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POCSO Laws and Cases Relating to POCSO Along with Guidelines for Police and Courts in these Cases in India

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ABSTRACT

Sexual offenses in India have increased a lot over the last 20 years. Children are the vulnerable group who are victims of such offenses where the offenders overpower them with strength.

Trends of the Courts in India with respect to POCSO Act cases:

Overview of the controversial judgments by the Bombay High Court - The Bombay High Court's Nagpur Bench handed down two rulings in two separate cases of child sexual abuse, Libnus v. State of Maharashtra (hereafter referred to as the Libnus case) and Satish v. In less than a week in January 2021, the State of Maharashtra (hereinafter referred to as the Satish case) has drawn harsh criticism for its questionable legal practices. Later in February, the Mumbai POCSO court made some contentious comments in its ruling.

Keywords: *Pocso, Sexual Harassment, IPC, Criminal Law, Police.*

I. INTRODUCTION

1. Satish v. the State of Maharashtra

The single justice bench of Pushpa V. Ganediwala A 32-year-old man was exonerated charges brought against him under Sections 7 and 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO), concluding that there was insufficient evidence to prove that the accused committed a sexual assault because there was no "skin-to-skin" contact. According to Section 7 of the POCSO, sexual assault is defined as any non-penetrative sexual contact with the victim. Any non-penetrative sexual contact with the victim constitutes sexual assault, according to Section 7 of the POCSO. The mandatory minimum jail term for sexual assault is three years. The following are the ingredients that make up the offense. A physical touch that is not penetrated is required to start. When a person touches a child's vagina, penis, anus, or breast, or makes the child touch the vagina, penis, anus, or breast, this is referred to as physical contact.

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The second requirement is to make physical contact sexually.

The Criminal Law (Amendment) Act of 2013 amended Section 354, which previously set a two-year maximum sentence with no mandatory minimum. In this case, the accused-appellant was accused of "pressing the breast" of the 12-year-old prosecutrix, which the prosecution dutifully established by introducing both circumstantial and direct evidence.

The appellant was unable to remove the survivor's underwear because she screamed and fled the room from outside when he tried to do so, according to the court, which stated that the conditions of Section 7 were not met. The Court concluded that the appellant's actions would, at best, be considered "outraging the modesty of a woman" as that term is used in Section 354 of the IPC. The punishment was imposed under, the judge added. Only Section 354 of the IPC was used to uphold the conviction because Section 8 of the POCSO for the offense described in Section 7 is "disproportionate" to the seriousness of the act.³ While the Supreme Court's stay in the Satish case is welcome, the message delivered by the Bombay High Court is still harmful.

2. Libnus v. the State of Maharashtra

The same Bench in the Libnus case cleared a 50-year-old man who had been found guilty by the Special POCSO Court of holding a 5-year-old girl's hand while his pants were still unzipped. The survivor also told her mother, PW-1, that the appellant had taken her penis out of his pants and asked her to sleep with him. In this case, the appellant was found guilty of aggravated sexual assault under Sections 10 and 12 of the POCSO, as well as Sections 354A and 448 IPC.

Aggravated sexual assault and Section 7 share similar characteristics in that the crime is committed under specific "aggravating circumstances," such as the victim's young age or a rapport of trust and confidence. The minimum sentence under Section 10 is five years. The POCSO's Section 11 defines sexual harassment and Section 12 outlines penalties for it. Despite the fact that both offenses share the same name, Section 11 of the POCSO does not exactly overlap with Section 354A of the IPC in terms of its constituent parts.⁴

The appellant's conviction under Sections 10 and 12 of the POCSO was overturned by the Bombay High Court, which found him guilty under Section 354A of the IPC. In this case, the judge decided to convict under Section 354A (3) of the IPC, which has a maximum jail term of three years and no statutory minimum sentence, despite the severe minimum mandatory punishment specified in Section 10 of the POCSO. In addition, the court decided that the

³ Section 354 Indian Penal Code

⁴ Section 10 of POCSO Act 2012

appellant's five months in jail were "adequate" given the seriousness of his crime and released him.

