



# **THE LAW AND PRACTICE RELATING TO CHILD SEXUAL ABUSE**



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# Outline

- Understanding Child Sexual Abuse
- Substantive Law
  - Protection of Children Against Sexual Offences
  - Indian Penal Code
- Procedural Law
  - Victim Protection
  - Investigation
  - Trial
  - Sensitivity Towards Survivors
- Reintegration
- Prevention
- Gaps
- Practices in Other Countries



# Contents of the Reference Material

- PowerPoint Presentation



# UNDERSTANDING CHILD SEXUAL ABUSE



# What is child sexual abuse

- Child sexual abuse is the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or that violates the laws and social taboos of society, *World Health Organization*
- Child abuse is shrouded in secrecy and there is conspiracy of silence around the entire subject, *Women and Child Development Ministry, Report on Child Abuse in India, 2007*



# Social forces behind child sexual abuse

- Children's status in society
- Male child preference
- Entitlement, often gendered
- Victim blaming and silencing of survivors
- Myths about perpetrators
- Underfunded prevention efforts
- Sexual taboos prevalent in society



# Why is child sexual abuse unreported?

- Emotional conflict in reporting abuse
- Angry response or disbelief by family members
- Ostracism by community
- Private settlements to avoid stigma
- Fear of retaliation
- Abuse in schools/institutions- authorities disbelieve the child's account/cover up abuse to protect their reputation
- Fear of traumatic court and investigative process



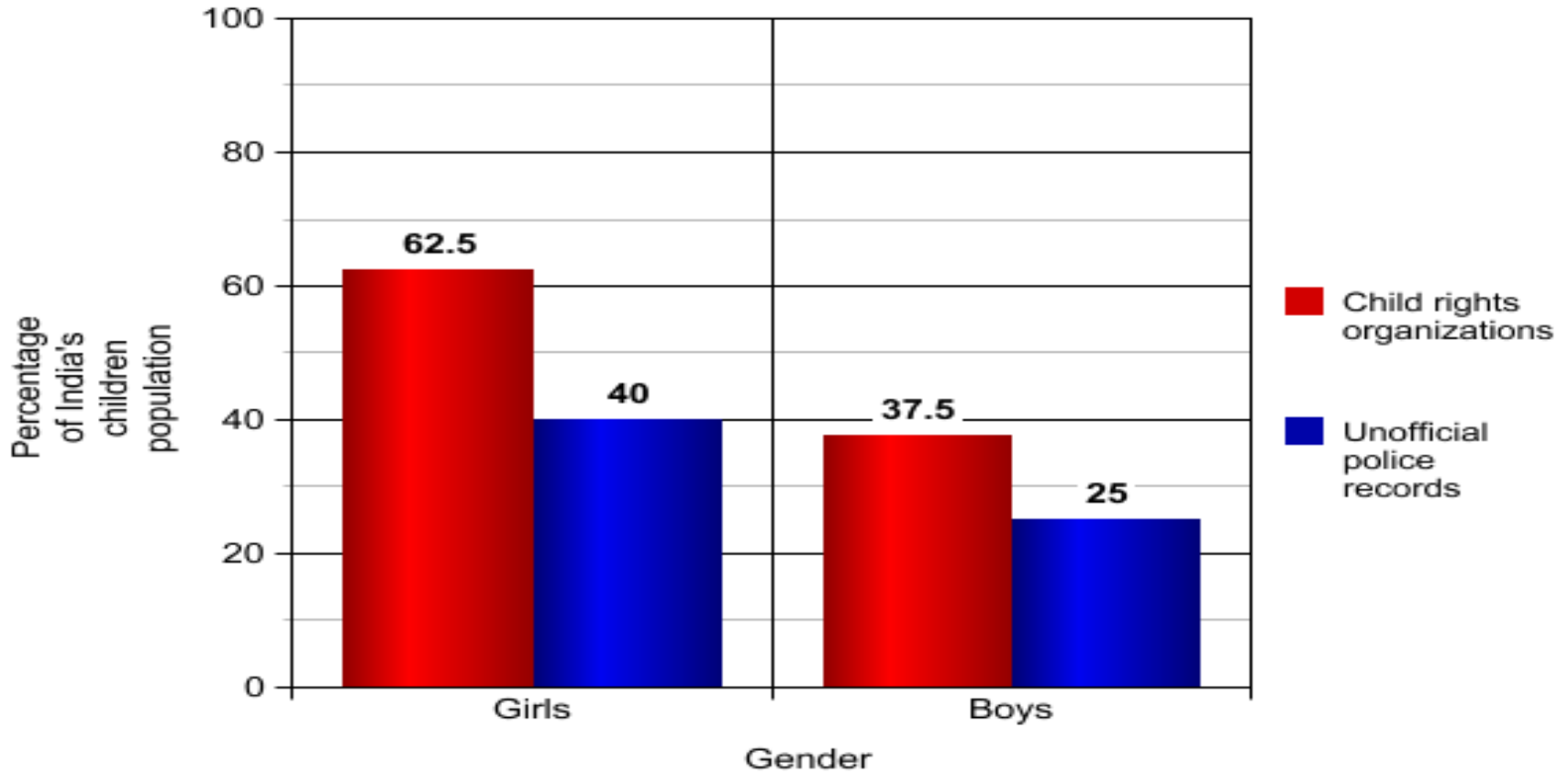


# Difficulty in quantification

- More than 53% of children in India have probably been sexually abused and many have never reported the abuse, *Women and Child Development Ministry, Report on Child Abuse in India, 2007*
- 1 out of 3 girls and 1 out of 10 boys sexually abused as children, Tata Inst. of Social Sciences survey , 1985



Child Sexual Abuse in India



Pinki Virani, "Bitter Chocolate"

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# Understanding vulnerability

- A network of deprivations and vulnerabilities create situations where children are sexually exploited.
- Factors that lead to vulnerability are: poverty, age, gender, caste, lack of safe spaces, lack of schools, lack of proper institutional care for children without functional families



# Common misconceptions

- Sexual abuse, exploitation and harassment are always perpetrated in a superior subordinate equation and is never peer to peer
- Men cannot be victims of sexual abuse and exploitation
- Women cannot commit sexual assault/rape
- The home is a safe space free from the possibility of sexual abuse
- To bring home the offence of rape, it is necessary to prove that there has been complete/partial penetration and rupture of hymen
- Because they find sex acts uncomfortable, children will stay away from the abuser or immediately report the abuse



# Why children don't disclose abuse?

- Grooming
- Child Sexual Abuse Accommodation Syndrome



# Grooming

- Grooming is a calculated method child sex abusers use to entice and manipulate children into complying with sexual relationships
- Development of trust is a critical aspect of grooming (Olson, 2007)
- Grooming may range from offering children sweets, gifts, care, etc. to even intimidating a child though the latter is rare. Emotional and verbal manipulation are most commonly used (Pryor, 1996)
- Offenders develop relationships of trust even with the adults around children
- Once trust is developed, gradually the child is introduced to sexual acts through showing of porn, inappropriate touching etc.



