CHAPTER- 7

JUDICIAL TREND AND RECENT DEVELOPMENT

“It is the spirit and not the form of law that keeps justice alive.”- Earl Warren

The role of the India Judiciary and the scope of judicial interpretation have expanded remarkably in recent times, partly because of the tremendous growth of statutory intervention in the present era. The twin safeguards of equality before law and equal protection of laws are acknowledge as two most important pillars of human rights of the universe where freedom to assert and develop these rights is recognized, whether under an unwritten or a written constitution. Regard for the judiciary was a piece of the regular man's desires for keeping up Rule of Law and building an equitable society. The more profound point of the law was formation of a decent society. The underlying foundations of this high respect lie in the unbiasedness’, autonomy and trustworthiness of the individuals in the judiciary. Judicial activism by and large incorporates a range of administrative vacuum in the field of human rights. The Supreme Court and the High Courts have assumed a huge part in securing the principal privileges of the general population. The judges were after all piece of the general public and can't be absolutely safe from the overwhelming patterns of social musings winning in that. An analysis of the judicial decisions therefore was undertaken to show to what extent the judges are concerned about the predilections prevailing in the society and how in spite of such predilections they rendered decisions which advanced the progress of the law towards juvenile justice. Thus the, Indian judiciary has paid a yeoman’s service in protecting and preserving the rights of the children as well as sensitising the society concerning the rights of the half of the human

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1Earl Warren (March 19, 1891 – July 9, 1974) was an American jurist and politician who served as the 30th Governor of California(1943–1953) and later the 14th Chief Justice of the United States (1953–1969).
population. Over and over the Supreme Court of India has developed the ambit of Article 21 of the Constitution of India and held that insignificant presence was not the privilege to live—it was the privilege to live with respect. Thus, whenever the children’s are victim it must be viewed under Article 21 of the Constitution of India and not merely as a crime against the children. In order to show the change and improvement in the Judicial approach with respect to sexual abuse of children law, an attempt is made herein to discuss some of cases, which showed the apathetic and indifferent judicial attitude towards children’s and the perpetrator of the crime.

The Constitution of India imposes an obligation on every instrumentality including the judiciary to transform the status quo into a new human order in which there will be equality of status and opportunity for all. The judiciary has, therefore, a socio-economic and creative functions. In the same spirit the judiciary of India played significant role in promoting child welfare. It is in this spirit that the apex court has laid emphasis on the fact the nation is to take care of the child, in whom lays the hope of nation’s future.\(^2\)

Supreme Court guidelines to Prevent Child Sexual Abuse as laid down in the case of-

*Shankar Kisanrao Khade Vs State of Maharashra*\(^3\)

1. The persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest S.J.P.U. or local police, and they, depending upon the gravity of the complaint and its genuineness, take...

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\(^3\)(2013)5 SCC 546
appropriate follow up action casting no stigma to the child or to the family members.

(2) Media personals, persons in charge of Hotel, lodge, hospital, clubs, studios, and photograph facilities have to duly comply with the provision of Section 20 of the Act 32 of 2012 and provide information to comply with Section 23 of the Act as well.

(3) Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate.

(4) Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

(5) Hospitals, whether Government or privately owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child.

(6) The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

(7) Complaints, if any, received by NCPCR, S.C.P.C.R. Child Welfare Committee (CWC) and Child Helpline, NGO’s or Women’s Organizations etc.,
they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law.

(8) The Central Government and the State Governments are directed to constitute SJPUs in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J. J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime.

(9) The Central Government and every State Government should take all measures as provided under Section 43 of the Act 32/2012 to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

7.1 JUDICIAL TRENDS IN SAFEGUARDING THE INTEREST OF THE CHILD DURING TRIAL IN CASES OF RAPE AND SEX ABUSE

State of PunjabVs Gurmit Singh &Ors.4

In this case SC observed the various guidelines as following:

The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

Trial of rape cases in camera should be the rule and an open trial in such cases, an exception.

The anonymity of the victim of the crime must be maintained as far as possible throughout.

If possible lady judges should try a case of sexual assault on female to provide the victims an ease and the system an improved quality of evidence

41996 AIR SC 1393
and proper trial. The Court in this case also hoped and observed that “… the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.”

*Sakshi Vs UOI &Ors.*

The SC gave following direction regarding trial of offences child sexual abuse and/or rape: re-enquiry or trial of offences under S. 354 (outraging the modesty of a woman by use of assault or criminal force) or under S. 377 (unnatural offences) S. 327 (2) (regarding constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence) should also be applied. The Court further provided for procedures to safeguard the interest of the child victim to such crime:

1. A screen or some such arrangements may be made where the victim or witnesses do not see the body or face of the accused;
2. The questions put in cross-examination on behalf of the accused, relating to the incidence of crime should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a clear language which is not embarrassing;
3. The victim of child abuse or rape be given sufficient breaks as and when required.

*Hiranath Misra Vs Rajendra Medical College*

The denial of opportunity to cross-examine the material witnesses was held not to vitiate the order made. It was a case where certain male students entered a girls’ hostel during the night and misbehaved with the girls. The committee appointed to enquire into the matter recorded the statements of girls in camera and used them (on the question of identity of miscreants) against the
appellants without allowing them to cross-examine the girls on the ground that such a course would reveal the identity of the girls and would expose them to further indignities and also because the enquiry was held by a committee of responsible persons.

7.2 DIRECTIONS FOR MAGISTRATES/JUVENILE JUSTICE BOARD/LEGAL SERVICES AUTHORITY

“Trials of cases of trafficking should generally be In-Camera and the Magistrate/Board should avoid disclosing the name of the prosecutrix and their orders, to save embarrassment to the victim and anonymity of the victim of the crime should be maintained throughout.” To check if the appropriate sections of Indian Penal Code, Immoral Traffic Prevention Act and Juvenile Justice Act against the traffickers have been stated in the Charge Sheet and refer the matter to the concerned Court. Ensure that the evidence of the child is taken in-Camera, as per Section 327 of the Cr.P.C. and arrange for translators, if the child is from another State and does not speak the local language. Ensure that the Special Courts/Boards have a child friendly and supportive atmosphere while taking the child’s evidence. Preferably, an elder woman who inspires the confidence of the child may be present.

The High Court of Himachal Pradesh at Shimla discussed in great detail the procedure to be followed by the Board in disposing off the juvenile cases. In

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7 Procedures to safeguard the interest of the child during trial in cases, available at nlrd.org › Home › rape laws › latest judgements of supreme court/high court, accessed on 12/11/2017
8 Section 327: The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.[2] Notwithstanding anything contained in sub- section (1), he inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.[3] Where any proceedings are held under sub- section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.
Juvenile Justice Board is to be three members Board consisting of a Metropolitan Magistrate or a Judicial Magistrate of the first class, as the case may be, and two social workers of whom at least one shall be a woman, forming a Bench and every such Bench have been vested with the powers conferred by the Code of Criminal Procedure, on a Metropolitan Magistrate or, as the case may be, or a Judicial Magistrate of the first class and the Magistrate on the Board is to be designated as the Principal Magistrate. As regards the procedure etc. to be followed by the Board, the same is provided in Section 7 and sub section (3) of Juvenile Justice (Care and Protection of Children) Act, 2015 thereof reads as under:

"3". A Board may act notwithstanding the absence of any member of the Board, and no order made by the Board shall be invalid by reason only of the absence of any member during any stage of proceedings: Provided that there shall be at least two members including the principal Magistrate present at the time of final disposal of the case."

