

Landmark Judgments Under POCSO Act, 2012 and Analysis

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Introduction

The POCSO Act, enacted in 2012, is a gender-neutral statute that recognizes a child as someone under the age of 18. The Indian Penal Code, 1860 does not recognize that sexual assault can be committed on boys as well. The Act of 2012 has a broad spectrum definition of what constitutes a sexual offence against a child. It further expands the definition of sexual assault to cover both non-penetrative and aggravated penetrative sexual assault (Sections 3–10) and is also inclusive of penalties for those in positions of trust, such as public workers, educational personnel, and police officers.

The POCSO Act also established measures to make the criminal justice system more child-friendly and to prevent re- traumatization. This includes everything from how the statement of the child should be recorded, to the medical examination, to the designation of special child-friendly courts. In this article, the reader will get familiar with some of the landmark judgments under the POCSO Act, 2012 which will help them to get an idea regarding the implementation of the aforementioned statute.

Landmark judgments under POCSO Act, 2012

Some of the recent and most relevant landmark decisions made with respect to the POCSO Act, 2012 have been laid down hereunder.

Attorney General for India v. Satish and another (2021)

The Bombay High Court's Nagpur Bench had ruled in the case of *Satish Ragde v. State of Maharashtra (2021)* MANU/SCOR/24055/2021 that grabbing a child's breasts without making "skin-to-skin contact" constituted molestation under the POCSO Act, 2012. The comment was given by a single bench led by Justice Pushpa Ganediwala. The Attorney General of India, the National Commission for Women, and the State of Maharashtra filed appeals against the High Court's controversial decision, which were heard by a bench consisting of Justices Uday Umesh Lalit, S Ravindra Bhat, and Bela M Trivedi, in the present case of Attorney General for India versus Satish and another (2021) Neutral Citation: 2021 INSC 762 ' Manu ID: MANU/SC/1086/2021.

The issue at hand was how should Section 7 of the POCSO Act, 2012 be interpreted so as to provide a fair and reasonable solution to the cases falling under its ambit. The present judgment observed that Section 7 covers both direct and indirect touch thereby

highlighting that the logic in the High Court's opinion quite insensitively trivializes indeed legitimizes a whole spectrum of undesirable behaviour which undermines a child's dignity and autonomy, through unwelcome intrusions.

Setting aside the Bombay High Court's judgment, the Apex Court observed that the matter at hand would be an appropriate situation for using the "mischief rule" of statutory interpretation. It emphasizes that courts must constantly interpret the law in order to prevent harm and promote the remedy. In this view, the top court's judgment observed that the High Court's interpretation not only restricts the implementation of the legislation but also seeks to pervert its objective.

Jarnail Singh v. State of Haryana (2013)

Neutral Citation: 2013 INSC 378, Manu ID: MANU/SC/0626/2013

The Supreme Court of India while deciding the case of **Jarnail Singh v. State of Haryana (2013)** Neutral Citation: 2013 INSC 378, Manu ID: MANU/SC/0626/2013 has observed that the procedure which is used to determine the age of a child who is in conflict with law as have been provided by the Juvenile Justice (Care and Protection of Children) Rules, 2007, can be followed in cases falling under POCSO Act, 2012 as well. In the present case, the appellant was accused of kidnapping and raping the daughter of one Savitri Devi, when her daughter was sleeping. The Apex Court observed that Rule 12 of the erstwhile Juvenile Justice (Care and Protection of Children) Rules, 2007, which detailed the age determination process for children in conflict with the law should be applied to determine the age of a child victim. Applying the same, the Court convicted the appellant, Jarnail Singh.

Alakh Alok Srivastava v. Union of India and Others (2018)

Neutral Citation: 2018 INSC 433; Manu ID: MANU/SC/0489/2018

In the case of *Alakh Alok Srivastava v. Union of India and Others (2018)*, Neutral Citation: 2018 INSC 433; Manu ID: MANU/SC/0489/2018, the Supreme Court of India laid down guidelines to be followed by Special Courts while trying a case under the POCSO Act, 2012 so that the trial is completed within a period of one year from the date of taking cognizance of the offence, as provided under Section 35 of the aforementioned Act. The guidelines are provided hereunder:

1. The High Courts are responsible for ensuring that cases filed under the POCSO Act are heard and decided by Special Courts and that the presiding officials of such courts are trained in child protection and psychological reaction.
2. If not previously done, the Special Courts should be constituted and given the role of dealing with matters brought under the POCSO Act.

3. The Special Courts should be given instructions to expedite cases by not granting superfluous adjournments and following the procedure outlined in the POCSO Act, allowing the trial to be completed in a time-bound manner or within a certain time period set forth in the Act.
4. The Chief Justices of the High Courts have been asked to form a three-judge committee to control and supervise the progress of the POCSO Act cases. In the event that three judges are not available, the Chief Justices of the respective courts will form a Judge Committee.
5. A Special Task Force will be formed by the Director- General of Police or a State authority of comparable rank to guarantee that the investigation is properly handled and witnesses are presented on the dates set before the trial courts.
6. The High Courts must take appropriate efforts to create a child-friendly environment in Special Courts, keeping in mind the requirements of the POCSO Act, to ensure that the spirit of the Act is upheld.