II. MEANING OF NON-PENETRATIVE SEXUAL ASSAULT

Sexual assault is the subject of POCSO Section 7. Because the word "assault" is not defined in the POCSO, it must be defined according to Section 351 of the IPC, which stipulates that only "skin-to-skin" contact is necessary to commit the crime of assault. Just some physical contact with the other person's "body" or even "with anything that that other is wearing, that such contact affects that other's sense of emotion" is all that is necessary for the definition of "force" in Section 349 of the IPC.

Section 350 of the IPC defines intentional use of force as the force used "... to commit any offense." Although the word "assault" appears in the title of Section 7 of the POCSO, the provision's actual language calls for physical contact with the victim, suggesting that force must be used to bring the case within the purview of this section. The use of unlawful force is what Section 7 refers to, despite the word "attack" being used in the title. By incorrectly interpreting Section 7 to require "skin-to-skin," the Court has violated both the legislative meaning of "force" and "criminal force" as well as the long-established judicial interpretation of these expressions."

When comparing Section 7 of the POCSO and Section 354 of the IPC, it is impossible to conclude that what is an offense under the latter is not covered by the former. Similarly, Section 354A (1)(i) of the IPC, which the Court found to be made out against the appellant in the *Libnus* case, required "physical contact and advances involving uninvited and explicit sexual overtures," according to the Court. It is possible to make sexual advances both orally and non-verbally.⁵ Therefore, a violation of POCSO Section 7 is also a violation of Section 354A (1)(i).

Additionally, the behavior of the appellant is covered by Section 11/12 of POCSO and the appellant's conviction should have been upheld based on PW-1, the survivor's mother, who testified that the appellant had shown his penis to her daughter. The definitions of sexual assault (Section 7, POCSO) and sexual harassment (Section 354A (1)(i)) include holding a child's hand when the pant zip is visible.

Although "physical contact" and "skin-to-skin contact" are not yet defined in Indian law, numerous Indian High Court rulings have highlighted how even the smallest actions committed with sexual intent can result in a conviction under Section 7. For instance, the *Ravi v. State in*

⁵ Section 354A of Indian Penal Code 1860

2018, specify that grabbing the child survivor's hand with a sexual motive constituted sexual assault.

Without delving into the specifics of whether the appellant had undressed the child survivor or put his hand under her clothes, the Delhi High Court held in *Rakesh v. State* (2018). The instant judgment, on the other hand, destroys the point of the provision by unnecessarily requesting specifics regarding skin-to-skin contact and bestows enormous latitude on the criminal to get away with such a heinous act.

III. THE DEFEAT OF THE PURPOSE OF POCSO

(A) Nature of POCSO

In the *Satish* case, because of the Act's strict nature, the judge believed that "stricter proof and significant claims are required." Along with being a strict law, the POCSO is a protective measure that was adopted as a special provision in accordance with Article 15(3) of the Indian Constitution. According to the Act's Preamble and statement of objects and reasons, the POCSO Act is a self-contained, all-encompassing piece of legislation that safeguards minors from sexual assault, harassment, and other types of abuse.⁶

In addition to the Act's goal of protecting children and considering their best interests, the Model Guidelines issued by the Ministry of Women and Child Development under Section 39 of the POCSO Act categorically states that the Act recognizes "almost every known form of sexual abuse against children as punishable."⁷ As a result, excluding a child grasping over his or her garments would be contrary to the legislation's meaning. Additionally, because the minor child's consent is unquestionably absent in cases of child sexual abuse (CSA), the meaning cannot and should not be diminished to this extent.

Chief Justice Dipak Mishra declared that when reading Section 2(d) of the POCSO Act in *Era through Manjula Krippendorf vs. State (Govt. of NCT of Delhi) and Ors* (2017), "the 'color,' 'substance,' and 'context' of legislation must all be considered when interpreting a social welfare statute. The Judge needed to break free from the constraints of rigid linguistic interpretation and clear the way for the legislative intention's soul, and in that case, he needed to become a true creative constructionist, Judge."