# Grooming

- Through grooming, abusers lower the defenses of children so that they perceive sexual acts as normal rather than abusive
- Offenders may groom children over a period of months or years and this method is effective in avoiding disclosure because the child believes they are also responsible for their abuse





# Child Sexual Abuse Accommodation Syndrome

Summit (1983) explained the 5 dimensions of this syndrome:

- The **secrecy** that surrounds the abuse
- The **helplessness** of the victim who is generally obedient to adults and will obey the abuser's demands for secrecy
- **Entrapment and accommodation** because the child feels trapped, sees themselves as responsible for it and begins to dissociate from it
- **Delayed disclosure**
- **Retraction** when children may resile from their testimony and become hostile witnesses because they are not believed and there is lack of support for them





# Forms of child sexual abuse

- The Supreme Court noted that, sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on, *Shankar Kisanrao Khade v. State of Maharashtra*, 2013CriLJ2595



# SUBSTANTIVE LAWS



# Indian Law Derives from International Law

- Convention on the Rights of the Child
- Model Law prepared by UNICEF and United Nations Office on Drugs and Crime on Justice in Matters Involving Child Victims and Witnesses of Crimes (prepared in consultation with government of Canada and Sweden)



# Indian Law

- The Protection of Children from Sexual Offences, Act, 2012
- Indian Penal Code
- Information Technology Act, 2008



# The Protection of Children from Sexual Offences Act, 2012



## Position prior to POCSO

- There was no focused, legal approach to child sexual abuse
- Many types of sexual abuse were not defined as crimes
- Age of consent was different in different enactments
- Burden of proof was on victims and legal presumptions not available-making it harder for child victims to report offence and establish guilt
- Marital rape exception in IPC
- No laws specifying victim sensitive investigation and trial procedure



# Need for POCSO

- The Supreme Court recognizing that Indian law permitted child sexual abuse urged Parliament to draft a law punishing child sexual abuse, *Sakshi v. Union of India*, AIR2004SC3566
- The Rajasthan High Court held that, the POCSO has been enacted for the very special purpose to protect the children from sexual assault and sexual harassment. POCSO is in line with Article 15(3) of the Constitution of India so as to make special provisions for the children”, *Sharath Chandra Pottala v. UoI*, 2014 (2) WLN 410 (Raj.)



# Children deserve special care

- The Constitution of India protects children
- *Article 15(3)* permits the State to make special provisions for children
- *Article 39 (e) and (f)* requires the State to protect children of tender age from abuse, to be provided equal opportunities and facilities to develop in a healthy manner and to be protected from exploitation and moral and material abandonment
- In *Lakshmi Kant Pandey v. Union of India* [1984] 2 SCR 795, the Supreme Court asserted that children are a "supremely important national asset" and the future well being of the nation depends on how its children grow and develop.





## Section 3: Penetrative sexual assault

- A person commits penetrative sexual assault if:
  - he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child do so with him or any other person ; or
  - inserts to any extent, any object or a part of the body, not being the penis, into the vagina, urethra or anus of the child or makes the child do so with him or any other person; or
  - manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child do so; or



# Penetrative sexual assault

- applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other



## Section 4: Punishment

- Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.



# Section 5: Aggravated penetrative sexual assault

- Penetrative sexual assault is deemed to be aggravated when committed by:
  - Police officer within the limits of the police station or premises where he is appointed or in the premises of any station house to which he is appointed whether in the course of duty or not
  - Member of armed forces within the limits of his deployment area or in areas under the command of the forces, whether in the course of duty or otherwise
  - Public servant



# Aggravated penetrative sexual assault

- Management or staff of jail, remand, protection or observation home or any other place of custody or care and protection on a child who is an inmate
- Management or staff of an educational institution or religious institution or hospital on a child in the institution or hospital
- Persons committing gang penetrative sexual assault
- Person using deadly weapons, fire, heated or corrosive substance
- Person causing grievous hurt or bodily harm and injury or injury to the sexual organs



# Aggravated penetrative sexual assault

- Person causing physically incapacitation or mental illness or impairment of any kind or impregnation of female child or infliction of the child with HIV/life threatening disease which temporarily or permanently impairs the child
- Person taking advantage of a child's mental or physical disability
- Person committing penetrative sexual assault on a child more than once or repeatedly
- Person committing penetrative sexual assault on child below 12



# Aggravated penetrative sexual assault

- Person being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child
- Person being, in the ownership, or management, or staff, of any institution providing services to the child
- Person being in a position of trust or authority
- Person knowing the child is pregnant
- Person attempting to murder the child





# Aggravated penetrative sexual assault

- Person committing penetrative sexual assault on a child in the course of communal or sectarian violence
- Person having prior conviction for sexual offence
- Person causing the child to strip or parade naked in public





# Section 5: Aggravated penetrative sexual assault

- The Patna High Court held that, penetrative sexual assault becomes aggravated penetrative sexual assault if the penetrative sexual assault is, subject to certain conditions, committed, within the premise of a police station, by the member of armed force or security forces or a public servant or by a person entrusted by management of jail or its staff or entrusted with the management or staff of a hospital or management or staff of an educational institution or religious institution, or when the penetrative assault is by a gang, *State v. Hemlal Sah*, 2014CriLJ1767



## Section 6: Punishment

- Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.
- The Madhya Pradesh High Court held that, in a case based purely on circumstantial evidence, conviction under section 5 and 6 can be sustained by medical report, injury on victim's body and forensic evidence, *Vijay Raikwar v. State of Madhya Pradesh*, MANU/MP/0690/2014



## Section 6: Punishment

- The Bombay High court relied upon extra-judicial confession made by accused to his wife to uphold conviction under section 5 and 6 of POCSO as the same was found to be voluntary, true and sufficiently corroborated, *State of Maharashtra v. Dattatraya*, 2014ALLMR(Cri)2078



## Section 7: Sexual assault

- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.



## Section 8: Punishment

- Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.



## Section 9: Aggravated sexual assault

- Same grounds of complicity and culpability as Section 5 (aggravated penetrative sexual assault) except there is no ground of culpability for impregnation of female child as this offence deals with physical contact minus penetration



## Section 10: Punishment

- Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.





## Section 11: Sexual harassment

- A person is said to commit sexual harassment upon a child when such person with sexual intent:
  - utters any word or sound, or makes any gesture or exhibits any object or body part with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child
  - makes a child exhibit his body or any part of his body so as it is seen by such person or any other person
  - shows any object in any form or media for pornographic purposes





## Section 11: Sexual harassment

- repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means
- threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act
- entices a child for pornographic purposes or gives gratification therefor
- Explanation: Any question which involves "sexual intent" shall be a question of fact



## Section 12: Punishment

- Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.
- The Delhi High Court held that obstructing the child victims on the way to the washroom and then returning with her to her train berth constitutes sexual harassment, *Vinod Kumar v. State*, MANU/DE/3515/2014



# Section 13: Use of child for pornography

- Whoever, uses a child in any form of media (whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes:
  - representation of the sexual organs of a child;
  - usage of a child engaged in real or simulated sexual acts (with or without penetration);
  - the indecent or obscene representation of a child



# Section 13: Use of child for pornography

- Explanation: For the purposes of this section, the expression “use a child” shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.



