permits the judge to convert the charge into a minor offence, or an attempt to commit the offence, where it is appropriate.

Section 222, CrPC reads as follows:

222. When offence proved included in offence charged. - (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

- (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
- (3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.
- (4) Nothing in this section shall be deemed to authorise a conviction of any minor offence, where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied.

In *Buddhadeb Debnath v. State of Tripura*⁸⁷, the Supreme Court upheld the conversion of a charge of attempt to rape under Section 376(1) read with Section 511 of the IPC to a lesser charge of ‘Assault or Criminal Force to woman with intent to outrage her modesty,’ under Section 354, IPC. The court found that all the elements of a charge of ‘attempt to rape’ had not been proved, but all elements relating to the offence under Section 354 had been proved although no charge was framed. The court accordingly upheld the conviction under the said charge. In *Jongi v. State*⁸⁸, the Delhi High Court converted a charge of sexual assault under Section 7 of the POCSO Act to a charge of sexual harassment under Section 11 of the POCSO Act, on finding that the elements

⁸⁶ *State of J & K v. Vinay Nanda*, (2001) 2 SCC 504 at 509.

⁸⁷ CrL. A. No. 30 of 2011 decided on 17.01.2015.

⁸⁸ CrL. A. 1477/2013 decided on 14.10.2014 by Delhi High Court.

required under Section 7 of the POCSO Act had not been fulfilled.

6.5.17. What are the options available to the judge when the child and other prosecution witnesses turn hostile?

Since the offences under the POCSO Act cannot be compounded or compromised, the cases continue even if the child victim turns hostile. However, any evidence recorded continues to be relevant, even if the witness turns hostile.⁸⁹ The courts have ordered convictions even where the main witnesses have turned hostile.⁹⁰ The Supreme Court, in the case of *Bhajju @ Karan Singh v. State of Madhya Pradesh*,⁹¹ held:

It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution, to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence...

Further, in *Gura Singh v. State of Rajasthan*⁹², the Supreme Court specifically stated that the evidence given by a witness who later turns hostile cannot be discarded:

There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration... In *Rabindra Kumar Dey v. State of Orissa* (AIR 1977 SC 170), it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.

⁸⁹ *Ramesh Harijan v. State of UP*, (2012) 5 SCC 777. See also *Bhagwan Singh v. State of Haryana*, (1976) 1 SCC 389; *Rabindra Kumar Dey v. State of Orissa*, (1976) 4 SCC 233; *Syad Akbar v. State of Karnataka* (1980) 1 SCC 30 and *Khujji v. State of M.P.*, (1991) 3 SCC 627 at 635, para 6.

⁹⁰ *State v. Dinesh Sharma*, SC No. 155 of 2013

⁹¹ (2012) 4 SCC 327

⁹² AIR 2001 SC 330

6.5.18. How can a judge ensure that victims do not turn hostile?

Given the sensitive and stigmatic nature of child sexual abuse, a large number of victims and their families often turn hostile during the trial proceedings. Traumatic interactions with the criminal justice system could be one of the contributing factors. In addition, victims and their families often face threat and intimidation from the accused pending trial and turn hostile in order to protect their families.

Judges of Special Courts can play a crucial role in ensuring that the courtroom is a conducive and non-adversarial environment for children to testify. In *Ankush Kumar v. State*,⁹³ the petitioner approached the High Court urging it to quash the FIR under Section 377, IPC pursuant to Section 482, CrPC, on account of a compromise arrived at between him and the victim's father. Citing *Shimbu v. State of Haryana*,⁹⁴ a case in which the Supreme Court had held that rape cases cannot be compounded or compromised, the High Court observed that the conduct of the petitioner was an abuse of the legal process and took note of the pressure being put on the victim and his parents. It directed the trial court to assure protection to the child witness and to cancel the bail, if necessary, to ensure the independent testimony of the child. The High Court also directed all criminal courts to:

...adopt all the reasonable precautions to ensure the true testimony of the child witnesses and to provide an atmosphere and the circumstances to the effect that the child witnesses shall not be compelled by the circumstances, by the accused including the parents, from bringing truth before the Court. It shall further be ensured that the child witnesses be examined in special court room meant for it and provide all the precautions available to the child victims under the Prevention of Children from Sexual Offences Act, 2012.

