



# Protection of Transgender Children from Sexual Offences: A Judicial Approach

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## ABSTRACT

Transgender Child Sexual Abuse is, of late, legally acknowledged as a menace in India. A palpable development in the direction is the enactment of a special law *i.e.*, the Protection of Trans Children against Sexual Offences Act, 2012 and thereby criminalising a range of acts under it including child rape, harassment, and exploitation for pornography. The form and substance of the law, which has defined a child as anyone below 18 years of age, is to protect Trans children from sexual abuse. In India, to discharge its judicial obligations, judiciary has been exercising and evolving its jurisdiction by courage and have adopted egalitarian approach in numerous judgments in cases of child sexual abuse. To preserve the interest of child victim judiciary had granted the interim compensations, linked the offence of child sexual abuse with infringement of fundamental rights, mentioned not to question the chastity of minor rape victim, took marital rape of a girl below the age of 18 within the scope of child sexual abuse. But in many cases to protect the interest of innocent rape accused the court had refused to accept the testimony of victim as ideal truth, conviction on mere conjuncture or surmise was not acceptable and as, in the recent high court judgement, abuse of a girl child which lacked 'skin to skin' touch was denied to be recognised as sexual assault. Therefore, the present research paper underlines that there is an urgent need to impart sensitisation by training not only the members of judiciary but also law-keeping forces for such heinous crimes; since, without this justice delivery would likely be only partial.

**Keywords:** Transgender, Child Sexual Abuse, Judicial Approach, Juvenile Justice, POCSO, Sexual Offences.

## 1.1. Introduction

“We ought to judge each society by how it treats the most vulnerable and weakest of its members.”<sup>1</sup>

In the past, child sexual abuse was a veiled problem in India which was ignored largely in public discourse and even by the criminal justice system. Until recently, it was not acknowledged as a criminal offence. Due to

<sup>1</sup> Father of the Nation Mohandas Karamchand Gandhi (October 2, 1869 – January 30, 1948). As the Indian spiritual and political leader, he coordinated and led national struggle for independence against British imperial rule on the strength of a non-violent movement survives largely intact.

absence of any specific legislation, a range of offensive behaviours like child sexual assault not amounting to rape, harassment, and exploitation for pornography were never punished. In the past decade many Non-Governmental Organisations (NGOs) and the Union Ministry of Women and Child Development have actively partaken to address the issue. On one hand, there was constant rise in the number of cases relating to sexual assault and on the other hand the conviction rate was declining as per successive reports of the National Crime Records Bureau (NCRB). It had led to the enactment of new legislation called the Protection of Children from Sexual Offences Act, 2012 (*hereinafter* referred to as the POCSO Act).<sup>2</sup> Prior to 2012, sexual offences against children were only recognised in three sections of the Indian Penal Code, 1860 (*hereinafter* referred to as the IPC), which were not specific to children. Mostly, provisions of the IPC were invoked and crimes were either registered for outraging modesty of a woman, rape, unnatural acts under Sections 354, 376 and 377 respectively. But the POCSO Act criminalises sexual acts committed on a child below the age of 18 like sexual assault, sexual harassment, and pornography. It has made it mandatory to set up 'Special Courts' to fasten the trials of the related offences.

The POCSO Act is the foremost legislation in the country which has been dealing specifically with sexual offences against children and clearly defines them. It includes within its purview the abuse of not only 'girls' as in the IPC but also of 'boys'.<sup>3</sup> Different penalties have been mentioned for different offences depending on gravity of the offence, which ranges from simple to rigorous imprisonment for several years. It also criminalizes attempt and abetment of these offences. Distinction between sexual assault and aggravated sexual assault has been made; and stringent punishment is given for the latter. In the POCSO Act, an offence is to be treated as 'aggravated' if it is committed by a man who is holding a position of trust or authority in the eyes of the child, such as a police officer, public servant, a member of security forces etc. The onus of proof has been shifted on the accused for the offences like 'penetrative sexual assault', 'aggravated penetrative sexual assault', 'sexual assault' and 'aggravated sexual assault'.<sup>4</sup> This change was introduced keeping in mind the greater vulnerability of children and the heinous nature of the offences. Additionally, the POCSO Act also punishes those who make a fallacious complaint or gives fallacious information with malicious intent.<sup>5</sup> However, to not to discourage reportage of cases, the degree of punishment has been kept relatively low. Special Courts have to be established for trial of the listed offences, keeping the interest of the child at priority at each stage of the process by incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences.