## Section 14: Punishment

- Upon first conviction, imprisonment of either description which may extend to five years and fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and fine
- If the person commits penetrative sexual assault, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and fine
- If the person commits aggravated penetrative sexual assault, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and fine.



## Section 14: Punishment

- If the person commits sexual assault, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than six years but which may extend to eight years, and fine.
- If the person commits aggravated sexual assault, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than eight years but which may extend to ten years, and fine.



## Section 15: Punishment

- Any person who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both.





## Section 16: Abetment

- Any person who:
  - instigates any person to commit an offence
  - engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence
  - intentionally aids, by any act or illegal omission, the doing of that offence,
- Is guilty of abetment under the Act



## Section 16: Abetment

- Explanation I: A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence
- Explanation II: Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of the act



## Section 16: Abetment

- Explanation III: Whoever employ, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.



## Section 17: Punishment

- If the act abetted is committed in consequence of the abetment, the person responsible for such abetment shall be punished in accordance with the punishment provided for the offence he has abetted.
- Explanation: An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment



## Section 18: Attempt

- Whoever in course of attempting to commit an offence under this Act, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.



## Section 29: Burden of proof reversed

- Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and section 9, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved



## Section 30: Burden of proof reversed

- In any prosecution under this Act which requires a culpable mental state, on the part of the accused, the Court shall presume the same, but it shall be a defence for the accused to prove the fact that he has no such mental state with respect to the act charged as an offence in that prosecution
- For the purposes of this section, a fact is said to be proved 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.
- *Explanation:* In this section, “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact.





# Constitutionality of Presumptions

- The Supreme Court, in *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 held that the presumption of innocence is a human right rather than a fundamental right. The constitutionality of a provision reversing the burden of proof must be weighed against the State's responsibility to protect innocents.
- Note that the plain reading of POCSO goes against *Noor Aga* – it eliminates preponderance of probability. The accused must prove beyond a reasonable doubt.



# Evolution of protection of victim rights from insensitivity to protection

- In *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143, the Supreme Court acquitted police officers of the rape of a 16-year old girl despite the fact that her rapists were inquiring into a police complaint against her, were unknown to her and she reported the incident as soon as possible.
- Making no distinction between “passive submission” and consent and based on the presumption of innocence and the sexual history of this girl, the Supreme Court acquitted the accused.
- Both extremes on the spectrum of presumption of guilt have fearful consequences for society but in case of children, perhaps greater care is warranted.



# The Indian Penal Code, 1860



# Indian Penal Code

- Section 375 and 376- Rape and Punishment for Rape
- Section 377- carnal intercourse against the order of nature
- Section 293- Sale, etc., of obscene objects to young person
- Section 294 – Obscene acts, songs and expressions in public places
- Section 325 - Punishment for voluntarily causing grievous hurt
- Section 354 – Assault or criminal force to woman with intent to outrage her modesty



# Indian Penal Code

- Section 354A- Sexual harassment
- Section 354B- Assault or use of criminal force to women with intent to disrobe her.
- Section 354C- Voyeurism
- Section 354D- Stalking
- Section 509 - Word, gesture or act intended to insult the modesty of a woman



# The Information Technology Act, 2008



# Information Technology, Act S. 67-B

- Violation carries a sentence of up to 7 years and fine of up to Rs. 10 lakhs
- The section punishes:
  - Electronic publication or transmission of material depicting children in sexually explicit acts or conduct (causing such publication or transmission is also an offence)
  - Creating text or digital images, collecting, browsing, seeking, downloading, advertising, promoting, exchanging, distributing in electronic form depictions of children in an indecent, obscene or sexually explicit manner
  - Cultivating, enticing inducing one or more children online for sexually explicit acts or in a manner that could offend a reasonable adult





# Information Technology, Act S. 67-B

- The section punishes (contd):
  - Facilitates online exploitation of children
  - Records in any electronic form the sexual abuse of children committed either by himself or others

Exceptions: electronic records used for the public good, science, art, literature etc. or for bona fide heritage or religious purpose.



# PROCEDURES: VICTIM PROTECTION



# Child Protection: Mandatory Reporting

- Any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, shall provide such information to the Special Juvenile Police Unit; or the local police, S. 19(1), POCSO
- When the report is given by a child, it shall be recorded in a language and manner comprehensible to the child, S. 19(3), POCSO
- In case contents are being recorded in a language not understood by the child or wherever it is deemed necessary, a translator or interpreter shall be provided to the child, S. 19(4), POCSO



# Child Protection: Mandatory Reporting

- Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, shall, on coming across any material or object which is sexually exploitative of the child, provide such information to the Special Juvenile Police Unit, or to the local police, S. 20, POCSO



# Child Protection: Mandatory Reporting

In *Shankar Kisanrao Khade v. State of Maharashtra*, 2013CriLJ2595, the Supreme Court held that offences under POCSO should be mandatorily reported by:

- The persons in-charge of educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc.
- Media personnel, persons in charge of Hotel, lodge, hospital, clubs, studios, photograph facilities
- Institutions which house children with intellectual disability or persons in care and protection
- Hospitals, whether Government or privately owned or medical institutions where children are being treated



# Child Protection: Mandatory Reporting

- The Supreme Court held that (contd.):
  - Complaints, if any, received by NCPCR, SCPCR Child Welfare Committee and Child Helpline, NGO's or Women's Organizations etc., may be taken up for follow up action
  - 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.*
  - The court reiterated that non-reporting of crime is a serious offence



# Child Protection: Mandatory Reporting

- Ministry of Women and Child Development, Model Guidelines Under Section 39 of POCSO- Guidelines for the Use of Professionals and Experts:
  - Obligation to report to the police is mandatory and is not discharged if complaint is reported elsewhere.
  - The purpose of reporting is to identify children suspected to be victims of sexual abuse and to prevent them from coming to further harm





## Section 21: Penalty for non reporting

- Any person who fails to report the commission of an offence under section 19(1) or section 20 or who fails to record such offence under section 19(2) shall be punished with imprisonment of either description which may extend to six months or with fine or with both
- Any person, being in charge of any company or institution (by whatever name called) who fails to report the commission of an offence under section 19(1) in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.
- This provision does not apply to a child



## Section 22: Penalty for false reporting

- Any person who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both
- Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed
- Whoever (not being a child) makes a false complaint or provides false information against a child, knowing it to be false, thereby victimizing such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or both.