Thus, the cases of "juvenile in conflict with law" and "child in conflict with law", as the case may be, can be disposed of finally only by at least two members including the Principal Magistrate present at the time of disposal of such case. No individual Member including the Principal Magistrate and no two Members excluding the Principal Magistrate can finally dispose of the case.

It is well settled and needs no authority that "where a Court takes upon itself to exercise a jurisdiction it has not possessed its decision amounts to nothing". Consequently, any order passed by the Court having no jurisdiction is non est\(^{10}\) and its invalidity can be set up when it is sought to be enforced or is acted upon

\(^9\) MANU/HP/0911/2017

\(^{10}\) Latin for “it is not my deed”
as a foundation for a right, even at the stage of execution or in collateral proceedings. Any order passed by such authority is *coram non judice*.\(^\text{11}\)

This aspect of the matter has been considered by the Hon'ble Supreme Court in *Hasham Abbas Sayyad Vs Usman Abbas Sayyad and others*,\(^\text{12}\) wherein it was held as under: The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even *res judicata* which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be *coram non judice*\(^\text{13}\) being a nullity, the same ordinarily should not be given effect to.

### 7.3 Judicial Process: Towards a Victim-Centric Approach

Court proceedings are generally held in open courtrooms to ensure transparency under the maxim, "*not only must justice be done, it must also be seen to be done.*" The recent trend of in-camera trial has evolved contrary to this maxim to ensure confidentiality and to lessen the trauma and stigma caused to a victim. It also provides protection from voyeuristic intrusion by the media.

A judge is duty-bound to maintain the delicate balance between the rights of an accused for a fair trial and the rights of a victim for protection against the violation of her dignity. Closed-door proceedings place an additional responsibility on the presiding judge to ensure this, as these proceedings are not open to public scrutiny. Within this constraint, the innovative survivor support programme of Majlis\(^\text{14}\) in Mumbai provides a ringside view of rape trials. It becomes an important social responsibility to

\(^{11}\)Latin for “not before a judge”
\(^{12}\)AIR 2007 (SC) 1077
\(^{13}\)Supra at 11
\(^{14}\)Majlis Legal Centre is a forum for women's rights discourse and legal initiatives. It is a group of women lawyers and social activists committed to informing, educating and empowering women on their legal rights.
share these insights with a wider readership in the hope of letting in a breath of fresh air within these cloistered spaces.

In the case of Subramanian Swamy Vs Raju¹⁵ Constitutionality of Juvenile Justice and Childrens Acts was upheld - Twin grounds of challenge: that (i) JJ Act results in under classification as all juveniles below age of 18 yrs, irrespective of the level of mental maturity and gravity of crime are grouped in one class, and, (ii) it replaces the criminal justice system in the country, therefore, derogates from a basic feature of the Constitution, rejected. The court held, if the legislature has adopted the age of 18 as the dividing line between juveniles and adults and such a decision is constitutionally permissible, enquiry by the courts must come to an end. If provisions of the JJ Act clearly indicate the legislative intent in the light of the country's international commitments and the same is in conformity with the Constitutional requirements, it is not to understand the legislation in any other manner. JJ Act is wholly consistent with Art. 14 - Same penal law i.e. the Penal Code applies to all juveniles, only difference is that a different scheme for trial and punishment is introduced by the JJ Act in place of the regular provisions under the Cr.P.C for trial of offenders and the punishments under the Penal Code, 1860 - Hence, JJ Act need not be read down as it is not unconstitutional.

Differences between juvenile justice system and the criminal justice system for adults in India, enumerated. Procedure and approach in light of objectives sought to be achieved and explained. The Same penal law i.e. the Penal Code applies to all juveniles, the only difference is that a different scheme for trial and punishment is introduced by the JJ Act. The court further held, emphasis of criminal trials is to record a finding on the guilt or innocence of the accused, while the prime object of sentencing is to punish a guilty offender. Emphasis of juvenile inquiry is to determine the guilt/innocence of the juvenile and investigate the underlying social or familial causes of the alleged

¹⁵(2014) 8 SCC 390
crime, and aim of juvenile sentencing is to reform and rehabilitate the errant juvenile

7.3.1 Double trauma

Apart from the actual incident of rape, what rape victims fear the most is the courtroom ordeal. What comes to mind is a slogan coined during the anti-rape campaign in the early 1980s in the context of the acquittal of two policemen.\(^\text{16}\) They were charged with the rape of a 16-year-old tribal girl, who was poor, in a police station, and had termed her a liar as there were no marks of injury on her body. “She was raped twice, first by the police and then by the courts.” This still holds true for many victims, despite the introduction of statutory changes and positive rulings of the Supreme Court. Within the hostile environment of a criminal court, the victim looks up to the judge to get the wrinkles out of what is a gruelling process. It is the sensitivity displayed by the judge which alone can save the situation.

On this subject, trial court judges try to pass the buck on to defence lawyers saying that it is they who need to be sensitised. However, it is entirely up to the judge to take control of the situation. A confident judge well-versed in statutory provisions and positive rulings will be in a commanding position to maintain the dignity and decorum of the court; only those who lack in confidence will allow themselves to be cowed down by the intimidating tactics of defence lawyers.\(^\text{17}\)

7.3.2 Issue of victim’s past

The SC in a ruling stated that in case of sexual abuse, the questions should not be asked about the past character of the victim. In the case which happened in the pre-amendment era, where a 16-year-old girl was dragged out of her paying guest accommodation in a slum to a vacant room down the street and brutally raped by five men until she fell unconscious. The first information

\(^{16}\)Tukaram&Anr. v. State of Maharashtra (Mathura rape case)1979 AIR SC 185

\(^{17}\)http://www.thehindu.com/opinion/lead/for-a-victimcentric-approach/article6420007.ece, accessed on 12/10/2017
report (FIR) could be lodged after about a month, and after the Herculean efforts of a social worker. The plea by the defence was that the girl was the daughter of a sex worker and she had a boyfriend, she herself was of questionable character. This background provided ample scope for her humiliating cross-examination by five astute lawyers. However, the presiding judge remained firm, relying on the path-breaking Supreme Court ruling in Gurmit Singh, and did not permit any questions regarding the victim’s past sexual history.

In that case, while overturning the verdict of the two lower courts, which had acquitted the accused in a case of the gang rape of a 16-year-old schoolchild who had been kidnapped from her examination centre, the Supreme Court had ruled: “Even in cases where there is some acceptable material on record to show that the victim was habituated to sexual intercourse, no such inference like the victim is a girl of ‘loose moral character’ is permissible to be drawn from that circumstance alone. No stigma, like the one as cast in the present case can be cast against such a witness, for after all, it is the accused and not the victim of sex crime who is on trial in the court.”

The trial court judge ruled that questions regarding the credibility of the witness, or her past sexual history can no longer be entertained after this ruling. She further commented that it was not a case of a complaint of sexual assault arising out of a love affair, but was a case of gang rape. The judge ensured that the deposition of the victim was concluded on the same day, even if it meant a sitting beyond the court timings. The case finally ended in a conviction, despite the lapses.