## 1.2. Definition of Child

Section 2(d) of the POCSO Act defines a child as any person below the age of 18 years. It changed the definition of a child in criminal laws as consenting age of a girl is raised from 16 years to 18 years; therefore,

<sup>2</sup> Jyoti Belur and Brijesh Bahadur Singh, "Child Sexual Abuse and the Law in India: A Commentary", viewed at: [https://www.researchgate.net/publication/283154821\\_Child\\_Sexual\\_Abuse\\_and\\_the\\_Law\\_in\\_India](https://www.researchgate.net/publication/283154821_Child_Sexual_Abuse_and_the_Law_in_India) (last assessed on May 28, 2021)

<sup>3</sup> S. 2(1) (d), the Protection of Children from Sexual Offences Act, 2012.

<sup>4</sup> The Ministry of Women and Child Development, the Protection of Children from Sexual Offences Act of 2012, available at: <http://pib.nic.in/newsite/erelease.aspx?relid=84409> (last assessed on June 12, 2021).

<sup>5</sup> S. 22, the Protection of Children from Sexual Offences Act, 2012.

bringing consensual sexual assault with a girl below the age of 18 years within the ambit of penetrative sexual assault.

In the landmark judgement of *Ms. Eera through Dr. Manjula Krippendorf v. State*<sup>6</sup> for the first time the question was raised that whether mentally retarded person or an extremely intellectually challenged person who has even crossed biological age of 18 years can be included within the holistic conception of the term child in the POCSO Act. It was held by the court that:

“It is only from the language of statute that the intention of legislature must be gathered, for the legislature means no more and no less than what it says. It is not permissible for the court to speculate as to what the legislature must have intended and then to twist or bend the language of statute to make it accord with the presumed intention of the legislature. The Parliament had intentionally fixed the age of the child and it is in the prism of biological age and nothing else.”

Thus, Section 2(1)(d) the POCSO Act does not include mental age within the ambit of legislative wisdom as such.

### 1.3. Rudiments of the Protection of Transgender Children from Sexual Offences Act

The various rudiments covered within the domain of the POCSO Act are discussed hereunder:

**1.3.1. Sexual Assault:** Whoever touches the private parts of a child with the bad intention either it's a male or a female child, or makes the child to do so or does any other act with a sexual intent and which involves physical contact without penetration will constitute Sexual Assault.

**1.3.2. Sexual Harassment:** When any person utters a word or makes any sound or gesture or displays or exposes any part of the body, with a sexual intent that the child would hear the sound or sees the part of the body would constitute the offence of Sexual Harassment. Repeatedly or constantly following or watching or contacting a child directly or on phone is also punishable.

**1.3.3. Use of children for pornography:** Even showing of any porn film with any sexual intention too is an offence.

## 2. Constitutional Validity of the Protection of Children from Sexual Offences

The Constitution of India has been introduced on November 26, 1949 and it came into effect on January 26, 1950. Many special provisions regarding children are given under Fundamental Right, Directive Principles and Fundamental Duties of the Constitution. Article 15 has specifically prohibited discrimination by the State on grounds of religion, race, caste, sex or place of birth. Under Article 15(3) the State has been empowered to make any special provision for women and children. Further in Article 39 it has been provided that the State can make

<sup>6</sup> AIR 2016 SC 1217.



policies for the benefit of children like securing the children of tender age from being abused and to protect their childhood and youth against exploitation and to make sure that they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. Part IV of the Constitution provides provisions which shall be fundamental in the governance and the State shall be duty bound to apply them in making of various laws. Article 39(a), (e) and (f) contain specific provisions which are to be followed by the State to ensure welfare of the children.<sup>7</sup>

The rights of children for care and protection were first recognised, internationally, under Article 25(2) of the Universal Declaration of Human Rights, 1948. Eventually, the United Nations Convention on the Rights of Child, 1989 created legal responsibility of the State to implement it through domestic laws. To implement these in India, the POCSO Act was enacted by the Parliament.

### 3. Judicial Approach

The judiciary is given the job to ensure justice. It has to act as a guard of justice and make sure that justice is delivered to every individual.<sup>8</sup> Judiciary has played a very significant role in promoting the child welfare. It has acted as the guardian in protecting and promoting human rights by enlarging its domain and by encouraging public interest litigations with positive results. The judiciary has actively promoted the rights of children, especially in areas like education,<sup>9</sup> child labor,<sup>10</sup> children in brothels,<sup>11</sup> adoption of children,<sup>12</sup> justice for juveniles,<sup>13</sup> children in jail,<sup>14</sup> and the sexual abuse of children,<sup>15</sup> etc. Whenever a legal wrong or injury has been caused to a child, the judiciary has come forward to help. The historic judgments made by the judiciary in the past have clearly shown that judiciary is serious and sincere to the check and curb the child sexual abuse and in the protection of children from sexual offences.