Although, no legislation in India has provided for specific protection of witnesses, the courts have over the years provided for guidelines to protect vulnerable witnesses. The Delhi High Court in the case of *Neelam Katara v. Union of India & Ors*,⁹⁵ issued guidelines for the first time to provide protection to the witness for crimes punishable with capital punishment and life imprisonment.

Recently, the state of Delhi has become the first in the country to issue a Witness Protection Scheme.⁹⁶ Refer to Box No. 2 in chapter 1 for an overview of the Delhi Witness Protection Scheme.

93 CRL.M.C. 4046/2015 & CrI.M.A.Nos.14412-14413/2015. Decided by the Delhi High Court on 30.09.2015.

94 (2014) 13 SCC 318.

95 CrI. W. No. 247/2002 (High Court of Delhi)

96 Delhi Witness Protection Scheme, 2015 available at

6.5.19. Can sexual offences under the POCSO Act be compounded?

Sexual offences under the IPC do not appear in the list of compoundable offences under the CrPC. The POCSO Act is silent on whether or not the offences thereunder can be compounded. The Supreme Court has condemned attempts at fostering reconciliation in rape cases by proposing marriage or monetary compensation. There is no reason why this will not extend to cases under the POCSO Act. In *Shimbhu v. State of Haryana*⁹⁷, the Supreme Court held:

...Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases...

In *Narinder Singh v. State of Punjab*⁹⁸, the Supreme Court examined the power of the High Court under Section 482, CrPC, to quash proceedings under Section 307, IPC, based on a compromise between the parties. It reiterated previous decisions of the Supreme Court and crystallized the key principles that should guide the High Court's exercise of inherent power under Section 482, CrPC, while quashing proceedings involving non-compoundable offences. A summary of the principles are as follows:

- (i) Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
- (ii) When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
 - (i) the ends of justice, or
 - (ii) to prevent abuse of the process of any Court.

While exercising this power, the High Court is to form an opinion on either of the aforesaid two objectives.

97 (2013) 10 SCALE 595.

98 Criminal Appeal No. 686/2014, decided on 27.03.2014.

- (iii) Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences, such as murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society.
- (iv) Those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.
- (v) While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.
- (vi) Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this *prima facie* analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement to quash the criminal proceedings/investigation whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.
- (vii) While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation.

Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after *prima facie* assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally

the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court.

In *Ankush Kumar v.State*,⁹⁹ the Delhi High Court dismissed a petition urging it court to quash a FIR under Section 377, IPC pursuant to Section 482, CrPC on account of a compromise arrived at between him and the victim's father. Reliance was placed on *Shimbu v. State of Haryana*,¹⁰⁰ a case in which the Supreme Court had held that rape cases cannot be compounded or compromised.

6.5.20. Is consent to sexual relations relevant in cases under the POCSO Act?

No, consent is not relevant. Under the POCSO Act, consensual sexual contact between children or between a child and an adult is not recognised. None of the sexual offences under the Act require that the absence of consent, force, or coercion be established by the prosecution. In other words, any sexual act with a person under the age of eighteen years is an offence. The IPC also makes it clear that sexual intercourse with or without the consent of a woman below the age of 18 years, will amount to statutory rape.

The Supreme Court has time and again reiterated that consent of a minor is irrelevant in determining the guilt of the accused person in such cases. Recently, the apex Court, in the case of *Satish Kumar Jayanti Lal Dabgar v. State of Gujarat*¹⁰¹ stated:

It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The

99 CRL. M. C. 4046/2015 & CrI. M.A. Nos. 14412-14413/2015. Decided by the Delhi High Court on 30.09.2015.

100(2014) 13 SCC 318.

101(2015) 7 SCC 359.

law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.¹⁰²

6.5.21. Will the POCSO Act apply to cases of marital rape?

Yes, the POCSO Act does apply to cases of marital rape. Unlike the IPC, the POCSO Act does not create any exceptions in case of married couples. Further, one of the grounds of aggravated penetrative sexual assault, is penetrative sexual assault on a child by a relative of the child through blood, or adoption, *or marriage*, or guardianship, or in foster care, or having a domestic relationship with a parent of the child, or who is living in the same or shared household with the child.. This is punishable with a fine and a minimum term of 10 years imprisonment.

Therefore, under the POCSO Act, a spouse of a person below the age of 18 years can be prosecuted. Irrespective of whether or not the marriage has been contracted voluntarily, a person having sexual contact with a person below 18 years can be punished. While sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount to rape under the IPC, it will indeed constitute aggravated penetrative sexual assault under the POCSO Act.