7.3.3 On child victims

Let us contrast this with the case of an eight-year-old who lived in a lower class tenement, and sexually abused by a neighbour, a 26-year-old man.

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19Available at http://www.thehindu.com/opinion/lead/for-a-victimcentric-approach/accessed on 12/10/17
The incident lasted barely 10 minutes as the child heard her mother calling out to her and began to scream. The girl experienced great trauma and could not describe the incident even to her mother for two days.\(^\text{20}\)

During the trial, the child was cross-examined by a reputed criminal lawyer over three court dates, where her parents and she had to travel a distance of two hours each way. The busy lawyer either came late or pleaded his inability to complete the cross-examination as he had other matters to attend to. The court gave in to his request, disregarding the hardship being caused to the family of meagre means. The trial was in the designated Special Court, constituted under the Protection of Children from Sexual Offences (POCSO) Act, 2012, which stipulates special child-friendly trial procedures.

Throughout her deposition, the child, of a small build, was precariously perched on the ledge of the witness box, so that the presiding judge could see her and listen to her scared and muffled voice. This case too ended in conviction. The manner in which the two trials were conducted shows that there is a world of difference.

The Sakshi Guidelines \(^\text{21}\) stipulate that in cases concerning children, the defence lawyer must first submit the questions in writing to the judge, and the judge, at his/her discretion, ask only those questions which are relevant to the incident. But these guidelines are seldom followed.

We have also witnessed shocking instances of judges, under the compulsion of having to complete the trial within the stipulated time frame, and in the absence of the defence lawyer, asking the accused to come forward and conduct the cross-examination. This is in total violation of the stipulation that the victim should not ever be made to face the accused during her deposition, and that a screen or a one-way mirror should be installed to shield her from the intimidating gaze of the accused.

\(^\text{20}\)ibid
\(^\text{21}\)Sakshi v Union of India and Ors. AIR 2004 SC 3566
7.3.4 Monitoring Courts

Due to the presumption that a victim of sexual abuse would feel more at ease deposing before a lady judge, there is a stipulation that, as far as possible, only lady judges should be assigned to special courts. However, the belief that all lady judges are equally sensitive to victims, and that as a class, lady judges are more sensitive to victims of sexual crimes than men is not substantiated. It is not biology which determines sensitivity. Judges assigned to these courts must be specially exposed not only to statutory provisions but also to the mandatory protective measures that are required to be diligently followed before their assignment to these courts.

There is also a need to monitor the functioning of these courts and provide mechanisms of redress, in case of lapses. Closed-door trials cannot be construed as sacrosanct spaces beyond the scope of a social audit. Campaigners who were instrumental in bringing about these changes cannot abdicate their responsibility once the statute is enacted. The enactments are only the beginning of a long-drawn and challenging process.

Sessions courts are formidable and intimidating spaces meant for the police, criminals and their lawyers. To turn them into child-friendly spaces would require special ingenuity which those in charge of structuring these spaces usually lack. They need to be stripped of their high podiums, musty air and black coats and the space needs to be redesigned from the perspective of victims, especially children and those with disabilities.

Within their limitations, some judges have been using simple measures such as the setting up of a temporary screen or placing a cupboard in a manner so as to shield the victim during the deposition and allowing frequent breaks during the gruelling process of cross-examination. There are instances where victims have fainted during the deposition. Some judges also permit the victim

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22For the same a proviso was Ins. By Act of 2009,sec 4(w.e.f.31-12-2009) under section 26 of Cr.P.C “Provided that any [“offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code”] (45 of 1860) shall be tried as far as practicable by a Court presided over by a woman.”
to enter from the entrance meant for judges and allow them to wait in their own chambers until the matter is called out. These are small but significant gestures which will help ease the trauma of the victim.

While Delhi has successfully set up special courts for vulnerable witnesses, for the rest of the country, this is still a far cry.

7.4 LEADING CASES ON CHILD SEXUAL ABUSE

_Ghanashyam Misra Vs State of Orissa_\(^\text{23}\)

In this case, a minor girl aged 10 years, was raped by the accused who was her school teacher. The accused used to induce her to come inside the room and committed rape. The High Court convicted the accused under section 376 IPC and enhanced the sentence to 7 years rigorous imprisonment and a fine of Rs.200 as the perpetrator had taken advantage of the teacher student relationship.

_Tukaram & Anr. Vs State of Maharashtra (Mathura rape case)_\(^\text{24}\)

Mathura, a minor girl, was raped by two policemen attached to police station when she had gone with others for recording of a statement. The session court acquitted the accused on the ground that the victim was surrendered her body to police constable with her own will. As per the medical report, only old injuries were found on the hymen, and no semen stains were traced. Thus, the prosecution had failed to prove the case.

While the High Court convicted the accused and held that mere passive submission of the body and its resignation to other’s lust induced by threats or fear cannot be equated with the desire or will. On the other hand, Mathura was alone at the station at the dead of night. Probably, initiative for sexual desire must have proceeded from the accused and the victim must not have been a willing party to that act. Also her subsequent conduct in making statement to her relatives as well as members of crowd proved that she was subjected to

\(^{23}\) AIR 1957 ORISSA 78.

\(^{24}\) AIR 1979 SC 185.
forcible sexual intercourse. Later, the Supreme Court set aside the conviction on the ground that no circumstances proved that there was a case of fear of death or of hurt on the part of the girl. Therefore, sexual intercourse is not proved to amount to rape in the present case.

*Munna & Ors. Vs State of Uttar Pradesh &Ors.*

In this case, it was alleged that juveniles are sexually exploited by adult prisoners in the Kanpur Central Jail. Also a boy named Munna was unable to sit after the way he was used according to the news report. The session judge was unable to meet the juvenile victims said in the petition as they had been released within a few days of publication of news report. The court directed magistrate that no person apparently below the age of 16 years is sent to jail according to the provisions of Uttar Pradesh Children Act 1951. Juveniles, under 16 years, must be detained in children’s home or other place of safety set up by the government.

**7.5 RECENT JUDICIAL PRONOUNCEMENT UNDER POCSO**

*Ashish Kumar and ors. Vs State of U.P. and Ors.*

In this case FIR was lodged under sections 147, 354 A, 352, 323 and 506 of IPC and Sections 7/8 of POCSO. The victim's age was about 16 years and as she had alleged molestation, etc. The Court observed that as the instant matter arises out of case which is based on a police report and not on the complaint, after submission of the charge-sheet, the matter goes to the Magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial or not. The Magistrate cannot exclude or include any section into the charge-sheet after investigation has been completed and charge-sheet has been submitted by the police. The same would be permissible by the trial court only at the time of framing of charge under Sections 216, 218 or under Section 228 CrPC as the case may be which

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25 AIR 1982 SC 806
26 MANU/UP/0439 /2015
means that after submission of the charge sheet it is open for the prosecution to contend before the appropriate trial court at the stage of framing of charge that on the given state of facts the charge of certain other offences should also be framed.