The Apex Court in *Sheela Barse v. Union of India* held that children are the assets of a nation. In this case judiciary acted as a guardian of the most exposed segment of the society including children.<sup>16</sup> In *M. Veerasamy v. State of Tamil Nadu* Supreme Court observed, “child sexual abuse happens because the system of silence around the act perpetuates it.”

In *Nishu v. Commissioner of Police, Delhi and Ors.*<sup>17</sup> a minor was kidnapped and raped by group of nine people. One of the accused was constable in Haryana police. In this case neither the copy of the medical report was furnished to the prosecution nor was any FIR under Section 376 D of the IPC or under the provisions of the

<sup>7</sup> Anju Jain, “Juvenile Justice System and Child Related Legislation in India” 1 IJRTI (2016).

<sup>8</sup> Aarti Sharma, “Role of Indian judiciary in protecting the rights of the victim of Rape: An Overview” 4 IJRAR 542-558 (2017).

<sup>9</sup> *Unni Krishnan v. State of Andhra Pradesh*: (1993) 1 SCC 645.

<sup>10</sup> *MC Mehta v. State of Tamil Nadu & Ors*: (1991) 1 SCC 283 and (1996) 6 SCC 756.

<sup>11</sup> *Vishal Jeet v. Union of India & Other State and Union Territories*: (1990) 3 SCC 318 and *Gaurav Jain v. Union of India*: (1997) 4 SCC 114.

<sup>12</sup> *Laxmi Kant Pandey v. Union of India*: (1984) AIR SC 469.

<sup>13</sup> *Hiralal Malik v. State of U.P.*: (1997) 4 SCC 44, *Sheo Shankar Singh v. State of Bihar*: (1982) 1 SCC 480 and *Shiv Shankar v. State of Uttar Pradesh*: (2001) 10 SCC 472.

<sup>14</sup> *Sheela Barse v. Union of India & Ors.*: (1986) 3 SCC 632, *Sheela Barse v. Secretary, Children's Aid Society & Ors.*: (1987) 3 SCC 50 and *Sheela Barse and Another v. Union of India & Ors.*: (1995) 5 SCC 654.

<sup>15</sup> *Sakshi v. Union of India*: (2004) 5 SCC 518, *Madan Gopal Kakkad v. Naval Dubey*: (1992) 3 SCC 204

<sup>16</sup> AIR 1986 SC 1873

<sup>17</sup> AIR (2014) SC 2516.

POCSO Act was registered against the accused persons. Petition under Article 32 was filed for registration of FIR and for the arrest of the accused. And thereby, an action against the officers of the Delhi and Haryana police was taken for refusal of registering FIR. The Court held that as the charge-sheet was filed and trial was commenced against all the nine accused; so, it was not appropriate to exercise writ jurisdiction under Article 32 of the Constitution.

In *Ashish Kumar and Ors. v. State of U.P and Ors.*<sup>18</sup> a FIR was lodged under sections 7 and 8 of the POCSO Act and Sections 147, 323, 352, 354A and 506 of the IPC. But the police laid charge-sheet only under Sections 323, 352 and 506 of the IPC. As a result, prosecution filed an affidavit alleging therein that on the date of the incident the victim was a minor and as she alleged molestation in her statement, offences punishable under sections 147 and 354A of the IPC and sections 7 and 8 of the POCSO Act were also made out. Upon receiving such affidavit, the learned Magistrate directed the return of the charge-sheet to be laid before the Special Court. The High Court in this matter held that if the Magistrate after taking cognizance of the offences had found that case is to be tried by a Special Court under the POCSO Act, then he was empowered to commit the case to the Special Court by taking support of the provisions of section 209 of the Code. This judgment had shown that cases of sexual assault of minor are to be exclusively tried by special courts constituted under the POCSO Act.