Hari Dev Acharya @ Pranavanand and Ors v. State (2021)

Neutral Citation- 2021:DHC:3576 ; Manu ID- MANU/DE/3029/2021

The Delhi High Court recently stated in the case of *Hari Dev Acharya @ Pranavanand and Ors v. State (2021)* Neutral Citation- 2021:DHC:3576 ; Manu ID- MANU/DE/3029/2021 that as the Protection of Children from Sexual Offenses (POCSO) Act, 2012 is silent on whether two separate incidents can be combined in a single First Information Report (FIR), the provisions of the Code of Criminal Procedure, 1973 (CrPC) would apply, allowing joint trial if the offences were committed during the same transaction. A single-judge bench of the Hon'ble High Court, Justice Manoj Kumar Ohri, made the remark while dismissing a number of people's petitions challenging the summons issued by a special POCSO court and the additional charge sheets.

The summons and charge sheets were issued in August 2019 in connection with an incident in which a youngster studying at a Gurukul in Delhi was reportedly raped by a superior. The accused took the youngster to the teacher's room and sexually attacked him. The boy had then informed his friend about the same. They went to the police station and renewed their complaint, but because his mother and sister had already arrived, a solution was achieved under the pressure of four people. According to Justice Ohri, Section 219 of the CrPC allows a person who commits three similar offences within a twelve-month period to be prosecuted at the same time, and because both offences are punished under the same section of the IPC and POCSO, they constitute the same transaction. Therefore, the summoning orders were upheld and the petitions were dismissed.

State of Karnataka v. Shivanna (2014)

Neutral Citation:2014 INSC 345; Manu Citation: MANU/SC/0400/2014

The POCSO Act, 2012 does not require that every statement made under Section 164 of the Criminal Procedure Code, 1973 be recorded. The statement of a victim against whom offences have been committed under Sections 354, 354-A, 354-B, 354-C, 354-D, 376(1), 376(2), 376-A, 376-B, 376-C, 376-D, 376-E, or 509 of the IPC, 1860 should be recorded by a Judicial Magistrate, according to the Section 164(5-A) (a) of the Criminal Law (Amendment) Act, 2013. The statement should be recorded as soon as the commission is brought to the attention of the police, according to Section 164(5-A)(a) Cr.P.C. The Supreme Court of India while deciding the present case of ***State of Karnataka v. Shivanna (2014)*** 2014 INSC 345; Manu Citation: MANU/SC/0400/2014 observed that the investigating officer should present the victim before any Metropolitan, ideally Judicial Magistrate within 24 hours of the rape to record the statement under Section 164(5-A)(a) C.r.P.C., preferably to a Lady Magistrate.

Gaya Prasad Pal @ Mukesh v. State (2016)

Neutral Citation: 2016:DHC:7941-DB ; Manu ID: MANU/DE/3290/2016

The present case of *Gaya Prasad Pal @ Mukesh v. State (2016)* Neutral Citation: 2016:DHC:7941-DB ; Manu ID: MANU/DE/3290/2016 that appeared before the Delhi High Court involved the appellate challenging his conviction for being charged twice because of the same offence. For raping his stepdaughter under the age of 14 and making her pregnant, the man was found guilty of penetrative sexual assault under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter, POCSO Act) read with Section 376 of the Indian Penal Code. The reason for the delay in filing the FIR was because the child was concerned about her mother and stepbrother's safety if her stepfather was convicted and sentenced to prison. Separate sentences were imposed on the appellant for offences punishable under Section 376 IPC, Section 6 POCSO Act, Section 354 IPC, and Section 506 IPC. The observations made by the Hon'ble High Court in this present case have been laid down hereunder:

1. The trial court did not put the appellant on trial for the offence of aggravated penetrative sexual assault under Section 6 of the POCSO Act. As a result, punishing him for the same offence was unconstitutional.
2. In the case of a minor, 'rape' (Section 375 IPC) can also be considered 'penetrative sexual assault' (Section 3 POCSO Act). Acts that constitute 'penetrative sexual assault' against a girl child would also be considered rape. A person may not be punished twice for the same set of actions of conduct or omission that collectively form an offence covered by two separate articles of law. Despite the fact that the law allows for a trial on an alternative charge for both offences, the punishment can only be given for one of them, the one that is more serious.
3. Furthermore, the Court noted that the appellant's conviction for the violation under Section 4 of the POCSO Act is in addition to his conviction for the offence under Section 376 of the IPC. And the appellant's actions are punishable under Section 376(2) of IPC which provides for a punishment of life imprisonment (imprisonment for the rest of a person's natural life) as well as a fine, which is more severe than the punishment under

Section 4 of the POCSO Act. In this case, Section 42 of the POCSO Act applies, and the Court is required to penalize the offender for the offence under Section 376(2)(f)(i) and (k) of the IPC, which is more serious than the offence under Section 4 of the POCSO Act.