The Hon’ble High Court held that in a case which is triable by a Court of Session though the Magistrate cannot add or alter a charge but he is empowered by sections 209 and 323 of the Code to commit the case to a Court of Session. Since under Section 31 of the POCSO Act a Special Court constituted under the said Act is deemed to be a Court of Session, the Magistrate, if he finds that offences triable by a Special Court under the POCSO Act are also made out, he is empowered to commit the case to the Special Court by taking aid of the provisions of section 209 of the Code. But such commitment arises after the Magistrate takes cognizance of the offences laid in the charge sheet.

Sharath Chandra Pottala Vs Union of India27

The case was broadly discussed on the following two potential grounds:

a) Section 34 of POCSO empowers the Special Court under POCSO to determine the age of an accused if question arises over the age of a juvenile accused whereas there is no provision for the accused person to seek determination of age of victim despite there being a valid and sustainable question and dispute over the age of victim and such an anomaly in POCSO creates a serious prejudice for the accused person.

b) A Special Court under POCSO would not have jurisdiction to try an offence when the victim is major and therefore when a dispute or question arises over the age of victim, there ought to be a procedure for deciding the same and denial of such remedy to the accused

27 2014 (2) WLN 410 (Raj.)
would be serious infringement of the fundamental right of accused under Arts. 14 & 21 of the Constitution of India.

The Court after giving considerations to the challenges made to the provisions of POCSO Act, that the so-called shortcomings, anomaly or lacuna in the procedure as provided, remain bereft of substance and do not make out a case against the constitutionality of the enactment. Court said that it remains a trite that a statutory provision could be challenged as ultra vires on the grounds either on the legislative competence or if the provision offends any of the provision of the Constitution. Legislative competence is not in question in the present case; and on the submissions as made, it is unable to find any of the constitutional provision being offended by the enactment. It said that POCSO has been enacted for the very special purpose to protect the children from the Sexual Assaults and Sexual Harassment etc. The procedure has been provided for recording of the statement of the child was also the medical examination of the child in Section 27 in accordance with Section 164-A of Code of Criminal Procedure. Designation of Special Courts for trying the offences under the Act has been made with the provisions overriding even the other special enactments like Information & Technology Act, 2000. Petition was dismissed by the Hon’ble Court.

*Siddu Vs State of Karnataka and ors.*

Interpretation of Section 34 of POCSO Act is done by the court in this pertinent case.

The Hon’ble Karnataka High Court said that the main object of considering the age of the accused under Section 34 of the POCSO Act 2012 is to decide which Court is proper to try the accused and also to sentence him. If the accused is held to be less than 18 years and is a Juvenile, the learned Sessions Judge will lose his power to conduct trial and the Juvenile Justice

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28 2016 SCC OnLineKar 708
Board alone is competent authority to try and dispose of the case, in accordance with the said special enactment. Therefore, it is incumbent upon the learned Sessions Judge, who is competent, to pass appropriate order under Section 34 of the POCSO Act, 2012 to pass order deciding whether the accused is a Juvenile' or he has crossed the age of 18 years in order to try him before the Sessions Court. Even, if there is any doubt with regard to the age of the accused and the Court requires some more evidence to resolve the dispute, it can take such evidence and on the basis of that evidence, it has to decide the age of the Juvenile and thereafter only, the Court has to proceed with the merits of the case.

Gangadhar Sethy Vs State of Orissa29

In this case the Court adverted over the age of the victim girl at the time of incident since for attracting the ingredients of offence under section 4 of POCSO Act which deals with punishment of penetrative sexual assault, the victim must be a child as per the definition of "child" provided under section 2(d) of the POCSO Act which indicates that "child" means any person below the age of eighteen years and also because section 376(2)(i) of Indian Penal Code will be attracted only when the rape is committed on a woman when she is under sixteen years of age. After looking into the evidences the court is satisfied that the victim was within the age group of five to seven years and thus one of the ingredients of both the offences i.e., section 376(2)(i) IPC and section 4 of POCSO Act regarding age is satisfied.

On the question of offence of rape or penetrative sexual assault on the victim, Court looked into the medical examination which suggested that the victim was a nubile virgin on the date of her examination and there was no evidence to corroborate recent or past sexual intercourse. No injuries present on her person or in or around her private parts. Report

292015 SCC OnLineOri 173
further shows that the victim was a girl child aged about six years and her hymen was intact and no penetrative test was done during the examination. Court held that none of the ingredients of Section 3 of POCSO Act is satisfied in this case. Therefore it cannot be said that section 4 of POCSO Act which deals with punishment of penetrative sexual assault is attracted. Similarly in absence of any statement of the victim that she was raped by the appellant or in absence of any corroborative medical evidence, it would not be proper to convict the appellant under section 376(2) (i) IPC.

Court took a view that materials available on record shows the assault has been made on the private parts of the victim and the ingredients of the offence under section 8 of the POCSO Act is also clearly made out. Therefore, the court said that the conviction of the appellant under section 376(2)(i) of IPC is not sustainable in the eye of law and accordingly the same is set aside and instead he is convicted under section 354 of IPC. Similarly the order of conviction of the appellant under section 4 of POCSO Act is set aside and instead he is convicted under section 8 of POCSO Act.

*Ravinder Kumar Vs State*30

In the instant case a petitioner has file the petition in the instant case to quash the FIR which was registered under Sections 354/451/323/34 I.P.C. & Section 12 of POCSO Act on the ground that parties have settled the matter. The court held that In view of the fact that the parties have amicably resolved their differences of their own free will, volition and without any coercion and no useful purpose will be served in continuance of the proceedings, rather the same would create further acrimony between them, it would be in the interest of justice to quash the abovementioned FIR and the proceedings pursuant

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302014 (2) JCC 1210
In this case the court elaborately observed section 28 and 32 of POCSO Act 2012.

The Hon’ble Court, from a bare reading of Section 28 of the POCSO Act, the Parliament has conferred powers on the State Government to designate a Court of Sessions to be a Special Court to try the offences under the Act. In other words, POCSO Act does not empower the State Government to constitute or create new Courts under the Act, but only empowers the State Government to designate in each District a Court of Sessions to be a Special Court to try the offences under the Act. The Court further held that Section 32(1) of the POCSO Act casts a duty upon the State Government to appoint Special Public Prosecutor for every Special Court for conducting cases under the provisions of the POCSO Act. The State Government cannot abdicate its duty by not appointing sufficient number of Public Prosecutors, because trial under the POCSO Act should not get unnecessarily delayed on account not the failure of the State Government to appoint Special Public Prosecutors. Only to achieve this end, Parliament in its wisdom has cast a statutory duty on the State Government to appoint Special Public Prosecutors so that prosecutions do not suffer for want of Prosecutors.

In this case the court gave micro interpretation of various provision of POCSO.

The Court observed that in order to attract any offence under the provisions of the POCSO Act, it should be proved by the prosecution that as on the date of the commission of the crime, she was a child. The term "child" has been defined in Section 2(d) of the Act, which states

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31 2014 SCC OnLine Mad 2589.
32 MANU/TN/1611/2015
that child means any person below the age of 18 years. Thus, for the purpose of the offence of kidnapping as well as for any offence under the POCSO Act, the age of victim should be proved to be below 18 years as on the crucial date.