# False reporting by the child

- The Kerala High Court exercised its discretion and quashed the FIR against the accused when the victim admitted to lodging false case upon being thwarted in love. Despite the public prosecutor urging the court that, such practice should not be encouraged in light of the serious nature of allegation and the steps already taken by the police to investigate the crime, given the tender age of the victim and her future career prospects, the court chose to allow her the relief she prayed for. The court also commented on the improbability of success in judicial proceedings in the absence of cooperation of the petitioner, *Aiswarya v. Inspector of Police*, MANU/KE/1262/2014



# Child Protection: Confidentiality

- Section 23 of POCSO stipulates that:
- No person shall make any report or present comments on any child, which may lower his reputation or infringe upon his privacy.
- No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighborhood or any other particulars which may lead to disclosure of identity
- Provided that, for reasons to be recorded in writing, the Special Court may permit such disclosure, if in the interest of the child
- Punishment for contravention- imprisonment of either description not less than 6 months but may extent to 1 year or with fine or both



# Child Protection: Confidentiality

- The Delhi High Court held that, the Guidelines for Media Reporting on Children and directions to stakeholders concerning disclosure of identity of child sexual abuse cases be disseminated and implemented, *A.K. Asthana v. Union of India*, W.P.(C) 787/2012
- Court shall ensure that the identity of the child is not disclosed at any time during investigation/trial, S. 33, POCSO



# Child Protection: Safe custody

- Where the SJPU or local police officer is satisfied that the child is in need of care and protection the SJPU/Police officer shall record the same in writing and immediately arrange to give him such care and protection (including admitting him to a shelter home or hospital) within 24 hours of the report, as may be prescribed, Section 19(5) POCSO
- The matter shall be reported before the Child Welfare Committee without unnecessary delay but within 24 hours, Section 19(6) POCSO
- The CWC shall determine whether child is in need of care and protection and needs to be taken out of parental custody keeping in mind the best interest of the child, Rule 4, POCSO Rules





# Child Protection: Safe custody

- The Madras High Court held that, the magistrate may make an order for the child's intermediate custody in a safe place. If the child has objection to go back, the magistrate should try to determine the reasons for it and take a decision which will serve the best interest of the child rather than giving her custody to the claimers, *The Director, Tamil Nadu State Judicial Academy v. State of Tamil Nadu and Another*, W.P.No.36807 of 2006





# PROCEDURES: INVESTIGATION



# Remand

- The Police must approach the Special Court directly for all purposes including remand
- The Special Court is required to act under the Act from the start of the criminal prosecution even if the accused is not yet committed for trial. The very first stage of the trial which is the production of the accused for remand is no exception set out in the legislation. The only function of the Magistrate under the Children's Act is recording of 164 statement, *Shraddha Meghshyam Velhal v. State of Maharashtra*, Criminal Application No. 354 OF 2013



# Remand: Contra Judgment

## Contra judgment:

- The Kerala High Court held that, a reading of section 33 clearly spells out that cognizance of an offence under the Act without any order of committal for trial can be done by the Special Court. Though a magistrate may exercise this power of first remand under Section 167 of CrPC, any subsequent order of remand, and entertaining of or consideration of any application for bail from such accused can be done only by the Special Court, *Prasad V. v. State of Kerala*, ILR2013(2)Kerala 1010



# Bail

- The Rajasthan High Court rejected the bail of the accused holding that his release would impede the progress of trial as well as jeopardize the safety of the victim and her family, who have been living under constant threat, *Shri Asharam Babu v. State of Rajasthan*, 2014(3)RLW2407(Raj.)
- The Himachal Pradesh High Court rejected bail holding that it is not expedient in the ends of justice to release the applicants on bail till testimonies of minor prosecutrix are not recorded. Further, if applicants are released on bail at this stage then trial of case will be adversely effected and there is apprehension that they will induce and threat the prosecution witnesses, *Sachin v. State of Himachal Pradesh*, MANU/HP/1301/2014



# Anticipatory bail

- The Rajasthan High Court held that, when accused are absconding, they are not entitled to anticipatory bail, *Mahendra v. State of Rajasthan*, 2014(3)RLW2470(Raj.)
- The Madras High Court held that, it is a very sad state of affairs that for alleged offences committed by a 59 year old man against a 13 year old girl, booked under Section 6 of POCSO, he has come forward seeking Anticipatory Bail to project himself clean before the society. The High Court refused to grant such bail on account of seriousness of the offence and the gravity of the sentence if convicted, *Meyyappan v. The Station House Officer*, 2014(4)CTC23



# Romeo-Juliet Cases – Grave Offences?

- Do Romeo-Juliet cases deserve the same treatment as POCSO cases where consent has been obtained through manipulating the vulnerability of the minor?
- In cases of love affairs, where the “offender” is between 19-22 years of age, the victim is between 15-18 years, there is some indication of a marriage, the 164 statement of the minor girl supports the contention of the offender and her consent can be “safely inferred”, it is a fit case for bail, *Sunil Mahadev Patil v. State of Maharashtra*, Bail Application No. 1036 of 2015 (Bombay High Court)





# Medical examination

- Section 27 of POCSO provides procedure for medical examination
  - The medical examination of a child victim shall, notwithstanding that a FIR or complaint has not been registered, be conducted in accordance with section 164A of the CrPC
  - Girl child shall be examined by a woman doctor
  - The medical examination shall be conducted in the presence of the parent of the child or any other person whom the child trusts and in their absence, medical exam shall be conducted in the presence of a woman nominated by the head of the medical institution





# Medical examination

- The Delhi High Court held that:
  - Girl victims should be examined by women doctor
  - Psychiatric help be made available to the child victim
  - Report should be prepared expeditiously and a copy provided
  - Parents/guardian/person in whom child have trust should be allowed to be present during the medical examination
  - Emergency medical treatment when necessary should be provided
- *Court on its own motion v. State of Delhi, MANU/DE/8458/2007*



# PV (Per Vaginum) Examination

- The Supreme Court held that, presuming consent on the basis of the “two finger test” violates the right of rape survivors to privacy, physical and mental integrity and dignity. Consent cannot be presumed even if the report is affirmative, *Lillu @Rajesh v. State of Haryana*, 2013CriLJ2446
- The Delhi High Court observed that the two-finger test must not be conducted as its findings are irrelevant to the determination of sexual assault. Conclusions such as 'habituated to sexual intercourse are forbidden by law, *Atender Yadav v. State*, 2013(4)JCC2962
- The interpretation of the test (and conclusions drawn on the basis of erroneous interpretation) violate the dignity of victims.