In the aforementioned decision, the Supreme Court stated that when analyzing the POCSO Act's provisions, "When two interpretations are practically possible, the one that serves to carry out the Act's beneficial aim should be preferred; furthermore, the said interpretation should not

⁶ Article 15 (3) of Indian Constitution

⁷ Section 39 of POCSO Act

unreasonably expand the scope of a provision. Because of this, the Court had to proceed with extreme caution when choosing a different reasonable reading.”

(B) Availability of more severe punishment

The very purpose of the enactment of POCSO, as its name suggests, was the protection of children from sexual offenses. However, The Court appears to be hesitant to impose more severe punishment prescribed by the POCSO in both judgments, believing that the statutory minimum punishment under Sections 8 (three years imprisonment) and 10 (minimum of five years imprisonment) is disproportionate to the gravity of the appellants’ actions. While the constitutionality of minimum mandatory sentences is being questioned in various jurisdictions, a constitutional court cannot avoid its obligation to convict under the appropriate provision of a penal statute without declaring the minimum mandatory sentence unconstitutional, cruel, and degrading.

Article 7 of the 1966 International Covenant on Civil and Political Rights stipulates that everyone has the right to be free from cruel, degrading, and inhuman punishment. In *R v. Nur* (2015), the Canadian Supreme Court determined the minimum mandatory sentence for firearms offenses to be unconstitutional.⁸

(C) Presumption clause not given importance

A presumption of *actus reus* and *mens rea*, respectively, is established by Sections 29 and 30 of the POCSO based on establishing "foundational facts. It effectively means that the prosecution will show *prima facie* the presence of “foundational facts” by adducing cogent and trustworthy evidence, the burden shifts to the accused to prove his innocence by demonstrating the lack of *mens rea*. Importantly, this reverse duty can only be satisfied if the defendant meets the threshold of “evidence beyond a reasonable doubt,” which is normally borne by the prosecution.

When a person is prosecuted under Section 7 of the POSCO Act, it is believed that the individual has committed the offense, according to Section 29 of the POSCO Act. Section 30, on the other hand, presumes that the accused was in a responsible mental state when the crime was committed. It is obvious that the onus of proof rests with the accused to demonstrate his innocence based on a joint interpretation of these laws. Further, Section 30(2) states that the burden of proof for the accused must be "beyond a reasonable doubt" as opposed to "by a preponderance of the evidence" in order to overcome these presumptions.”

⁸ Article 7 of the 1966 International Covenant on Civil and Political Rights

The Court's finding that "stricter proof" is necessary to maintain Satish's conviction under Section 7/8 of the POCSO because the offense carries a more severe sentence contradicts the POCSO's presumption of guilt. Even if we pretend that the artificial distinction between groping over clothing and skin-to-skin touching is a legitimate distinction, the accused must still prove beyond a reasonable doubt that the skin-to-skin touch did not take place. The topic of reverse onus is not at all discussed in the Libnus case either.

IV. CONCLUSION

To prevent the judiciary from making such interpretations, which would ultimately undermine the goals of justice, more precise definitions must be added to the POCSO statute. No court has the authority to refuse to convict an accused of any crime that precisely fits within the four corners of the statutory definition, even though the desirability, utility, and constitutionality of mandatory minimum jail terms are debatable. While a punitive action should be understood strictly, no one who is affected by the plain terms of a penal statute should be let off lightly or penalized unduly for extraneous considerations and misinterpretation of the law. High Court decisions form and unshape the law of the land, and this cannot be done without careful consideration of statutory and case law. We, as a society, undoubtedly deserve better legal and rational judgments.

(A) Guidelines for police and Courts in POCSO cases:

It is almost 8 years since the POCSO Act is in force. Yet there are many concerns. The country is still reeling from the trauma of what had happened to Nirbhaya when Gudiya (real name withheld) was gang-raped at the young age of five by a man she called "Uncle." This incident shook our collective conscience.