The Court decided as to whether the act of the accused in having sexual intercourse with victim would fall under Section 4 or Section 5(1) r/w Section 6 of the Act. Court looked into the term "penetrative sexual assault" which has been defined in Section 2(f) of the POCSO Act, which states as follows: - "penetrative sexual assault has the same meaning as assigned to it in Section 3. Whereas Section 5(l) of the POCSO Act which deals with aggravated penetrative sexual assault reads as follows: "whoever commits penetrative sexual assault on the child more than once or repeatedly is said to commit aggravated sexual assault". Court got into the gravity of both offences i.e. Section 3 & 5 that which of them is a major offence. The aggravated penetrative sexual assault, which is made out of several particulars, includes a mere penetrative sexual assault, which is made out of some of those particulars. Therefore, there can be no difficulty in holding that the Sections 4 and 6 read with Section 5(1) of the POCSO Act are cognate offences and Section 4 of the POCSO Act is a minor offence to Section 6 r/w Section 5(1) of the POCSO Act.

To bring clarity to above conclusion, Court also gone into punishment as provided under these penal provisions. Though the maximum punishment awardable under Section 4 as well as Section 6 is imprisonment for life with fine, the minimum punishment provided in Section 4 of the POCSO Act is imprisonment of either description for a term which shall not be less than seven years, whereas the minimum punishment provided under Section 6 of the POCSO Act is rigorous imprisonment for a term which shall not be less than ten years.

The term "imprisonment" under Section 4 of the POCSO Act may be of either description, viz., either rigorous or simple, whereas under Section
6 of the POCSO Act, the term imprisonment shall be only rigorous. From these ingredients, it can be noted that in the matter of punishment also, Section 4 of the POCSO Act is minor to Section 6 of the POCSO Act. It also hold that the conviction of the appellant under Section 4 of the POCSO Act, though the appellant stood charged under Section 6 r/w Section 5(1) of the POCSO Act and there was no charge under Section 4 of the POSCO Act, it is not illegal and so the same is liable to be confirmed.

_Pranch Gupta Vs State of Sikkim_33

In his case the consent of the Victim aged about 14 years was in question. The allegation against the accused was filed under Section 4 of the POCSO Act, 2012 and under Section 363 of the Indian Penal Code, 1860.

The Hon’ble HC rejecting the contention of appellant that it was a consensual act and they were having a love affair, the Court looked into Section 375 of IPC, which indicates that when the offence of rape has been committed, the consent of the victim under 18 years of age is irrelevant. Similarly, for an offence under POCSO Act, 2012 which is a more stringent Act, the consent of the child would be of no consequence, as she is protected by the provisions of law. Court agrees that the Victim herself went along with her friend to Pelling to meet the accused and she stayed with the accused with her own will. But for an offence under Section 3 of the POCSO Act, 2012 the consent of a minor is irrelevant. It must also be borne in mind that Section 30(2) of the POCSO Act, 2012 requires that a fact is stated to be proved for the purposes of Section 30(1), only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. It has also been clarified that "Culpable Mental State" includes intention, motive, knowledge of the fact and the belief in or

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33 2015 SCC OnLineSikk 113
reason to believe a fact. Thus, mere denial of the offence U/S 313 of the Cr.P.C. by the accused will not suffice, he has to establish lack of mensrea beyond a reasonable doubt.

**Vinod Kumar Vs State of Delhi**

The court in the present case observed that any question that involves sexual intent "shall be a question of fact. Section 9 of POCSO Act deals with aggravated sexual assault, which is punishable under Section 10 of the said Act. In order to ascertain as to under which Section the act committed by the Appellant falls, it is necessary to refer to Section 11 of the said Act which particularly states that ...A person is said to commit sexual harassment upon a child when such person with sexual intent,... (iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means.

**Jagar Singh Vs State of H.P**

In this case a minor girl was severely molested by accused touching the private parts of the girl. The petition under Section 438 of the Cr.P.C 1973 has been filed by the accused for grant of anticipatory bail in connection with case where he is charged under Section 354(A) of IPC and Section 8 of POCSO Act 2012.

The High Court said that as per Section 30 of the Protection of Children from Sexual Offences Act 2012 there is presumption of culpable mental state and onus is upon the accused to prove that he had no such mental state. As per Section 42-A of Protection of Children from Sexual Offences Act 2012 provisions of POCSO Act shall have overriding effect on the provisions of other law to the extent of inconsistency. Interpretation of Section 7 of POCSO Contention was made that as per Section 7 of the Protection of Children from Sexual Offences Act 2012 sexual intent to touch

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34 2014 SCC OnLine Del 7444
35 2015 (2) RCR (Criminal) 320
the naked vagina, naked penis, naked anus or naked breast of the child is essential in order to frame charge against the accused. Court has carefully perused Sections 7 and 8 of Protection of Children from Sexual Offences Act 2012. Court is of the opinion that there is no recital in Section 7 of POCSO Act that touches with sexual intent should be to the naked vagina, naked penis, naked anus or naked breast of the child. Court is of the opinion that even touches to the vagina, penis, anus or breast of the minor child when minor child has worn clothes is sufficient to attract Sections 7 and 8 of the Protection of Children from Sexual Offences Act 2012. The word naked is missing in Section 7 of Protection of Children from Sexual Offences Act 2012 and it is well settled law that Protection of Children from Sexual Offences Act 2012 is a special Act enacted for protection of minors children and it is well settled law that Court is the guardian of minors and it is also well settled law that when two interpretations are possible then interpretation favourable to the minors should be adopted by Court in the ends of justice. Court held that it is not expedient in the ends of justice to release the applicant on anticipatory bail. Hence anticipatory bail application filed by applicant is rejected.

Youth Bar Association of India Vs. Union of India and Others

In this case the following directions were issued by the Hon’ble SC at the request of Youth Bar Association of India through writ petition under Article 32 of the Constitution of India.

(a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C

(b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/parokar for grant of a certified copy before the

362016 SCC OnLine SC 914
concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within twenty-four hours.

(c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.

(d) The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under POCSO Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the First Information Report so that the accused or any person connected with the same can download the FIR and file appropriate application before the Court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.

(e) The decision not to upload the copy of the FIR on the website shall not be taken by an officer below the rank of Deputy Superintendent of Police or any person holding equivalent post. In case, the States where District Magistrate has a role, he may also assume the said authority. A decision taken by the concerned police officer or the District Magistrate shall be duly communicated to the concerned jurisdictional Magistrate.
(f) The word ‘sensitive’ apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy regard being had to the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive.

(g) If an FIR is not uploaded, needless to say, it shall not ensure *per se* a ground to obtain the benefit under Section 438 of the Cr.P.C.

(h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

(i) The competent authority referred to hereinabove shall constitute the committee, as directed herein-above, within eight weeks from today.

(j) In cases wherein decisions have been taken not to give copies of the FIR regard being had to the sensitive nature of the case, it will be open to the accused/his authorized representative/parokar to file an application for grant of certified copy before the Court to which the FIR has been sent and the same shall be provided in quite promptitude by the concerned Court not beyond three days of the submission of the application.

(k) The directions for uploading of FIR in the website of all the States shall be given effect from 15th November, 2016.
In the instant case, the Hon’ble Court said that it is a well-settled law that a minor cannot be confined in Nari Niketan against her wishes. In this regard, the Judgment of this same Court was put forth. In the case of *Smt. Parvati Devi v. State of U.P. and another*, 1992 All Crl C 32, it has been observed by the Apex Court that the confinement of a victim in Nari Niketan against her wishes, cannot be authorized under any provisions of the Code. There is no such legal provision wherein the Magistrate has been authorized to issue directions that a minor female child shall, against her wishes, be kept in Nari Niketan.