The marital rape exception under the IPC will not apply in such cases, as the POCSO Act categorically provides that in case of conflict between the provisions of the POCSO Act and any other law, the former will override. Thus, in all cases of child marriage, where the bride or groom is below 18 years of age, a charge of aggravated penetrative sexual assault can lie against their spouse under the POCSO Act.

6.5.22. What can the judge do to ensure that the cases are completed within one year?

The objective of making the trial expeditious is that inordinate delay in prosecution of cases has an adverse impact on the victims. Delayed filing of charge-sheet, forensic report, non-execution of summons and warrants to witnesses, are all reasons for a prolonged trial. The Law Commission of India, in its report submitted to the Supreme Court,¹⁰³ made the following recommendation to curtail the delay during the trial of criminal cases:

- a) The Additional Session Judge to bring it to the notice of the District Judge if there is any failure in arresting the accused or the producing the witness. The Principal Judge would appraise the concerned SP/SSP to initiate action in this

¹⁰²ibid, para 15.

¹⁰³Law Commission of India, "Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities Report No. 239 Submitted to the Supreme Court of India in W P (C) NO. 341/2004, *Virender Kumar Ohri v. Union of India & Others*" available at <http://lawcommissionofindia.nic.in/reports/report239.pdf>

regard. The District Judge to send special report to the High Court if the lapse persists

- b) Special drive to secure attendance of proclaimed offender
- c) To dispose off promptly applications for witness protection
- d) To create special cells in High Court to take stock of old pending case.”

In order to complete the trial of POCSO cases within a year, the judge needs to ensure that the evidence of the child is completed within 30 days of taking cognisance and to record reasons if there is a delay. For instance, if the child is severely traumatised, it would be against her best interest to compel her to testify in court. Delay on this ground is acceptable. However, if the child is present in court and is ready to testify, he/ she must be examined. In *State of UP v. Shambu Nath Singh*,¹⁰⁴ the Supreme Court was critical of the practice of adjourning a case despite the witness being present. It stated:

We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by the presiding officers of the trial courts and it can be reformed by everyone provided the presiding officer concerned has a commitment towards duty.

In order to avoid any delays in the filing of the chargesheet within the stipulated time, the court could consider giving directions to the concerned police station to file a comprehensive chargesheet with all annexures, including medical reports and forensic laboratory reports, within the statutory time frame. Adjournments should not be granted for trivial reasons.

Adjournments should also not be granted for trivial reasons. In *Vinod Kumar v. State of Punjab*¹⁰⁵, the Supreme Court was highly critical of the gap of one year and eight months between the examination-in-chief and cross-examination in a case under the Prevention of Corruption Act, 1988 and observed:

The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment

104 (2001) 5 SCC 667.

105 AIR 2015 SC 1206.

for non-acceptable reasons. In fact, it is not all appreciable to call a witness for cross-examination after such a long span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. 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. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded.

6.6. Compensation

6.6.1. In what circumstances can compensation be awarded by the Special Court judge under the POCSO Act and Rules?

The Special Court under the POCSO Act can award compensation under four grounds:

- When there is any loss or injury caused to the child. For instance, compensation may be granted if the child has suffered a fracture, which occurred during the commission of the offence.
- For any physical or mental trauma that the child has undergone because of the offence.
- To meet the immediate needs of the child. For eg, compensation may be granted to enable the child to avail of urgent medical intervention if s/he has suffered internal organ injuries.
- For rehabilitation of the child.

Apart from the POCSO Act, Section 357A of the CrPC, (inserted in 2009) provides for Victim Compensation Schemes to be notified by the State Governments for the purpose of providing compensation to victims. As per this provision, an accused need not even be identified or traced for the purpose of providing compensation to a victim. Where the compensation to a victim under Section 357 CrPC (permitting whole or part of the fine to be given as compensation to the victim) is inadequate, Section 357A CrPC comes of aid.

The Supreme Court, in 2014, while noting that a few states had still not enacted a Victim Compensation Scheme, in the case of *Suresh v. State of Haryana*¹⁰⁶ directed the non-compliant states to notify a compensation scheme for victims. The court further stressed upon the obligation to provide interim compensation and also expressed concern that although states have a discretion in deciding the quantum of compensation, it cannot be

¹⁰⁶ IV (2014) CCR 559 (SC) available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=42130>

fixed too low, so as to defeat the object of the provision. It observed that:

...it is the duty of the Courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the Court ought to direct grant of interim compensation, subject to final compensation being determined later. *Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim.* At the stage of final hearing it is obligatory on the part of the Court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.¹⁰⁷

6.6.2. Does an application have to be filed to seek compensation under the POSCO Act?

Though an application can be filed seeking compensation, the Special Court can also award compensation on its own, without having actually received such an application. In fact, victims are sometimes discouraged to file compensation, based on the belief that the court may draw an adverse inference that such a case has been filed for ulterior financial motives. Judges must therefore pro-actively assess needs of the victim/survivor and order interim compensation on their own.