In *Gajraj Singh v. State of U.P*<sup>19</sup> a FIR was registered against kidnapping of a minor girl. The girl was recovered from the keeping of accused and charge-sheet was submitted in the case against accused only under sections 363 and 366 of the IPC and sections 3 and 4 of the POCSO Act. Thereafter, applicant as well as accused had moved an application before the Special Judge/Additional Session Judge for the custody of girl. Applicant who was the father, claimed that he was entitled to custody as the girl was a minor, whereas accused wanted custody of her on the ground that he was her husband. Rejecting both applications, the Court sent the girl to *Nari Niketan* and held that it was a clear-cut case of illegal confinement of minor against her wishes and therefore, infringing her basic fundamental right to choice. This judgment had shown that how judiciary is interpreting laws on guardianship for protecting the rights of victims.

In *Avinash v. State of Karnataka*<sup>20</sup> the appellant committed an act where he sexually assaulted the victim after kidnapping her in the night hours and had sexual intercourse with her on many occasions. After the incident, complaint was filed and on completion of the investigation, charge-sheet was laid against the appellant/accused for offence punishable under section 366 of the IPC and under section 4 of the POCSO Act. The trial court convicted accused under the said offences. Aggrieved by the conviction and sentence, the accused filed an appeal before the High Court questioning the age of the victim. The Court held that the scrutiny of the material placed on record was important to reveal the age of the victim as it helped in deciding whether offence under section 366 of the IPC and section 4 of the POCSO Act was made out or not. But to prove the age merely the photocopy of the Secondary School Leaving Certificate (commonly referred to as SSLC) marks card was not enough. Hence, the

<sup>18</sup> AIR (2015) UP 0439.

<sup>19</sup> AIR (2015) ADJ 350.

<sup>20</sup> AIR (2015) KA 127.

court put aside the conviction and sentence by passing on the matter to the trial court with a direction that opportunity of being heard must be given to the prosecution in relation to the said order.

In *Santhosa v. State*<sup>21</sup> case was registered under section 366A of the IPC, but, subsequently, by filing the remand application two more accused were also included in the case and the alleged offence under section 376 read with section 34 of the IPC and also under sections 3 and 4 of the POCSO Act were added. Bail application for accused-1 & anticipatory bail for accused-2 & 3 was filed. On the date of the alleged incident, victim was of 13 years. The argument of the counsel for the petitioner was that since both victim and petitioner were married by choice so there was no violation of free will of girl. But seeing the gravity of the offence, the court rejected the petition and the bail application of accused-1. But the anticipatory bail of remaining two accused was allowed. In above decision judiciary had set the precedent that in grievous offences accused cannot run away from his liability by taking the consent of a minor.

In *Vijay Kumar v. State of Karnataka*<sup>22</sup> the petitioner was working in the Girls Hostel. He was ill-treating, harassing and sexually exploiting the girl students at the said institution and another person was giving assistance to him; accordingly a FIR was lodged against the both. The Police had investigated the matter and submitted the charge sheet. Statements of the girl students, headmaster and others were recorded during the course of investigation. Petition was filed before the Court by accused-1 for grant of bail on the ground that accused-2 was granted bail. The court observed that neither any of the girls had stated as to whether they were exploited nor they stated that who was actually being exploited. Hence, due to lack of strong reasons, the court held that petitioner was entitled to bail. The above mentioned decision indicates that accused will get benefit of doubt in the absence of concrete evidences against him.

In the similar way, in *Siddu v. State of Karnataka and Ors.*<sup>23</sup> petitioner was alleged to have ravished the victim girl aged six years. In this case petitioner's age was also in question. The police had registered a case for the offences punishable under Sections 376(f), 506 of the IPC and also under Section 6 of the POCSO Act. When the accused approached the Sessions Court for grant of bail during investigation, his case was referred to the Juvenile Justice Board holding him as a minor. Further, the Juvenile Justice Board again referred the matter to Session Court to determine age. It was held that court must take more evidences in case of doubt with regard to age and considering such evidences, it should decide the age of such Juvenile and thereafter only, the Court should pursue with the merits of the case.

In *Bhagwan v. State of Rajasthan*<sup>24</sup> the prosecutrix and the accused were both minors. They both were having intimate relationship and eloped to a place where both of them started working as laborers. Even report of investigation officer also illustrated intimate relation between both of them before the date of incident. The consent given by prosecutrix was not valid as she was minor at the time of incident. Also, the Probation Officer's report was not adverse to interest of the petitioner. So, the Court held that there were valid and justifiable grounds

<sup>21</sup> AIR (2014) KarLJ 251.

<sup>22</sup> AIR (2015) KA 44.

<sup>23</sup> AIR (2015) WLN 886.