# Age Verification

- If any question arises before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record its in writing the reasons for such determination, S. 34(2), POCSO



# Recording of statement

- Procedural safeguards for recording victim statement before magistrate has been provided in section 25, and 26 of POCSO.
  - During recording of s.164 statement, the Magistrate shall record it verbatim
  - The provisions contained in the first proviso to sub-section (1) of section 164 CrPC shall, so far it permits the presence of the advocate of the accused shall not apply in this case
  - The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 CrPC, upon the final report being filed by the police under section 173 CrPC



# Recording of statement

- The Magistrate shall record the statement in the presence of the parents of the child or any other person in whom the child has trust or confidence.
- The Magistrate may take the assistance of a translator or an interpreter wherever necessary
- In the case of a child having a mental or physical disability, Magistrate may seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert
- Magistrate shall ensure that the statement of the child is also recorded by audio-video electronic means, wherever possible



# Recording of statement

- The Delhi High Court held that:
  - The statement of the child victim shall be recorded promptly and any adjournment shall be avoided
  - In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital
  - To create a child friendly environment separate rooms be provided within the Court precincts where the statement can be recorded
  - Wherever possible the Court may resort to the recording of statement through video conferencing



# Recording of statement

- The Delhi High Court held that (contd.):
  - The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of “ascertaining voluntary nature of statement” unless parents are found to be abusive or it is in the interest of justice to do so
  - Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded
- *Court on its own motion v. State of Delhi*, MANU/DE/8458/2007





# STAGE: TRIAL



# Trial by Special Courts

- Constitution and functioning of Special Courts are enumerated in sections 28-32 of POCSO
- To facilitate speedy trials, the State Government shall designate a Sessions Court to be a Special Court to try offences under the Act
- Special Courts will presume persons prosecuted under Sections 3, 5, 7 and 9 guilty until they are proven innocent, and will also presume the presence of a culpable mental state
- A Special Public Prosecutor shall be appointed to every Special Court for conducting cases under the Act



# Delay in reporting by victim

- The Supreme Court has held that leeway should be granted in cases of delay in reporting of sexual offences. Victims agonize over the possibility of stigma, the honor of their family, the wishes of their family member etc. before approaching the police, *Bhawna Garg v. State*, MANU/DE/0469/2014
- The Supreme Court has held that courts must expect delay in lodging of FIRs of sexual offences and must use different measures to appreciate these delays, *Satpal Singh v. State*, 2010 CrLJ 4283



# Test identification parade

The Supreme Court held that only the identification of the accused in court is substantive evidence while the prior identification in a test identification parade is only to corroborate the identification in court. Holding of test identification parade is not the rule of law but rule of prudence. However, even in the absence of such test identification parade, the identification in court can in given circumstances be relied upon, if the witness is otherwise trustworthy and reliable., *Ms. S. v. Sunil Kumar and Anr.*, Criminal Appeal No.1581 OF 2009



# Medical evidence

- The Bombay High Court held that, the margin of error for age verification can be plus or minus 6 months, *Narmada Govind Kamble*, 2010 Cri. L.J. 1220
- The Madhya Pradesh High Court has held that a medical opinion based on scientific tests is strong evidence having corroborative value, *Rajesh Kumar Kuswaha v. State of M.P*, MANU/MP/0564/2013
- The Supreme Court held that a medical witness is expected to put before the Court all materials and technical aspects that support their conclusion so that the Court although, not an expert may form its own judgment because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court, *Sultan Singh v. State of Haryana*, 2015(1)ACR196 (citing *Madan Gopal Kakkad v. Naval Dubey* (1992) 3 SCC 204)



# Medical evidence

- MWCD, Model Guidelines Under Section 39 of POCSO- Guidelines for the Use of Professionals and Experts :
  - Child sexual abuse is very difficult to prove. It usually occurs in secret, often over a prolonged period, child may be the only witness
- It is vital that the report of the expert witness presents conclusions with “reasonable clinical certainty”
- The adequacy of the qualification of the expert and the admissibility of his/her testimony are within the discretion of the Special Court.



# Professional witness

- Social workers testifying in cases will not be treated as professional witnesses, *Shankar Kumar v. State*, 2010/MANU/DEL/1723





# Reliability of child witness

- The Supreme Court has held that children are “incapable of having any malice or ill will against any person,” and thus, there must be evidence of something occurring between the date of the crime and the date of the child’s testimony to explain why the child would want to implicate the accused falsely, *State of Madhya Pradesh v. Ramesh*, (2011) 4 S.C.C. 786
- In the case of a rape of an 11-year old, the Delhi High Court held that the tutored improvements about rape were insufficient to reject the material facts underlying her testimony because the tutored testimony was “clearly severable” from the untutored portions, *Sunil Kumar v. Delhi*, 2009 MANU Del. 2340.



# Consent is no defense

- The Delhi High Court held that, according to Indian law, a child is incapable of giving lawful consent to sexual acts. The provisions of the POCSO Act as well as the Indian Penal Code stridently reinforce this position, prescribing stringent punishment for the involved adult offenders, *Delhi High Court Legal Services Committee v. Union of India*, MANU/DE/1916/2014



# Fit punishment

- Punishments should have a deterrent effect not only to prevent the repetition of the crime but also to deter others, *Zulfiqar Ali v. State*, 1986/MANU/UP/0557
- The punishment should be decided not only in terms of the brutality of the crime but also in term of its social impact, *State v. Kashiram*, 2009 CrLJ 1530
- The Bombay High Court held that keeping in mind the rising graph of sexual offences and especially of sexual offences against children and public outcry in relation to the same, the sentencing policy also now needs to be shaped keeping all these aspects in mind. *State of Maharashtra v. Dattatraya*, 2014ALLMR(Cri)2078



# Sentencing

- Section 42 of the POCSO states that when two laws dealt with the same offence, then the law ensuring stiffer punishment would hold
- The Madhya Pradesh High Court held that, since the offence committed by the appellant under Section 6 of POSCO is parallel to the offence committed under Section 376A of I.P.C. therefore, in the light of the provision under Section 42 of POSCO it would not be necessary to pass a separate sentence for offence under Section 6, *Sessions Judge v. Arvind*, 2014CriLJ4024



# “Compromise” does not mitigate the offence

- In *State of Madhya Pradesh v. Madanlal*, *MANU/SC/0689/2015*, the Supreme Court of India strongly condemned the practice of awarding lesser sentences due to “compromise” between the rapist and the victim.
- Reminding judges that rape is non-compoundable, the Supreme Court cautioned that “consent” born out of such “compromise” could be due to pressure from the accused or years of trauma. This “consent” is therefore an unsafe ground for the discretionary power to award a lesser sentence.
- The Supreme Court also rejected the idea of marriage as compromise for rape cases because this is a way of “putting pressure in an adroit manner” and cautioned Courts to stay away from this “subterfuge”.