6.6.3. What are the factors that the Special Court must take into account before ordering compensation under the POCSO Act?

The Court has to consider the impact of the abuse on the child and must take into account the following factors:

- the type of abuse
- the expenses that have been or need to be spent on medical treatment for ensuring the physical and/or mental health of the child
- if the child's education was affected because of the offence, including whether or not the abuse made the child to take leave of absence from her/his school
- if the child was working and had to take leave, or if the child lost the job, because of the offence
- if the child was related to the accused

¹⁰⁷ *ibid*, para 14

- if the offence was a one-time offence against the victim, or was committed repeatedly over a period of time
- if the child acquired HIV or any sexually transmitted disease (STD) because of the offence
- if the child became pregnant because of the offence
- if the child lost any limb or has become disabled because of the offence
- the financial condition of the child
- any other factor that the court may consider as important and relevant while making a determination on compensation to be granted to the victim¹⁰⁸

While appreciating the above, judges must also bear in mind that child sexual abuse is distinct from other criminal offences (Section 6.1.2 above). When awarding compensation, courts:

...need to evaluate the totality of the child's experience of abuse. Within the totality of that experience, children may be able to remember some incidents more clearly than others, and provide more consistent accounts of some incidents than others. As long as the court is satisfied of the substantial truth of the applicant's claim of victimisation, it is the whole experience of abuse which needs to be evaluated for the purposes of compensation.¹⁰⁹

6.6.4. Will a victim receive compensation only if the accused is convicted?

No, it is not essential that the accused be convicted in order that compensation is awarded to the child victim. The Special Court can award compensation as long as the child has suffered loss or injury as a result of the offence. It can also be given in cases where the accused is convicted, acquitted, or even where the accused is not even traceable or identifiable. For instance, compensation can be awarded to a child who was sexually assaulted during a communal riot, even if the accused is not known.

6.6.5. Can the accused be ordered to compensate the child victim under the POCSO Act?

Under the POCSO Act, fines can be imposed upon the accused. Pursuant to Section 357(1), CrPC, the judge can direct that a part or whole of such fine be paid to the victim(s), as compensation for the loss or injury suffered. Compensation under the POCSO Act is payable only by the State Government from the Victim Compensation Fund under Section 357A, CrPC or any other fund or scheme established for the purpose of compensating and rehabilitating victims.

¹⁰⁸ Rule 7(3) of the POCSO Rules, 2012

¹⁰⁹ *Supra*, n. 9.

With respect to the power available to the court under Section 357(1) of the CrPC, in *Hari Kishan v. Sukhbir Singh*,¹¹⁰ the Supreme Court emphasized that “this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender.”¹¹¹

6.6.6. What is the time-frame within which compensation must be paid?

The State Government must pay the compensation to the victim within 30 days from the date of the order of the Special Court. The court, in some cases, may also order for a part of the sum to be paid within a shorter period, in order to provide immediate relief to the victim.

In August 2014, the Delhi High Court expressed concern about the failure of the Delhi government in establishing a Victims Compensation Fund, even though the scheme had been notified.¹¹² It directed the establishment of a Single Window Disbursement System and stated that when the Fund is created, it must be placed at the disposal of the Delhi State Legal Services Authority (DSLSA). The order also required the Government to transfer funds periodically to the DSLSA under the Victim Compensation Account. This Account should be operated by the Member-Secretary, DSLSA and a Senior Accounts Officer. The DSLSA must ensure that the compensation is disbursed within 24 hours, by electronic clearance, to the victim’s/guardian’s bank account.

6.6.7. Can a child or her/his parent or guardian seek relief under any other governmental scheme in addition to the compensation under the POCSO Act?

Yes, the child/family can also apply for compensation under any other relevant laws or schemes. For instance, if a child has already been awarded compensation of INR 2 lakh for injuries suffered from the offence, she could also apply for assistance under a State scheme meant to promote education of the girl child. However, this cannot be used as a ground for the Special Court to reduce the quantum of compensation that it is to be awarded under Rule 7(2), POCSO Act.