<sup>24</sup> AIR (2015) SC 773.

for directing the release of juvenile to his guardian. Through this judgment judiciary held that where two minors entered into physical intimacy with their will then they cannot be punished under the POCSO Act.

On other occasions like in the *State of Rajasthan v. Manoj Pratap Singh*<sup>25</sup> a girl of eight years who was mentally and physically disabled was kidnapped and sexually assaulted by the accused. Charges were framed against accused for sexually assaulting and killing the minor girl under Sections 363, 365, 376(2)(f) and Section 302 of the IPC as well as under Section 6 of the POCSO Act. Special Court under the POCSO Act convicted the accused under the above-mentioned offences and awarded capital punishment to the accused. In the present case, court held that as offence committed by accused was “rarest of rare” so the death punishment was justified. In this judgment, judiciary adopted retributive approach of punishment and set a precedent that in such kind of heinous cases court will not hesitate to pass death sentence.

In *Niranjan Meena v. State of Rajasthan*<sup>26</sup> complainant lodged a FIR for the offence under Section 363, 376, 342, 354, 120B of the IPC and Section 4 and 6 of the POCSO Act against a juvenile delinquent. After investigation the juvenile delinquent was arrested by the police. Custody of the juvenile was demanded by his father under Section 12 of the Juvenile Justice (Care & Protection of Children) Act, 2000. The said application was rejected by the Juvenile Justice Board and his appeal was also dismissed. But in the revision petition after hearing the arguments of the counsel for the Juvenile delinquent, the Court held that juvenile deserved to be released on bail.

In *Letha J. v. State of Kerala*<sup>27</sup> on the basis of some alleged media reports the Child Welfare Committee, Wayanad had suo-motu registered a case on the alleged sexual assault on girl students of a Government School. It was alleged that the 1st accused had sexually assaulted and harassed the girl students of the said school repeatedly for a long period. The Child Welfare Committee had directed the head of the institution to submit a detailed report along with it. Court found this case as a classic example and a fine illustration to note down the gross illegalities being committed by the Child Welfare Committees without knowing as to what they were and what were their powers, and as to how recklessly they were exercising powers, which were not even conferred on them. It seemed that in this particular case, the Child Welfare Committee had crossed over all the limits and had committed gross illegality in passing such an order.

In *Ramrahit Singh v. Dhananjay Singh and Ors.*<sup>28</sup> a minor girl was raped. After conducting investigation, charge-sheet was been submitted against the accused under Section 6 of the POCSO Act and under Section 506 of the IPC. It was held that only under the POCSO Act, Special Court has been given all the powers to try an offence and to entertain and consider bail application. Not only this but it is also empowered with any incidental matter thereto including the power of detain and keeping accused in remand.

<sup>25</sup> AIR (2015) RH 085.

<sup>26</sup> AIR (2014) (3) WLN 126.

<sup>27</sup> AIR (2013) KHC 7863.

<sup>28</sup> AIR (2013) WB 4523.



In *State of Himachal Pradesh v. Sanjay Kumar*,<sup>29</sup> the Supreme Court held that the deposition of the prosecutrix should be taken as a whole, as the victim of rape is not an accomplice to the offence. As a result, her evidence can be taken as substantive evidence which needs no corroboration as her statement has higher evidentiary value than statement of an injured witness. In aspect of this, minor conflict between the statement of the prosecutrix and other material witnesses should not be considered relevant if other material facts of the incident were in synchronization. So, in this decision judiciary took a liberal approach towards evidentiary value of statement given by the victim. The Supreme Court adopted a survivor-centric approach and overturned a decision of the Himachal Pradesh High Court. In this case the apex court convicted the accused solely on the basis of the testimony of the survivor. Article 141 of the Constitution was also quoted by court in this judgment which mandates that Supreme Court judgments are the law of the land. This particular decision breaks an age-old myth and acts as a watershed moment in India's child sexual abuse trial and sentencing jurisprudence.

In another case of *Lawyers Association v. Union of India and another*,<sup>30</sup> the Supreme Court held that it is the duty of legislature to create offences or legislate punishments and not of the court. Petitioner in his PIL highlighted increasing incidents of rape of minor girls below the age of ten years. The court had observed that the Parliament should define child in context of rape by distinguishing girl children of ten years from girls who are below the age of sixteen under Section 376(2)(i) IPC. It was held that Parliament should enact provisions to give more severe punishment to those who commits rape on girl children who is below the age of ten.