# Incest merits strict punishment

In *Parhlad v. State of Haryana*, Criminal Appeal No. 983 OF 2015, the Supreme Court held that incest is a grave and serious crime:

- The accused (a cousin of the victim's father), took advantage of his social relationship with the victim and the fact that she had no reason to distrust him.
- Rape is an assault on the human rights of the victim and leaves her with mental scars
- These offences do not justify reduction of sentence





# Interim Compensation

- The Special Court may order that the compensation be paid not only at the end of the trial, but also on an interim basis, to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the FIR. This could include any immediate medical needs that the child may have, Rule 7, POCSO Rules
- Awarding Rs. 3 lakhs as interim compensation to a victim under POCSO, the Rajasthan High Court held that, to make the victim wait till the trial is concluded, is to leave her in misery without applying any balm or providing succour. Victims need compensation due to lack of institutions that provide psychological counselling or vocational options, *Shiva@Savaram v. State of Rajasthan*, 2014(1)Crimes102





# Compensation

- The victim must be awarded compensation so that she is not forgotten in the criminal justice system. Courts must record reasons not only for providing compensation but also for denying it, *Ankush Gaikwad v. State of Maharashtra*, AIR 2013 SC 2454
- Though victims cannot be made whole by compensation, it will provide at least some solace and “criminal justice will look hollow” without victim compensation, *State v. High Court of Gujarat*, AIR 1998 SC 364
- The Special Court may, in addition to the punishment, direct payment of such compensation to the child for any physical or mental trauma caused to him or for immediate rehabilitation, S. 33(8), POCSO



# Compensation

- The Special Court shall, in awarding compensation account for severity, gravity of offence, medical expenditure, loss of education/employment opportunity, relationship with perpetrator, single/repeat offence, pregnancy, contraction of STD/ HIV, financial condition of victim and any other relevant factor, Rule 7, POCSO Rules
- The compensation awarded is payable by the State Government from the Victims Compensation Fund or other schemes or funds established for the purpose of compensating and rehabilitating victims under Section 357A of the CrPC.
- Such compensation is payable within 30 days of the receipt of the order.



# PROCEDURE FOR SENSITIVE HANDLING OF VICTIMS

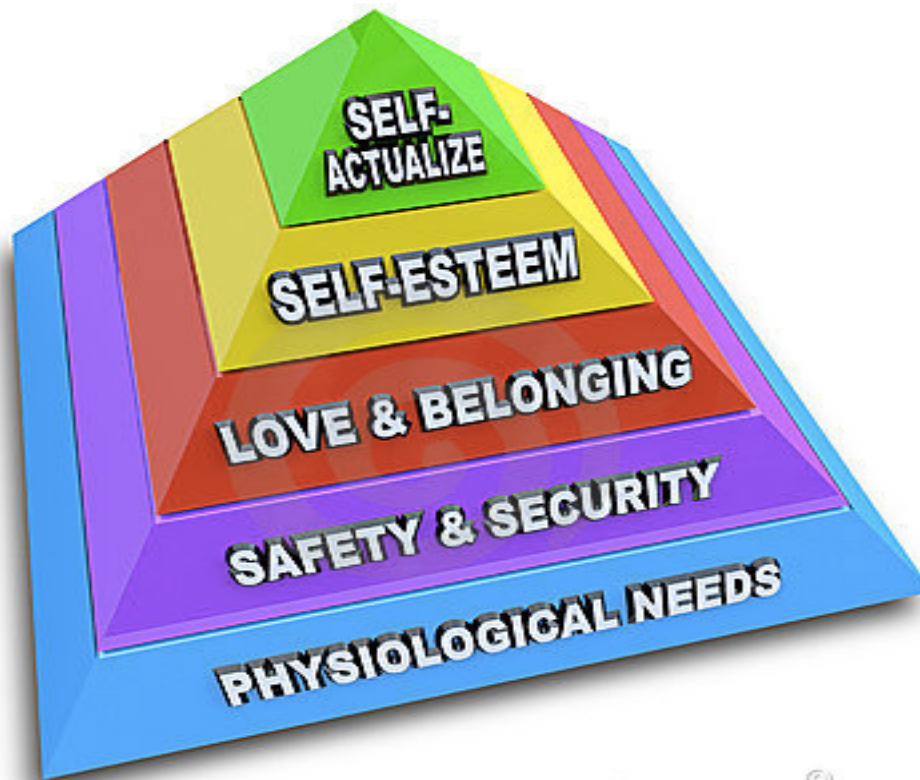


# Justice is part of Rehabilitation

- The justice process is meant to help survivors feel vindicated and justice can have a healing effect on survivors
- But the sad reality is that survivors experience secondary victimization on account of courtroom trauma and the process of providing their testimony can set them back in the restoration process



# Why Do Survivors Stay Away from Court?





# Why Do Survivors Stay Away from Court?

- Survivors feel isolated, believe that the system protects the accused and receive little validation or acknowledgment of their trauma
- Cross-examination, if uncontrolled, can lead to re-traumatization
- Attack on survivors' credibility, if unexplained, can retard rehabilitation and lead to loss of confidence
- Adjournments can prolong all the physical and emotional impact of the court testimony





# Child witnesses face greater challenges

In *State v. Sujeet Kumar, Criminal Application 1190 of 2014*, the Delhi High Court summarized the challenges children face:

- Emotional and mental trauma
- Fear of confronting the accused in an unfamiliar intimidating courtroom environment
- Fear of not being believed and that the word of an adult will have more credibility
- Fear of public exposure and embarrassment while testifying about traumatic situations
- Fear of being yelled at if they testify incorrectly and make mistakes





# Child witnesses face greater challenges

In *State v. Sujeet Kumar, Criminal Application 1190 of 2014*, the Delhi High Court also reminded courts that children are very different from adults:

- Young children's memory and recall is very different from adults and they will not testify the way courts would normally expect
- Children may take time to recall events and may need to pause during testimony



# How Can Courts Protect Children?

- The Delhi High Court held that effective measures should be taken at every stage of the criminal justice process to ensure reintegration of into the community. All involved in the investigation, prosecution and trial should mitigate the rigor of the trial, *Khem Chand & Ors. V State of Delhi*, ILR(2008)Supp.(5)Delhi92
- The Delhi High Court reminded courts of the special vulnerability of children that entitles them to special treatment appropriate to their age and life circumstances. Importantly, the High Court observed that special attention must be given to female children who face discrimination in the criminal justice system, *State v. Sujeet Kumar, Criminal Application 1190 of 2014*, citing the United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005



# How Can Courts Protect Children?

- The Delhi High Court directed criminal courts to adopt all reasonable precautions to ensure that children can testify truthfully and are not pressured by the atmosphere and circumstances of the courtroom, or the presence of the accused or even their parents into suppressing the truth, *Ankush Kumar v. State*, CRL.M.C. 4046/2015 & Crl.M.A. Nos. 14412-14413/2015
- The Supreme Court held that, courts must apply the “best interest of the child” standard – the best interest of the child is paramount and not the interest of the accused, *Shankar Khade v. State of Maharashtra*, 2013 (5) SCC 546



# Sensitivity during Competency testing

- The Supreme Court held that the Court can accept a child witness's statement only if the child understands questions, is capable of giving rational answers, is not tutored and his evidence has a ring of truth, *K. Venkateshwarlu v. State of Andhra Pradesh*, (2012) 8 SCC 73
- No Court shall examine a child without first testing his / her testimonial intelligence, *Baljeet Singh v. State of Delhi and Pushpa Devi v. Rajesh Kumar*, Criminal Appeals 386, 486, 487 And 1080/2011