In this case the appellant committed an act of sexual assault and intercourse after kidnapping the victim in the night hours. The charge-sheet was laid against the accused for offence punishable under Section 366 IPC and under Section 4 of the POCSO Act. The trial court passed an order of conviction. Aggrieved by the conviction and sentence, an appeal is filed before the Hon’ble High Court.

Hon’ble High Court observed that the scrutiny of the material placed on record would reveal that the age of the victim is an important aspect to be decided before considering the question as to whether there was either an offence under Section 4 of the POCSO Act and Section 366 IPC. To prove the age, merely the Xerox copy of SSLC marks card is given. Therefore, it appears to the Court that it would be proper to give an opportunity to the prosecution to produce the original SSLC marks card and to consider the same on its production, permit to produce any other supporting evidence and then dispose of the case in accordance with law. The Court set aside the conviction and sentence by remitting the matter to the trial Court with a direction to afford an

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37 2015 (3) ADJ 350
38 MANU/KA/127 3/2015
opportunity to the prosecution to produce original of the above mentioned document.

*Ramrahit Singh Vs Dhananjoy Singh and Ors*\(^{39}\)

In this case the petitioner left his two minor sons and the minor daughter aged about 13 years 4 months 16 days (victim girl) in his house. FIR was lodged, investigation was conducted and charge sheet was submitted against the accused under Section 6 of the POCSO Act and under Section 506 of the IPC.

The Court after conjoint reading of the provisions i.e. Section 6, 28, 31, 33 & 42-A of the Act clearly spells out that cognizance of an offence under the Act without any order of committal or trial can be taken by the Special Court on a complaint disposing facts, which constitute such offence, or upon a police report on such facts. Such being the position, where the Special Court is empowered to take cognizance of the offence on a complaint or police report on facts constituting an offence under the Act, the Judicial Magistrate has no jurisdiction to entertain and consider the application for bail moved by any accused proceeded for an offence under the Act. The Act does not interdict the Magistrate in passing the order for the first remand of an accused suspected and prosecuted for an offence under the Act, the accused being produced before him since he is empowered under Section 167 of the Cr.P.C. to do so. However, he has no jurisdiction to pass any subsequent order of remand and to entertain or to consider any application of bail filed by such accused and that can only be done by the Special Court.

Therefore, Court reaches to a conclusion that there remains no scope for harboring even the slightest doubt to accept the legal proposition that under the POCSO Act only the Special Court has been singularly vested with all the powers to try an offence under the Act and to entertain and consider application

\(^{39}\) MANU/WB/0218/2015
for bail filed by the accused and to deal with any incidental matter thereto including the power of detention and remand of the accused.

*Sachin Vs State of H.P*

In this case the Court put forth the opinion where if contradictory statement appears in two FIR lodged in same incident.

The court observed that in view of gravity of offence against the applicants under Section 376D IPC i.e. gang rape and in view of allegations of criminal offence under Sections 6 and 17 of POCSO Act 2012 i.e. aggravated penetrative sexual assault upon minor prosecutrix it is not expedient in the ends of justice to release the applicants on bail at this stage. Court is also of the opinion that if applicants are released on bail at this stage then trial of case will be adversely effected and there is apprehension in the mind of Court that if applicants are released at this stage then applicants will induce and threat the prosecution witnesses.

At the time of granting bail following factors are considered:

(i) Nature and seriousness of offence

(ii) The character of the evidence

(iii) Circumstances which are peculiar to the accused

(iv) Possibility of the presence of the accused at the trial or investigation

(v) Reasonable apprehension of witnesses being tampered with

(vi) The larger interests of the public or the State.

*The State of Maharashtra and Ors. Vs Viran Gyanlal Rajput and Ors.*

This is a case in which an appeal was filed in the Bombay High Court against the judgment and order of Additional Sessions Judge who convicted the accused for the offence punishable under Section 302 of the IPC and sentenced him to capital punishment of death. By the very same Judgment and Order,

\[\text{MANU/HP/1301/2014}\]

\[2015 (2) BomCR (Cri) 102\]
accused was also convicted under Section 366 IPC, Sections 10 and 4 of the POCSO Act, 2012. The Facts in the present case are like the victim girl aged about 13 ½ year old had been to her school, that very evening while she was returning home the incident took place. Post-mortem report found that deceased was forcibly subjected to sexual intercourse.

The Court in the instant case held that the offence committed by the accused had not been committed on the spur of moment. It was pre-planned. Accused took away the victim girl to a secluded place in jungle area. Even villagers had not thought of searching the place till the accused led them to the spot. Accused committed the offence in order to satisfy his lust. He forcibly raped 13 ½ year old defenseless school going girl and eliminated her life which is the ultimate insult of womanhood. The subsequent conduct of the accused indicates that he had felt no remorse. After commission of crime, he was found coolly wandering in the village.

He thought that victim might expose him before others so buried her body in a naked condition in a ditch and covered the place with grass and mud. The modus-operandi of the accused clearly shows that he would be a menace to the society and there is no possibility of the accused being reformed. Considering the nature of offence, manner in which it was committed and upon evaluating the aggravating and mitigating circumstances, according to the Court, this is a case which falls in the category of rarest of rare case. Therefore, no infirmity found in impugned order and capital punishment was rightly imposed. Hence, Appeal was dismissed.

The State of U.P. Vs Gayatri Prasad Prajapati and Ors.

The High Court has reportedly suspended special judge of POCSO Court Om Prakash Mishra who granted bail to Gayatri Prajapati. The Special Court Judge has granted bail to Gayatri Prajapati, who is accused of allegedly raping a woman and attempting to rape her minor daughter. The UP Government has

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42 MANU/UP/1320/2017
challenged the same before the Allahabad High Court and High Court has stayed the order.

Chief Justice Dilip B Bhosale in his order staying the bail order said,

“"It is pertinent to note that on the very same day Additional District Government Counsel (ADGC) also filed an application for seeking at least three days time for seeking instructions and to place their comments and case diary before the Court. It is pertinent to note that on this application, the learned Judge did not make any endorsement and he proceeded to hear the case on merits and enlarged the accused on bail. I would not like to make any comments at this stage on merits of the order passed by learned Judge. I may however observe that the manner in which the learned Judge has shown the haste in releasing the accused on bail ignoring the nature of offence allegedly committed by the respondent accused and the fact that the crime came to be registered against these accused by virtue of the order of the Supreme Court dated 17.2.2017, I have my reservations about the bonafide intention of the Learned Judge who is about to retire on 30.4.2017. This Court is also informed that insofar as accused No. 1 is concerned, he has not been released on bail in view of the fact that he is wanted in some other cases. So far as accused Nos. 2 and 3 are concerned, they have already been released on bail. It is also pertinent to note that the respondent-accused No.1 in his bail application has stated that no criminal cases are registered or pending against him which fact also prima facie does not appear to be true and correct."