Additionally, the Supreme Court has also stressed that the obligation of the government does not end with mere monetary compensation, but extends to ensure rehabilitation of the victim. The Court in *In Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News, dated 23.01.2014*¹¹³ held:

¹¹⁰ AIR 1988 SC 2127.

¹¹¹ *ibid*, para 5.

¹¹² Order passed by the Delhi High Court in *Court on its own motion v. Union of India*, W.P. (C) 7927/2012 on 13.08.2014.

¹¹³ *Suo Motu* Writ Petition (Criminal) No. 24 of 2014, available at <http://supremecourtfindia.nic.in/outtoday/>

Nevertheless, the obligation of the State does not extinguish on payment of compensation, rehabilitation of victim is also of paramount importance. The mental trauma that the victim suffers due to the commission of such heinous crime, rehabilitation becomes a must in each and every case.¹¹⁴

6.6.8. Is there any limit on the amount of compensation that can be ordered by a Special Court?

No, there is no limit specified in the POCSO Act or Rules on the amount of compensation that the Special Court may order. The court may consider the slabs stipulated under the State Victim Compensation Scheme (SVCS). For instance, according to the Odisha Victim Compensation Scheme, 2012 the maximum limit of compensation is INR 1,50,000 for penetrative sexual assault or aggravated penetrative sexual assault; INR 50,000 for sexual assault or aggravated sexual assault; and INR 20,000 for sexual harassment or using a child for pornographic purposes.¹¹⁵ This Scheme does not make any distinction between aggravated assault and assault. However, most SVCS do not refer to the offences under the POCSO Act and are confined to rape and rape of a minor. Judges should therefore exercise their discretion while ordering compensation in such States.

6.6.9. Can the Special Court determine the quantum of compensation?

Yes, the Special Court can determine the quantum of the compensation and does not have to send the victim to the DLSA for such determination. Rules 7(3) and 7(4), POCSO Rules empower the Special Court to *award* compensation after taking into account several factors. Where the Special Court has arrived at a quantum based on Rule 7(3), the victim's claim should not be subjected to any further scrutiny. This will unnecessarily delay the process and defeat the ameliorative objectives of compensation. The DLSAs should therefore not test the eligibility of the victim and the claim, after the quantum has been specified by the Special Court.

6.6.10. Can compensation be ordered in the absence of a State Victim Compensation Scheme?

Yes, the Special Court can direct the State Government to pay compensation to the victim even if no VCS has been notified in that State. Although, the Special Court is empowered to direct the state government to pay compensation, it is important to note that state governments are obligated to notify a victim compensation scheme in their states. As mentioned above, in November 2014, the Supreme Court has expressly directed that all non-complaint states immediately notify a scheme for victim

WR24.pdf

114Id. at para 22

115 Available at <http://homeorissa.gov.in/SchemesAndProjects/CHR-VCS-0001-27686-dt.29.07.2013.pdf>

compensation.¹¹⁶

6.6.11. Can compensation be provided to a victim who has turned hostile?

The POCSO Act and the provisions in Section 357 and 357A of the CrPC are silent on this issue. The Special Court can decide this based on the facts and circumstances of the case. It is important to consider, that victims often turn hostile in sexual offence cases due to fear of threat and the fear of social stigma attached to such offences. These must not be automatically interpreted as an unwillingness to cooperate with the prosecution. This would only further the trauma of the victim and the family.

6.6.12. How can a judge ensure that compensatory relief that is ordered is realized by the victim and the family without delays?

Although it is the Special Court that orders compensation, the amount is to be disbursed by the State Government through the District/State Legal Services Authority that sometimes require the victim to file a fresh application for compensation before them and even appear before them. Such additional procedures often cause severe delays and add to the trauma of the child. Where the compensatory relief was meant to aid in the medical expenses for the child, such delays prove to be even more problematic.

The Special Court can take several steps to ensure that the compensation ordered is in fact realized by the family/victim such as:

- a. ***Ordering Interim Compensation to be handed over within a time frame and along with compliance report:*** Where the child is in need of immediate medical help or where the abuse has resulted in loss of the sole earning member of the family, the court can order interim compensation to be disbursed to the victim within a specified time frame. The disbursement authority should also be directed to file a compliance report.
- b. ***Directing the Government to file an affidavit:*** In cases where the final order of the court contains a direction to the State Government to pay compensation to the victim, the Special Court may set a time limit for such disbursement and direct that an affidavit be filed by the government that such compensation has been paid. The case may be kept open until the filing of such affidavit to ensure that compensatory reliefs reach the victim.