In *State of Bihar v. Raj Ballav Prasad Yadav*,<sup>31</sup> the Supreme Court held where accused is prosecuted under Section 3, 5, 7 and 9 of the POCSO Act, 2012 there general presumption as to his innocence shall not be raised. The court further observed that court's prime consideration should be to conduct fair trial and to make sure that witness gives deposition freely and fearlessly. Before granting bail to the accused, factors like chances of accused running away from justice or interfering with evidence must be carefully assessed. Hence, in this case court had adopted a liberal approach and properly balanced between individual liberty and public interest. It also held that social interest should be prioritised over personal interest.

In *Bijoy v. State of West Bengal*<sup>32</sup> it was held that police and investigation officer shall ensure that the identity of the victim is not revealed during investigation except in a few cases with the express sanction of the special court, in the interest of justice. Further, the statements of victim shall be taken under Section 24 at the residence or a place of choice of the victim or that of his/her parents/custodian, as far as practicable. Any person, including a police officer, if discloses the identity of the victim, shall be prosecuted under Section 23(4). Moreover, special court was also barred from revealing identity of the victim at the time of delivering judgement until and unless it is required in the interest of child. So, through this judgement, judiciary ensured victim's right to privacy and right to live with dignity.

<sup>29</sup> (2017) 2 SCC 51.

<sup>30</sup> (2016) 3SCC 680

<sup>31</sup> (2017) 2 SCC 178

<sup>32</sup> AIR 2017 SC 663.



Recently in the case of *Independent Thought v. Union of India and Anr.*<sup>33</sup> the Hon'ble Supreme Court gave end to the decades-old arbitrariness of exception-2 to Section 375 of the IPC. It was held that a girl child if gets married or remains unmarried or if she is a divorced or gets separated, she would still remain a child only. Court had also quoted Shakespeare's eternal view that if a rose is given any other name it would smell as sweet and so is with the status of a child, despite any prefix. Similarly, the Juvenile Justice Act also provides protection to all the children below the age of 18. Also, the legal age for marriage is 18 years. The court held that by adopting the harmonious construction rule of interpretation, difference between these special pro child legislations and the IPC must be reduced by giving priority to the former over the latter. The Supreme Court had applied the balanced approach between exception-2 to Section 375 of the IPC and the POCSO Act. It was held that sexual intercourse by a husband with his wife will constitute rape if committed with girl who is below the age of 18 years. So, this is a landmark judgement through which judiciary recognised marital rape in India.

In *Nipun Saxena v. Union of India*,<sup>34</sup> the Supreme Court took a step to ensure payment of compensation to the victim and hence directed the National Legal Services Authority to constitute a committee to prepare the Model Rules for Victim Compensation for sexual offences and acid attacks. In *Sunil Mahadev Patil v. State of Maharashtra*,<sup>35</sup> petitioner was held punishable under various sections of the IPC and the POCSO Act like Section 376, 363, 366A of the IPC and under Section 3, 4, 5 and 6 of the POCSO Act. He demanded bail under Section 439 of the Code of Criminal Procedure. The Court held that where facts reveal that prosecutrix was a minor between the age of fifteen and eighteen years and she voluntarily gave consent to such act, then it should be considered as a mitigating factor while determining the bail of the applicant. Whereas a totally contradictory decision was given by Kerala High Court in *Sujit v. State of Kerala*,<sup>36</sup> the court held that consent of minor is invalid and immaterial and hence rejected the application of anticipatory bail of accused.

In regard to the jurisdiction of the court to entertain bail application in *Ramu Ram v. State of Rajasthan & Ors.*<sup>37</sup> the court observed that where offence under the POCSO Act is made out, then the bail application must be heard by special court constituted under the POCSO Act. The Court of the Chief Judicial Magistrate or Additional Session Judge is not empowered to entertain such application in that case. This judgement shows that cases of sexual assault with a minor shall solely be tried by special courts under the POCSO Act.

The Nagpur Bench of the Mumbai High Court recently passed an overwhelming judgment<sup>38</sup> which was criticised by all concerned stakeholders. In this judgement Justice Pushpa Ganediwala altered the order of a Sessions Court, which had sentenced a 39-year-old to three years of imprisonment for sexually assaulting a 12-year-old girl. She altered the order on the ground that merely if a person gropes breasts of a minor without skin to skin touch, then it cannot be termed as sexual assault. But the phrase "skin to skin contact" is nowhere mentioned in any law. Besides punishing the accused under the POCSO Act, she held him liable for outraging modesty

<sup>33</sup> MANU/SC/1298/2017.

<sup>34</sup> 2019 (13) SCC 719.