Bijoy Vs State of West Bengal43

The Hon’ble justice Joymalya Bagchi of Calcutta high court held,

Non-disclosure of victim’s identity: The officer-in-charge of the police station and the investigating officer, including the special juvenile police unit, shall ensure that the identity of the victim is not disclosed in the course of investigation, particularly at the time of recording statement of the victim under Section 24 of the Act, his/her examination before Magistrate under Section 25

43MANU/WB/0140/2017
of the Act, forwarding of the child for emergency medical aid under Section 19(5) and/or medical examination under Section 27 of the Act. Further, the recording of statement under Section 24 shall be done, as far as practicable, at the residence or a place of choice of the victim or that of his/her parents/custodian, as the case may be. Moreover, the victim’s identity shall not be disclosed in the media, except with the express permission of the special court, in the interest of justice. Any person, including a police officer, disclosing the identity of the victim, shall be prosecuted under Section 23(4) of the Act. Furthermore, the victim’s identity, particularly his name, parentage, address or any other particulars that may reveal such identity shall not be disclosed in the judgment delivered by the special court, unless such disclosure of identity is in the interest of the child.44

State of Bihar Vs Raj Ballav Prasad Yadav45

The Supreme Court held that General presumption of innocence of accused not applicable to cases where there is contrary statutory presumption of his guilt such as when prosecuted under Section 3,5,7 and 9 of POCSO Act, 2012. The court further observed that prime consideration is fair trial for which witnesses must feel protected for free, frank and fearless deposition. Chances of accused fleeing from justice or tampering with evidence/trial if released on bail must be carefully assessed. The court should adopt a liberal approach and properly balance individual liberty and possibility of accused interdicting fair trial if released on bail, which is a social or public interest. Social interest should outweigh personal interest.

Supreme Court women Lawyers Association (SCWLA) Vs Union of India and another46

In this case SC held that Courts can neither create offences nor do they introduce or legislate punishments. It is the duty of legislature. In the instant

45(2017) 2 SCC 178
46 (2016) 3SCC 680
case PIL was filed, Rape of young girl children, when statutory provision regarding rape of minor girls and punishment there for exists under S. 376(2)(i) IPC. Court can neither enhance punishment so provided nor can it create a new offence and prescribe punishment in that regard, this is a legislative function and Court can only make suggestions to legislature, Having regard to increasing incidents of rape of girl children, highlighted by petitioner in PIL, the court observed, in present social situation, Parliament should define “child” in context of rape by prescribing upper age limit, may be, of ten years so as to distinguish girl children from minors generally [falling within expression “woman when she is under 16 yrs of age” under S. 376(2)(i) IPC] and providing for more severe punishment for those committing rape on girl children.

Supreme Court Satish Kumar Jayanti Lal Dabgar Vs State of Gujrat47

The SC, held, if S. 375 Sixthly gets attracted, it makes consent of prosecutrix to sexual intercourse immaterial and inconsequential, Legislature has introduced aforesaid provision with sound rationale and an important objective behind it is that a minor is incapable of thinking rationally and giving any consent, whether it is civil law or criminal law, consent of a minor is not treated as valid consent, A girl child who is not only minor but less than 16 yrs of age can easily be lured into giving consent for such an act without understanding implications there of, Such consent, is treated as not informed consent given after understanding pros and cons as well as consequences of intended action, Therefore duty is cast on other person in not taking advantage of so-called consent given by such a minor girl, and the other partner in such sexual act is treated as a criminal who has committed rape, The law leaves no choice to him to plead that the act was consensual, So-called consent of prosecutrix below 16 yrs of age cannot be treated as mitigating circumstance, In a heinous and abhorrent crime of sexual assault if consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences particularly

47(2015) 7 SCC 259
in view of Protection of Children from Sexual Offences Act, 2012, Protection of Children form sexual Offences Act, 2012, under sections 2, 4, 6, and 10. It was further held, purpose and justification behind sentencing is not only retribution, incapacitation, rehabilitation but deterrence as well, Heinous crimes like sexual offences being against society at large and depicting depravity and lack of morality, purpose of punishment by law is deterrence, constrained by consideration of justice.

*Supreme Court Kaushal Kishor Vs State of Uttar Pradesh and others*48

In this case four important issues emerge for consideration. They are:

a) When a victim files an FIR alleging rape, gang rape or murder or such other heinous offences against another person or group of person, whether any individual holding a public office or a person in authority or in charge of governance, should be allowed to comment on the crime stating that “it is an outcome of political controversy”. More so, when as an individual, be has nothing to do with the offences in question?

b) Should the “State”, the protector of citizens and responsible for law and order situation, allow these comment as they have the effect potentiality to create a distrust in the mind of the victim as regards the fair investigation and, in a way, the entire system.

c) Whether the statements do come within the ambit and sweep of freedom of speech and expression and exceed the boundary that is not permissible?

d) Whether such comment (which are not meant for self-protection) defeat the concept of constitutional compassion and also conception of constitutional sensitivity?

However the potent questions still need to be considered by the Hon’ble Supreme Court.

48(2016) 9 SCC 395
7.6 RECENT DEVELOPMENT UNDER POCSO ACT: NEWS BY SIDE

Supreme Court asks HCs to compel states to allot prosecutors for POCSO cases:

The Supreme Court on April 7, 2017 directed Chief Justices of 11 High Courts to act suomotu for the appointment of independent public prosecutors in special courts hearing cases of sexual abuse of children under the POCSO Act. A bench of Chief Justice Jagdish Singh Khehar, Justice D.Y. Chandrachud and Justice Sanjay Kishan Kaul gave the directions on a petition by lawyer Gaurav Kumar Bansal who sought appointment of such public prosecutors and conversion of special courts under the Protection of Children from Sexual Offences Act, 2012, as “exclusive courts” to try these cases.

Informing the court that these states had failed to appoint independent public prosecutors as mandated under Section 32 of the Act, Bansal said Gujarat, Goa, Madhya Pradesh, Maharashtra, West Bengal, Chhattisgarh, Arunachal Pradesh, Manipur, Meghalaya, Mizoram, and Union Territories of Puducherry and the Andaman and Nicobar Islands are in breach of Section 28 of the POCSO Act for setting up the special courts.\[49\]

Section 28 of the act says there will be at least one special court in each district.

**Muslim personal law conflicts with POCSO, says Delhi court, allows marriage minor girl\[50\]**

IF a Muslim youth “elopes” with a minor girl and marries her under the Muslim personal law and the minor “resides with him as his wife,” can he be treated as an “offender” of having committed sexual assault under the

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Protection of Children from Sexual Offences Act (POCSO)? Raising this question, a special court in Delhi observed last week that there is “clear conflict” between Muslim personal law and provisions of POCSO. Additional Sessions Judge Vinod Yadav, acquitting an 18-year-old man who was married to a 15-year-old minor, both Muslims and faced charges of rape, kidnapping and under sections of POCSO Act, said that as per POCSO, the minor girl was a “child not capable of giving consent for her marriage and consummation thereof” but “her personal law clearly authorises her to go ahead and get married at that age”. The youth was also accused under Section 6 of POCSO — punishment for aggravated penetrative sexual assault.