¹¹⁶ *Suresh v. State of Haryana*, IV (2014) CCR 559 (SC) at para 14

6.7. Appreciation of Medical Evidence

The nature, role and value of medical evidence in a trial under the POCSO has been elaborately dealt with in Chapter 3 in Section 3.7.

Box No. 23: Key Points - Appreciation of Medical Evidence

1. Medical opinion is only in the nature of an expert opinion or ‘opinion of experts’ as per Section 45, IEA.
2. Medical opinion is *not* primary evidence. It is only corroborative in nature,¹¹⁷ i.e., it will be used to confirm or support a claim already raised by some direct evidence.
3. A doctor providing medical opinion is *not* a witness of fact unlike an eye-witness.¹¹⁸
4. A supportive Medical opinion is *not* a legal pre-requisite to obtain a conviction against an accused, even where the offence is sexual in nature.
5. The court need not seek corroboration by medical opinion in cases pertaining to sexual offences. A conviction can be based on the basis of the victim’s testimony where the court determines that it is sufficient and credible.¹¹⁹ A non-examination by a doctor, even in cases of rape, is not fatal to the prosecution.¹²⁰
6. A Medical opinion may be accepted or rejected by the Court. It does not constitute conclusive proof of any claim.
7. Where there is a conflict between an eye-witness’ statement and a medical opinion, the eye-witness’s testimony, being direct evidence, will gain supremacy.¹²¹ However, in cases where the medical opinion completely contradicts the direct evidence, this may affect the credibility of the witness.¹²²
8. A Medical opinion should not opine as to the nature of offence or even if an offence has occurred. For eg, a medical expert may never testify as to whether an offence of rape has occurred or not. He/she may only testify as to the nature and extent of injuries, if any. Only a court may determine as to whether or not an offence has occurred and if so the nature of such offence.
9. A medical opinion testifying to the absence of injuries in the private parts of the victim *does not* lead to the inference that no sexual offence has occurred.¹²³

117 *Solanki Chimanbhai Ukabhai v. State Of Gujarat*, AIR 1983 SC 484; *Awadhesh v. State of M.P.*, AIR 1988 SC 1158.

118 *Nagindra Bala Mitra v. Sunil Chandra Roy*, AIR 1960 SC 706

119 *State of Punjab v. Ramdev Singh* 2004 SCC (Cri) 307

120 *State of M.P. v. Dayal Sahu*, 2005 CriLJ 4375 SC

121 *Thaman Kumar v. State of Union Territory of Chandigarh*, (2003) 6 SCC 380

122 *Piara Singh v. State of Punjab*, AIR 1977 SC 2274

123 *Ranjit Hazarika v. State Of Assam*, (1998) 8 SCC 635

16.12.2018

The presence of injuries is not a pre-requisite to obtaining a conviction under the POCSO Act or the IPC.

10. A medical opinion testifying that the hymen on the victim was not ruptured *does not* lead to the inference that no sexual offence has occurred. A ruptured or torn hymen is *not* a pre-requisite in obtaining a conviction for penetrative sexual assault under the POCSO Act or the offence of rape under Section 376 of the IPC. Penetration, even if it is slight, is sufficient to constitute the offence of rape.¹²⁴
11. A Medical opinion testifying as to the absence of spermatozoa on the private parts or clothing of the victim *does not* draw the inference that no sexual offence was committed.¹²⁵
12. A Medical opinion testifying as to whether a victim was habituated to sexual intercourse, is irrelevant in the determination of whether an offence has occurred.¹²⁶ Thus, the two-finger test and other tests assessing whether a victim has been habituated to sexual intercourse are violative of a woman's dignity,¹²⁷ and the court must discourage medical witnesses from testifying upon aspects that hurt the dignity of the victim, as this leads to secondary traumatization.

124 *Madan Gopal Kakkad v. Naval Dubbey*, (1992) 3 SCC 204

125 *Prithi Chand v. State Of Himachal Pradesh* AIR 1989 SC 702

126 Ministry of Health and Family Welfare, Guidelines and Protocols: Medico-legal care for victims/victims of sexual violence, 19 March 2014, p. 60.

127 *Lillu v. State of Haryana*, AIR 2013 SC 1784.