# Sensitivity during Competency testing

- In *State v. Rahul*, (2013) ILR IIIDelhi 1861, the Delhi High Court held that the preliminary inquiry should address the following aspects:
  - Determining Intelligence and Memory- ability to Observe, Recall and Communicate (recent *and* distant events and experiences)
  - Understanding of Truth and Lie-To assess a child's understanding of these concepts, questions about right and wrong, real and make-believe, truth and lie typically are asked
  - An appreciation of the meaning of an oath to tell the truth and the understanding of the consequence of not telling the truth



# Sensitivity during Competency testing

- The Delhi High Court observed that, some types of questions are more developmentally appropriate than others, *State v. Rahul*, (2013) ILR III Delhi 1861
- The questions which were put to the child witness ought to have been sensitively framed keeping in mind the socio-economic background of the child, education of the child, the age as well as the capacity of the child which the trial judge would evaluate when the child is produced before him, *State v. Rahul*, (2013) ILR III Delhi 1861
- If a child does not understand the obligations of the oath, he can still be permitted to testify but his evidence must be scrutinized more carefully, *Jhinge v. State of Uttar Pradesh*, MANU/UP/1008/2006





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# Sensitivity during Competency testing

- In one case, the magistrate declined to depose the 3-year old child for the 164 statement on grounds that the child could not answer questions relating to the name of her school or the standard she was in. The child also could not explain to the magistrate the difference between truth and a lie.
- Reviewing this decision on appeal, the Delhi High Court held that the magistrate should first have ascertained if the child was attending school. It was clear from the testimony (provided at trial) that the child did not attend school, *State v. Sujeet Kumar, Criminal Application 1190 of 2014*



# Sensitivity during Competency testing

- Also, the Delhi High Court reiterated the holdings in *State v. Rahul* that children should be asked questions appropriate to their age and there are more effective ways to elicit if a child can understand the difference between the truth and a lie than by asking the question directly, *State v. Sujeet Kumar, Criminal Application 1190 of 2014* .



# Sensitivity during testimony

- Courts should minimize the number of times a child victim or witness is required to recount the occurrence. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilized in the investigation and prosecution of such cases involving a child either as a victim or a witness, *State v. Rahul*, (2013) ILR II Delhi 1861
- The Delhi High Court held that, efforts should be made to ensure continuity of persons, including judge and prosecutor who are handling all aspects of the case including such proceedings which may be out of criminal justice system, *State v. Rahul*, (2013) ILR III Delhi 1861



# Sensitivity during testimony

- The Delhi High Court held that, the court should ascertain the language of the witness as well as vocabulary before the deposition. Even if the prosecutrix uses unclear terms about “gandi harkatein” or “badtamezein” the Court should record those terms but also sensitively elicit their meaning, *State v. Rahul*, (2013) ILR IIIDelhi 1861
- The Madras High Court has held children should not be grilled about minute details of the sexual acts: there should be no secondary victimization by investigating agencies or courts, *The Director, Tamil Nadu State Judicial Academy v. State of Tamil Nadu and Another*, W.P.No.36807 of 2006
- The court further held that, in order to elicit complete evidence, a child witness may use gestures, *State v. Rahul*, (2013) ILR IIIDelhi 1861



# Sensitivity during testimony

- The Delhi High Court (quoting *Gurmit Singh*) held that, as far as possible trial should be conducted by women judges, *Virender v. State of NCT Delhi*, MANU/DE/2606/2009



## Elicit Evidence *in-camera*

- The Special Court shall try cases in camera. If the Special Court believes that the child needs to be examined at a place other than the court, it shall proceed to issue a commission under section 284, CrPC, S. 37, POCSO
- Unconnected advocates must leave the courtroom, *Varadaraju v. State*, 2005 CrLJ 4180
- Junior lawyers must leave if their seniors are cross-examining the victim, *Sumeshwar Choudhury v. State*, 1993/MANU/MP/0171
- Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing, *State v. Rahul*, (2013) ILR III Delhi 1861





# Elicit Evidence in-chamber

- The Delhi High Court held that, “the learned Trial Judge may also examine the child witness in his chamber so that the child is not overawed by the court atmosphere. The presiding Judge must ensure that child victim is examined in a congenial, cordial and friendly. It would be better if the evidence is recorded in post-lunch session at the end of Board when other cases are over and court is less crowded,” *Sheeba Abidi v. State*, 113 (2004) DLT 125





# Use video-conference, screens

- Through video conferencing, single visibility mirrors, curtains or any other device, the Special Court shall ensure that the child is not exposed to the accused during the deposition. At the same time the accused should be able to hear the statement of the child and communicate with his advocate. S. 36, POCSO
- The Delhi High Court held that, the screen should not hamper in judge observing the witness. Single visibility mirrors protect both the rights of the child and the rights of the accused during cross examination, *Virender v. State of NCT of Delhi*, Crl.A.No. 121/2008
- Through video-conferencing or closed circuit TV, the evidence of the child should be taken in the place other than one from which the evidence of other witnesses is taken, *Virender v. State of NCT of Delhi*, Crl.A.No. 121/2008



# Use Support Persons during testimony

- The Delhi High Court (citing *Virender v. State*), held that the trial judge may permit, if deemed desirable to have a social worker or another friendly, neutral or independent adult in whom the child has confidence to accompany the child who is testifying. This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony, *State v. Rahul*, (2013) ILR IIIDelhi 1861
- If parents are the support persons as well as witnesses, then their testimony must be recorded first.



# Use Support Persons during testimony

- A friendly, neutral or independent adult who has earned the confidence of the child
- Support persons can provide a courtroom visit prior to testimony to help the child understand the courtroom environment
- Support person must not influence the child's testimony
- Support persons can help children
  - Manage their anxiety
  - Understand the court process (including roles of various players)
  - Difference between chief and cross examination
  - Tell the truth
- If parents are the support persons as well as witnesses, then their testimony must be recorded first.



# Mitigate rigours of Cross examination

- Section 33 of POCSO enumerates several child friendly provisions :
  - The defence counsel shall communicate the questions to the Court which shall in turn put those questions to the child, *Sakshi v. Union of India* AIR 2004 SC 3566
  - The Court may permit frequent breaks for the child, *Sakshi v. Union of India* AIR 2004 SC 3566
  - The Court should allow a family member, a guardian, a friend or a relative, in whom the child has trust, to be present in the court.
  - The Court should not permit aggressive questioning or character assassination of the child



# Mitigate rigours of Cross examination

- The Supreme Court held that, “it is the role of the court to ensure that cross-examination “is not made a means of harassment or causing humiliation to the victim of crime,” *State of Punjab v. Gurmit Singh*, AIR 1996 SC 1393
- The Delhi High Court held that, questions containing a negative or double negative are better avoided, *Virender v. State of NCT of Delhi*, CrI.A.No. 121/2008
- The Delhi High Court held that, the court should ensure that there is no use of aggressive, sarcastic language or sexually explicit examination or cross examination of the child victim. It should discourage efforts to promote specifics of the offending acts which would traumatize the child victim or witness. *State v. Rahul*, (2013) ILR IIIDelhi 1861