“Therefore, a clear conflict is apparent between the Muslim Personal Law and the provisions of the Act with regard to the marriage of a Muslim girl. The Act treats her as a child not capable of giving consent for her marriage and consummation thereof whereas her personal law clearly authorises her to go ahead and get married at that age. The Parliament probably did not foresee the aforesaid issue,” ASJ Yadav said.In the present case, an FIR was filed under sections of POCSO Act based on a complaint by the girl’s mother who said that the boy had enticed her daughter and taken her away. Bombay HC quashes POCSO case against 26-year-old who agrees to marry victim

The Bombay high court on Tuesday quashed a case of kidnapping and sexual assault under the law aimed to protect minors, after the 16-year-old girl and the 26-year-old accused said they settled the matter with them marrying once she becomes a major. The accused has been in jail since last year and the HC bench of Justices RV More and V L Achliya after quizzing the girl, her mother and grandfather who had filed the criminal case and being "satisfied" that they were voluntarily and amicably settling the matter, quashed the case and ordered his release in the case filed last year before the Dahisar police station in Mumbai under the Protection of Children from Sexual Offences Act. The offences were of sexual assault that attracts upto seven years in jail and are non-bailable.
But the girl said she had known the accused, who lives in the locality and is a distant relative who she had willingly accompanied. The minor lives with her divorced mother and maternal grandfather, both who gave their "no-objection" to quashing the case.

"The grandfather and the mother of the victim as well as the (accused) applicant's father stated that the applicant is going to marry the victim on her attaining the age of majority. The statement is accepted. It can, thus, be seen that the matter has been amicably settled between the parties. From the perusal of complaint, it transpires that the allegations are totally personal in nature," said the judges in their order. And accepted the quashing plea by adding that, "In these circumstances, and especially, in view of the law laid down by the Apex Court in the case of Narinder Singh Vs. State of Punjab"51, we find that no purpose would be served by keeping the criminal proceedings pending except burdening the Criminal Courts which are already overburdened."52

**Don’t grant bail to accused if POCSO act is made applicable: High Court:**

While reverting the session’s court verdict, the Nagpur bench of Bombay High Court held that bail shouldn't be granted to accused if booked under the Protection of Children from Sexual Offences (POCSO) Act, 2012. The ruling came after a mother of a 14-year-old rape survivor knocked the doors of judiciary for cancellation of bail granted to her daughter's alleged perpetrator.

The High Court observed, while granting bail the risky & dangerous situation should be taken into consideration, witnesses are bound to be under trepidation and thus bail shouldn't be granted in wake of substantive evidence. In the

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51(2014)6 SCC 466
The Union Ministry of Women and Child Development has launched Protection of Children from Sexual Offenses (POCSO) e-box, in New Delhi.

It was launched by the Union Minister for Women and Child Development Maneka Gandhi in New Delhi. POCSO e-box is an online complaint management system for easy and direct reporting of sexual offences against children and timely action against offenders under POCSO Act, 2012. It is an initiative of National Commission for Protection of Child Rights (NCPCR), for Direct online Reporting of Child Sexual Abuse. The e-Box is incorporated in the home page of National Commission for Protection of Child Rights (NCPCR) website http://ncPCR.gov.in/. The user can lodge a complaint by pressing the arrow on this page which navigates to another page where he/ she has to select at least one picture option (describing the category of harassment). User also needs to fill the form with details such as e-mail, mobile number and description of the harassment in order register complaint.

The Top Court Directed Delhi State Legal Services Authority to award compensation to the victim keeping in view the scheme framed by the Delhi Government.

The stringent POSCO Act to deal with sexual offences against minors cannot be invoked to prosecute a man for raping a mentally-challenged adult victim having an under-developed brain like a child, the Supreme Court today ruled. The apex court said that according to Section 2 (d) of the POCSO Act, the term “age” cannot include “mental” age as the intent of the Parliament was to focus on children, that is, persons who are physically under the age of 18 years.

54 http://currentaffairs.gktoday.in/tags/ministry-of-women-and-child-development last accessed on 7 June 2017
Protection of Children from Sexual Offences (POCSO) Act 2012 deals with the sexual offences against those below 18 years of age. On a reading of the POCSO Act, it is clear to us that it is gender neutral. By saying ‘age’ would cover ‘mental age’, it has the potential to create immense anomalous situations without there being any guidelines or statutory provisions. Needless to say, they are within the sphere of legislature. To elaborate, an addition of word ‘mental’ by taking recourse to interpretative process does not come within the purposive interpretation as far as the POCSO Act is concerned,” the bench added.

In a concurring separate judgement, Justice R F Nariman said that the Parliament, when it made the 2012 POCSO Act, was fully aware of the distinction between a woman who is a minor and an adult woman who is mentally ill and chose to protect only children whose physical age was below 18 years. He said the interpretation of Section 2(1)(d) of the POCSO Act, 2012 cannot include “mental” age as such an interpretation would be beyond the “Lakshman Rekha”. “Thus, it is clear that viewed with the lens of the legislator, we would be doing violence both to the intent and the language of Parliament if we were to read the word ‘mental’ into Section 2(1)(d) of the 2012 Act,” Justice Nariman said.

The verdict came on a plea filed by a 60-year-old Delhi-based lady doctor whose 38-year-old daughter, suffering from cerebral palsy with a mental age of 6-8 years, was raped by a man in 2010. The man accused of sexually assaulting the woman had died during the pendency of the case. The victim’s mother had contended that biological age should not be the governing yardstick and her daughter should be considered as a child because she is intellectually challenged and mentally retarded.

The top court directed Delhi State Legal Services Authority to award compensation to the victim keeping in view the scheme framed by the Delhi government. “As regards the quantum, I am of the convinced opinion that it is a
fit case where the victim should be granted the maximum compensation as envisaged under the scheme. I clarify that it is so directed with regard to the special features of the case,” Justice Misra said.

The court said stretching of the words ‘age’ and ‘year’ would be encroaching upon the legislative function. “Needless to emphasise that courts sometimes expand or stretch the meaning of a phrase by taking recourse to purposive interpretation. A Judge can have a constructionist approach but there is a limitation to his sense of creativity,” the bench said.

“In the instant case, I am obliged to state that stretching of the words ‘age’ and ‘year’ would be encroaching upon the legislative function. There is no necessity,” the bench concluded.

**Sexual intercourse by a man with his own wife who is below 18 years is statutory rape.**

Recently in the case of *Independent Thought V Union of India and Anr.*\(^{55}\) SC ended the decades-old disparity between Exception 2 to Section 375 IPC and other child protection laws Justice Lokur said, “A child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated or widowed child. At this stage we are reminded of Shakespeare’s eternal view that a rose by any other name would smell as sweet — so also with the status of a child, despite any prefix”. The judgment has discussed the rigors of the POCSO Act which defines “penetrative sexual assault” and includes within its fold a girl or a boy child under the age of 18 years. Similarly the JJ Act also takes within its ambit all children who are below 18 years of age. Also, the PCMA has the minimum age of marriage as 18 years. The incongruity between these special legislations which are pro-child and IPC must be harmonized by

\(^{55}\text{MANU/SC/1298/2017}\)
giving primacy to the former over the latter in terms of Sections 5 and 41 of IPC. The Supreme Court has applied the harmonious and purposive construction to read down Exception 2 to Section 375 of IPC and held that sexual intercourse by a man with his own wife who is below 18 years is statutory rape.\footnote{http://www.livelaw.in/analysis-statutory-rape-dichotomy/ accessed on 25/11/2017}

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