<sup>35</sup> AIR 2016 (I) 34 BOM.

<sup>36</sup> 2018 (3) KHC 641.

<sup>37</sup> RLW 2014(2)Raj 987.

<sup>38</sup> Available at: <https://www.news18.com/news/buzz/justice-pushpa-virendra-ganediwala-who-is-the-bombay-hc-judge-under-scanner-for-controversial-posco-rulings-3365075.html>(last assessed on June 29, 2021).

under Section 354 of the IPC and punished accused for one year imprisonment. The judgment made it incumbent to sensitise members of judiciary and law keeping forces. Since without it there will be only partial delivery of justice. The decision was also criticized by the Attorney General of India and he held it as outrageous decision which would set a dangerous precedent. Finally, the Supreme Court to reversed it stating that “the construction of a rule should give effect to the rule rather than destroying it”, and “any narrow and pedantic interpretation of the provision, which would defeat the object of the provision, cannot be accepted”.

In another recent case,<sup>39</sup> a special POCSO court in Uttar Pradesh’s Firozabad gave a landmark judgement by disposing the case in a “record time” within three and a half months. In this case court sentenced accused with death sentence for raping and murdering an eight year old girl. Court held that accused committed a heinous crime and a crime against humanity and thus it falls in the category of “rarest of rare” case. Additionally, it directed district administration to pay compensation amount of Rs. eight lakh to victim’s family. In this case again judiciary adopted retributive approach of punishment and set a benchmark that a person will be punished with death sentence in case of heinous crimes.

In a historic judgement<sup>40</sup> for children who are victims of sexual abuse, Delhi High Court granted interim compensation amounting Rs. six lakhs to a young boy who was molested by his uncle at the age of six. Initially court awarded an interim compensation of Rs. 50,000. But with intervention of Bachpan Bachao Andolan, court revised amount from Rs. 50,000 to Rs. six lakhs. This judgment had set a precedent for awarding compensation to male victims under the POCSO Act.<sup>41</sup>

In another latest case of this year,<sup>42</sup> the Kerala High Court held that where the body of the victim was manipulated to hold the legs together for the purpose of simulating a sensation akin to penetration of an orifice; the offence of rape was attracted. Court gave its judgement on the basis of expanded definition of rape mentioned under Section 375 of the IPC as per 2013 amendment. But as in this case prosecution failed to prove that victim was a minor at the time of incident so provisions of POCSO Act were not attracted.<sup>43</sup>

#### 4. The Protection of Children from Sexual Offences Act and Juvenile Law

The Juvenile Justice (Care and Protection of Children) Act, 2015 (*hereinafter* referred to as the Juvenile Justice Act) was enacted as human rights legislation and it is now in force in all States uniformly, repealing the laws enacted by the various states. This legislation has dealt with the two types of juveniles. “Child in conflict with law” which is defined under Section 2(13) and “Child in need of care and protection” as defined under Section 2(14). As per Section 2(12) of the Juvenile Justice Act, any person below the age of eighteen is a child. The Juvenile Justice Act was enacted with the object of reformation and social rehabilitation of juveniles. As per the

<sup>39</sup> Available at: <https://www.newindianexpress.com/nation/2021/apr/01/man-sentenced-to-death-in-uttar-pradesh-for-raping-10-year-old-girl-2284536.html>, (last assessed on July 10, 2021).

<sup>40</sup> Available at: <https://www.indiatoday.in/india/story/hc-awards-compensation-to-6-year-old-sexual-assault-victim-says-system-cannot-undo-offence-1807255-2021-05-27>, (last assessed on July 12, 2021).

<sup>41</sup> Available at: <https://special.ndtv.com/justice-for-every-child-87/news-detail/delhi-high-courts-landmark-judgement-sets-a-benchmark-for-awarding-compensation-in-pocso-cases-2458550/7>, (last assessed on July 14, 2021).

<sup>42</sup> Available at: <https://www.onmanorama.com/news/kerala/2021/08/05/manipulation-woman-body-rape-rules-kerala-hc.html>, (last assessed on July 17, 2021).

<sup>43</sup> Available at: <https://www.tribuneindia.com/news/nation/penile-sexual-assault-between-thighs-of-victim-held-together-amounts-to-rape-kerala-hc-293483>, (last assessed on July 28, 2021).