Nevertheless, seven years after the heinous rape of Gudiya in April 2013, and eight years after the Protection of Children from Sexual Offences Act of 2012 [POCSO] was passed, some fundamental issues with the law continue to go alarmingly unresolved.

It is no secret that many POCSO cases result in acquittals. The grim reality is that there has been a glaring failure to support and rehabilitate the victim and her family, despite a more uninformed opinion that the cases themselves may not have been genuine.⁹

As a result of this, either the victims turn hostile or the family turns hostile, or they simply lose hope and stop cooperating.

Thus, timely payment of compensation in POCSO cases and due rehabilitation of the victim

⁹ Protection of Children from Sexual Offences Act 2012

are key to ensuring a proper trial that actually brings out the truth. Let's look at what the law states about these two issues. In accordance with POCSO's Section 33(8), the Special Court may, in appropriate circumstances, order the payment of compensation to the child for any physical or mental harm they have suffered or for prompt rehabilitation in addition to imposing a penalty. In accordance with the Parent Act, Rule 7 of the POCSO Rules of 2012 outlines the steps and requirements for disbursing such compensation. Rule 7(3) listed the various criteria/factors that the Special court was to take into account when determining such compensation, including the seriousness of the offense, the cost of medical care incurred or anticipated to be incurred, the loss of an opportunity to pursue an education, the financial situation, etc.¹⁰

According to Rule 7(4) and (5), the legal services authority must make a payment from the Victims Compensation Fund or other scheme within 30 days of receiving the Special Court's decision or grant.

Although the law expressly provides for compensation, POCSO victims actually face enormous difficulties in this regard. It is seen that grant of compensation by Special Courts under POCSO is both sporadic and erratic. Despite a careful reading of the Act making it quite clear that the Special Court was the disbursing authority, there is utter confusion as to whether the Delhi Legal Services Committee or the Special Court is to decide the amount.

The victim's representative for filing a claim for compensation is also unclear; many victims believe the investigating officer will file the claim on their behalf. To top it off, even in cases where compensation was granted by the Special Court, the amounts were rather inconsistent and arbitrary, some being as meager as Rs. 10,000.

As a result, even though many of these cases were appealed to the Delhi High Court, the compensation amounts were frequently multiplied. Contrast this paltry amount to the compensation granted in cases of rape as per the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018 issued by the National Legal Services Authority, where a minimum amount of Rs. 4 lakhs and a maximum amount of Rs. 7 lakhs is provided for in a sample study conducted by the Delhi Commission for Protection of Child Rights (Startling revelations were made in a statutory body established under Section 17 of The Commissions for Protection of Child Rights Act, 2005) entitled Mapping of Needs and Priorities: A Study of Child Rape Victims in Delhi. The study brought attention to issues that directly affect the rehabilitation and social reintegration of child rape victims and their families

¹⁰ Protection of Children from Sexual Offences Act 2012

as well as the difficulties they face. The study's analysis turned up the following results:

42% of the child victims dropped out of school. 50% of the children suffered from different types of physical illnesses that were linked to rape. About 81% of parents stated that they were unable to fulfill the health needs of their children

(B) Who were the victims of child rape?

The study's findings on compensation showed that, while 99 percent of the children did not receive compensation in accordance with the current scheme, only one child received compensation totaling more than Rs. 50,000. Only 15% of the victims had received any compensation, and 85% had not. 38% of the victims were without any legal representation.

This study was important for two reasons: first, it was carried out by a statutory body mandated by law with the responsibility of overseeing the Act's implementation; and second, it shed light on the Act's appalling state of implementation seven years after it was passed. The message was loud and clear - for those who wanted to hear it - we are failing to protect and provide succor to our children.

In a PIL that was submitted to the Delhi High Court back in 2016, these issues were raised and vigorously defended. The PIL noted that, according to the National Crime Records Bureau Report (2014), Delhi's POCSO trials remained pending at an astounding 95 percent of the time. In addition, only a pitifully small 1 percent of the trials resulted in convictions. The main concern was that trials could not be completed within the one-year time limit set forth in Section 35 of the Act unless exclusive courts rather than assigned courts were established under POCSO, and other special provisions of the Act would not receive the specialized attention they merited.