# Restore Credibility through re-examination:

- Re-Examination: Prosecutors have the freedom and the right to re-examine witnesses not only about ambiguity but any other matters arising during cross examination or even to elicit additional information, *Rammi v. State*, AIR 1999 SC 3544





# Elicit evidence through court questions:

- Judges must be active and effective instruments of justice, rather than mere spectators or recording machines, *Ram Chander v. State*, AIR 1981 SC 1036
- If the prosecutor is indifferent, the judge must exercise vast powers conferred under section 165 of the Evidence Act and section 311 of CrPC to elicit all necessary material by playing an active role in the evidence collecting process, *State v. Rahul*, (2013) ILR IIIDelhi 1861





# Elicit evidence through court questions:

In *State v. Rahul*, (2013) ILR III Delhi 1861, the Delhi High Court summarized guidelines to courts to elicit good evidence:

- The Court should ask the child questions which are not connected to case to make him/her comfortable and to remove fear or pressure
- The Court should satisfy itself that the child is not concealing evidence due to shame, fear or shyness.
- If the Court believes that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross examination



# Expedite Testimony

- The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court, S. 35, POCSO



# Deny adjournments

- Child victim should not be called repeatedly to testify in the court, S. 33, POCSO
- Systemic obstacles cannot justify violating CrPC Section 309, *Association of Victims of Uphaar Tragedy v. State*, 2002/MANU/DEL/0477
- Witnesses must be examined on the day they are present:
  - The absent accused must exempt identification or his bail should be cancelled;
  - If adjournments are unavoidable, witnesses must be provided with adequate costs, *State v. Shambhu Nath*, AIR 2001 SC 1403



# Deny Adjournments

- Adjournments should not be granted on grounds of:
  - Inconvenience to counsel, *Akil v. State*, 2013 CrLJ 57
  - Counsel's lack of preparation, *Delhi Administration v Vishwanath Lugnani*, 1982 SCC (Cri) 139
- Disciplinary action can be taken against counsel who absents himself without making arrangements for examination of witnesses, *Dastane v. Shivde*, AIR 2011 SC 2028



# Take special care of incest victims

- Statement of the victim to be recorded by the IO in presence of parents, except in incest cases, *Dilip v. State of M.P.*, 2013(6)SCALE264
- Their home is not a safe place: the Punjab and Haryana High Court observed that the fact that the victim was staying at Nari Niketan voluntarily shows that she was not under any influence. Such a young child chose to stay away from her own home post her step mother getting bail out of fear and consistently testified to the abuse by her father, *Gajjan Singh v. State of U.T.* 2013(4) RCR (Criminal) 1047
- They face immense family pressure: The Delhi High Court noted that, the step mother of the prosecutrix had urged her not to report the incestuous rape for preserving the family honour, *Lokesh Mishra v. State of N.C.T. Delhi*, Crl. A. 768/2010



# Take special care of incest victims

- The Delhi High Court noted that the victim in her statement explained that she delayed reporting the incestuous rape on account of criminal intimidation and threat by her father, *Mohd. Salauddin v. State*, Crl. A. 1366/2010
- The Allahabad High Court observed that, fear of being ostracized and nicknamed and mocked impel incest victims to submit to their abuse. In this case even the mother of the victim girl could not mobilize enough courage to put any successful resistance or protest against her husband. To the contrary the girl has even complained that even her mother was seen at times taking the side of the culprit, *Ram Prakash Sunar v. State of U.P*, 2015 (88) ALLCC 503





# Demonstrate Compassion:

- Speaking gently with victims being mindful of the trauma they've gone through and the trauma the court proceedings are causing
- Providing validation to the survivor:
  - By including in the summons where the survivor or family can reach out for support for instance, numbers of DLSA
  - Being careful to maintain boundaries by not touching the survivor
  - Referring to the survivor with respectful language
  - By making eye-contact
  - Treating him / her as a victim not just a witness





# Demonstrate Compassion:

- Setting the time for recording the evidence of the victim when the board is not too heavy
- Ensuring that the court is not on leave on day of recording testimony
- Ensuring there is no bandobast due to festival etc. ad the accused will be produced from the custody at the appointed time
- Ensuring Muddemal is ready



# **CHILD SEXUAL ABUSE: IMPLEMENTATION AND MONITORING**



# Implementation and Monitoring:

- Stakeholders involved in implementation and monitoring are:
  - State Government (POCSO Ss.39 and 43)
  - National Commission for Protection of Child Rights (POCSO S. 44)
  - State Commission of Protection of Child Rights (POCSO S. 44)



# **ONGOING STAGE: REINTEGRATION**

**Justice and Care: Advocate Michelle Mendonca:  
Contact at 7506662231/ 7506610176**



# CHILD SEXUAL ABUSE: PREVENTION



# The Supreme Court has urged adequate preventive measures

- The Supreme Court held that, in cases of child sexual abuse, more needs to be done in terms of prevention. Penal laws focus more on situations after commission of offences like violence, abuse, exploitation of the children. Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on perpetrator emotionally and economically and so on, *Shankar Kisanrao Khade v. State of Maharashtra*, 2013CriLJ2595



# Verma Committee on Prevention

- Strengthen the ICPS Program
- Train and sensitize police
- Monitor children's homes, *State of Tamil Nadu v. Union of India*, 2013(2)SCALE620
- Impart psychological correction in the parenting practices at the panchayat level as well as at the school level
- Audit the performance of all institutions of governance/law and order
- Courts should exercise oversight





# Gaps in POC SO

- Though gender neutral in intent and purpose, the law constantly uses the masculine pronoun while referring to offenders
- No mechanism to deal with false complaints by children
- No designated source for funding the Victim Compensation Scheme
- Non-availability of lady doctors may delay medical exam
- Presumption that biology determines sensitivity
- Lack of convergency between multi-disciplinary efforts by medical professionals, police and judiciary



# Gaps in POCSO

- Conflict between IPC and POCSO regarding criminal liability for husbands of 15-18 year olds.
- There is lack of clarity of how to deal with sexual acts between children
- POCSO takes away judicial discretion



# Gaps in POC SO

- Culture is far behind the law on crimes of child sexual abuse. Stigma attaches to victims.
- Infrastructural lag: Mandatory reporting not supported by child protection systems
- Lack of focus on prevention
- Lack of special protection for victims of incest
  - No provision of guardian ad litem
  - No protection or support for mothers to support children against an abusive father
  - Lack of emotional support to child



# PRACTICES IN OTHER JURISDICTIONS



# Practices in Other Jurisdictions

- Anatomical Dolls: the Delhi High Court (citing *Virender v. State*) stated that, foreign courts have evolved several tools including anatomically correct figures....this approach should be scrutinized to assess if it may be a valuable tool to ensure that the complete truth is brought out, *State v. Rahul*, (2013) ILR IIIDelhi 1861
- The second hearsay rule as followed in the United States allows medical professionals or investigators to testify to statements made to the them by the child victims.
- In Canada , interactive portals such as Super Hero Island, orient a child witness on court procedures and help him or her navigate the system without confusion or intimidation.



# CONCLUSION