Juvenile Justice Act, juvenile offenders should be distinguished from adults and be accorded appropriate treatment as per their age and legal status. It was subsequently amended with the aim of treating children within the age of 16 to 18 as adults in case of barbaric crimes like rape. Where on one hand the Juvenile Justice Act had ensured the safety, security, dignity and well-being of children; on the other hand, the POCSO Act has provided comprehensive provisions with the object of protecting children from the offences of sexual assault, sexual harassment and pornography. Where offence is committed by a child under the POCSO Act, he is given shelter in Juvenile Justice Act on the basis of principle of restorative justice. Another conflicting aspect between both the laws is that the POCSO Act is gender neutral whereas the Juvenile Justice Act is gender biased. Moreover, it remains a mystery in cases of consensual sex between adolescents below 18 years of age that which of these two laws will have overriding effect.<sup>44</sup> Therefore, application of a balanced approach between the provisions of the these two laws is the need of the hour.

### 5. Recommendations by Law Commission

The recommendations of the 172nd Law Commission Report of 2000 were substituted in the POCSO Act and in the Criminal Law (Amendment) Ordinance 2013 by substituting the gender-specific term of rape with the gender-neutral term of sexual assault. Recommendations were also made with regard to retention of the term “rape” instead of sexual assault in section 375 of the IPC, and advised a gender-neutral term of “person” as the victim. Its another recommendation was criminalization of non-consensual penetrative sex upon a woman by a man, including the same within the relationship of marriage, as rape which still needs to be recognised in our Indian laws. Referring to the cases which have been registered against young men in relationships with girls under the age of 18 it stated that the the United Nations Convention on the Rights of the Child (UNCRC) aimed to protect children from sexual assault and abuse and not to criminalize consensual sex between two individuals if they are below 18 years of age. Hence, the scales tilted in favour of reducing of the age of consent for sexual activity to 16, as the age of 18 would result in the criminalization of consensual sex between persons who are below 18 years of age. Recently, recommendations were passed to the Centre that the juvenile delinquency age be reduced from 18 to 16, and for trial under the POCSO Act all accused above 16 be tried as adults. Lastly, as per Law Commission, the inclusion of death penalty as punishment, which was inserted in the year of 2019 could result in decline of the number of cases reported and could also lead to murder of the victim. Further, till date there has been no amendment to provide reasonable compensation to victims, and no strong solution to work on reducing the pendency of cases.<sup>45</sup>

<sup>44</sup> Available at: <https://shodhganga.inflibnet.ac.in/bitstream/10603/214283/9/chapter%205.pdf>, (last assessed on August 10, 2021).

<sup>45</sup> Available at: <https://www.indiaspend.com/death-penalty-in-pocso-act-may-imperil-child-victims-of-sexual-offences/>, (last assessed on August 11, 2021).

## 5. Conclusion and Suggestions

“It is the spirit and not the form of law that keeps justice alive.”<sup>46</sup>

The thorough survey of the above-mentioned cases shows activism of the Indian judiciary to protect the children from child sexual abuse.<sup>47</sup> A remarkable development is done by judiciary in understanding child rights in the backdrop of child sexual abuse. However, in many cases it has been seen that courts adopt this saviour complex where they had assumed the duty towards only those who fit into the bracket of ‘helpless ideal victim, who has been brutally affected’. The other concerns have been ignored or considered not as pertinent as the stereotypical considerations by the Indian courts. Hence, there is an immediate need for training in sentencing of not only the judges at all levels but also the other legal fraternity involved in prosecution of offenders. Many stakeholders like police, child welfare committees, criminal justice machinery etc. needs to be deeply educated about provisions of law on child sexual abuse. In addition to this there is an urgent need to evolve some standards for determining the amount of fine for medical expenses and rehabilitation of the victim. To assess amount of fine, assessment of financial capacity of the offender should also be made integral part of decision making process at the stage of sentencing. Treatment and rehabilitation of the victim should be ensured by the State by giving them interim and final compensation.<sup>48</sup> For the better execution of criminal justice machinery the POCSO Act must be further explained in connection to the Juvenile Justice Act. In many cases the Indian courts have denied justice to the victim blatantly where victim does not fit into the definition of ‘ideal victim’ which is heart-breaking.



<sup>46</sup> Earl 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).

<sup>47</sup> Ved Kumari and Ravinder Barn, “Sentencing in Rape Cases: A Critical Appraisal of Judicial Decisions in India” 51 *Indian Journal of Law Institute* (2017).

<sup>48</sup> Vandana Peterson, “Speeding up Sexual Assault Trials: A Constructive Critique of India’s Fast Track Courts” 18 *Yale Human Rights and Development Law Journal* (2016).