Consider this if the data presented here seems astounding. When the NCRB data from 2017 was released, its analysis showed that, even if no additional cases are brought to trial during that time, it would take approximately 24 years to complete the trial of existing POCSO cases in India at the current rate of trial completion. To put it another way, we were essentially telling our kids to take care of themselves and not expect justice—at least not unless they were prepared to tenaciously pursue their case of child abuse well after they had their own kids!¹¹

The Supreme Court issued a significant ruling in *Nipun Saxena*¹² and *Anr v. United States* while the case was still being heard in the High Court in the captioned PIL. *Union of India and Others*. According to a directive, the Special Court must independently or upon the victim's

¹¹ National Crime Records Bureau Report 2014

¹² (2019) 13 SCC 719

request determine the child's immediate needs for relief or rehabilitation and issue the proper order for interim compensation after receiving information about the commission of any offense under the Act through the registration of an FIR.

Additionally, it was decided that the court must record its decision if it decides not to award interim or final compensation.

Why it chooses not to. The Apex Court also emphasized categorically that the Special.

Every POCSO case must be taken up by the court and evaluated for the aspect of compensation. This does not imply that compensation must be awarded in every circumstance, but that there must always be a decision regarding compensation.

Prior to Nipun Saxena's case, the Supreme Court rendered a significant decision under POCSO in *Alakh Alok Srivastava v. UOI*¹³, wherein the Apex Court ordered that each High Court form a three-judge committee to oversee and manage the progression of trials conducted under POCSO. Additionally, it was mandated that each state form a Special Task Force to make sure the investigation is carried out according to POCSO. A Special Task Force in Delhi has been established by order dated May 17, 2018, under the direction of a Special CP for Crime. On the ground, however, the situation has not really changed.

Truely, it was the Unnao Rape case and the Supreme Court's suo motu consideration was brought many of these issues to the fore. The Supreme Court noted that timelines of the Act are not being followed at all. Besides granting interim compensation of Rs. 25 lakhs to the victim, the Supreme Court directed that in each district in the country (if there are more than 100 POCSO cases) an exclusive Special Court will be set up, which will try no offense except those under POCSO Act. Even though the Court gave itself a 60-day extension, the process of establishing and running these courts across the nation is still in progress.

The POCSO Rules for 2020 became effective on March 9, 2020. These Rules stand out for including some important modifications like:

Both the Central and state governments are required by Rule 3 to implement appropriate awareness-raising and capacity-building efforts in accordance with the Act, as well as informational outreach at airports, train stations, and other public locations. Additionally, it calls for the creation of a "Child Protection Policy.". This clause will be helpful both in terms of "prevention" and "cure.". According to Rule 8, the relevant Child Welfare Committee must approve and provide "Special Relief"—immediate financial assistance—in the event of an

¹³ (2018) 2 SCC CRI 815

emergency or for urgent needs.

According to Rule 4, the support person designated for the benefit of the child is required to give the Child Welfare Committee monthly reports on the child victim.

Each victim/family is informed of their rights under the Act at the earliest possible stage, when they first come into contact with the Police, thanks to Form A and Rule 4 (14).

A preliminary assessment form called Form B and Rule (14) has been added to determine the child victim's immediate financial needs in order to make sure that he or she receives the assistance where it is needed as soon as possible.

POCSO victims have been given a glimmer of hope with the introduction of the new POCSO Rules, 2020, and the Supreme Court's 2018–2019 directives. Like all laws, once they are enacted, they must be put into practice, which is a completely different situation. It remains to be seen whether these new developments offer the care and rehabilitation that POCSO victims require and deserve. Whatever the case, a sliver of hope is preferable to a sliver of doubt!

Every child fails when they are abused, raped, or harassed, and this must be our guiding principle in ensuring the effective implementation of the Act. The least we can do is work together to avoid failing them again by delaying their financial compensation and rehabilitation.