Balaji Sarjerao Kamble v. State of Maharashtra (2017)

MANU/MH/1957/2017

The Bombay High Court observed that ‘merely because the date of the crime is not given by the victim, her evidence cannot be disregarded’ in the landmark case of Balaji Sarjerao Kamble v. State of Maharashtra (2017) MANU/MH/1957/2017. The child victim was roughly 6 to 8 years old at the time of the alleged rape. At such a young age, the victim is unlikely to have such a keen sense of time, the Court viewed. The decisions of the Hon’ble High Court have been presented hereunder:

1. Conviction and sentence of the appellant in the case, for offences punishable under Sections 4 and 8 of the POCSO Act, 2012 and Section 376 of the IPC were held to be maintainable.
2. The sentence imposed on the accused of the offence punishable under Section 376 of the IPC was rigorous imprisonment of 7 years as well as direction to pay a fine of Rs.5,000/- and in default of such payment, further rigorous imprisonment for 3 months, was quashed and set aside.

Nipun Saxena v. Union of India

Neutral Citation: 2018 INSC 1192; Manu Citation: MANU / SC / 1459 / 2018

When an infraction is committed under Section 23 of the POCSO Act, the publisher or owner of the media, studio, or photography facility is held jointly and severally accountable for his employee’s act/omission, observed the Supreme Court of India in a recent case of *Nipun Saxena v. Union of India (2019) 2018 INSC 1192; MANU / SC / 1459 / 2018* . The Apex Court released a set of guidelines in relation to the aforementioned provision which are provided hereunder:

1. No one may broadcast the victim's name in print, electronic, or social media, or even in a distant way divulge any details that might lead to the victim's identification and should make her identity known to the general public.
2. In cases where the victim is deceased or mentally ill, the victim's name or identity should not be revealed, even with the consent of the next of kin, unless circumstances justifying the disclosure of her identity exist, which must be decided by the competent authority, which in the present case is the Sessions Judge.
3. FIRs for offences under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB, or 376-E of the IPC, as well as violations under POCSO, are not to be made public.
4. If a victim files an appeal under Section 372 CrPC, the victim is not required to reveal his or her identity, and the appeal will be handled according to the law.
5. All papers in which the victim's identity is exposed should be kept in a sealed cover as much as possible, and these documents should be replaced with similar documents in which the victim's name is deleted from all records that may be scrutinized in the public domain.
6. All authorities to whom the victim's name is provided by the investigating agency or the Court are likewise obligated to keep the victim's name and identity secret and not to divulge it in any way except in the report, which should be delivered to the investigating agency or the Court in a sealed envelope.
7. An application by the next of kin to authorize the disclosure of the identity of a dead victim or of a victim of unsound mind under Section 228-A(2)(c) IPC should be made only to the Sessions Judge concerned until the Government acts under Section 228-A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organizations.
8. In the case of juvenile victims under the POCSO Act, 2012, the Special Court can only allow their identity to be revealed if it is in the child's best interests.

9. All the States and Union Territories are requested to set up at least one 'One-Stop Centre' in every district within one year from the date of the judgment of the present case.

Conclusion

The one feature that is common in every judgment that has been discussed is the set of guidelines delivered by the concerned court which will behave as a catalyst for the functioning of the POCSO Act, 2012. The Act of 2012 is social, gender-neutral legislation in the field of criminal law which can be used to its full potential only by the courts when they apply and interpret the provision of the said Act in cases falling within the ambit of the statute. Therefore, decisions made under the Act hold immense relevance.

Introduction

The Protection of Children from Sexual Offences Act, 2012 [“POCSO Act, 2012”] is legislation which aims at protecting children from all types of sexual abuse. Although the Convention on the Rights of the Child was adopted by the United Nations in 1989, the offences against children were not redressed by way of any legislation in India till the year 2012. It provides stringent deterrents for the commission of offences against children ranging from a minimum of 20 years of imprisonment to the death penalty in case of aggravated penetrative sexual assault.

Need of the POCSO Act, 2012

Before the introduction of the POCSO Act, 2012, the sole legislation in India that aimed at protecting the rights of a child was the Goa’s Children’s Act, 2003 and Rules, 2004. Under the Indian Penal Code, 1860, child sexual abuse accounted for an offence under Sections 375, 354 and 377. These provisions neither protect male children from sexual abuse nor protect their modesty. Also, definitions of the terms like ‘modesty’ and ‘unnatural offence’ are not provided in the Code.

Owing to the lack of any specific legislation, it was pivotal to establish a statute that pointedly tackles the issue of growing child sexual abuse cases in the country. With the efforts of multifarious NGOs, activists and the Ministry of Women and Child Development, POCSO Act, 2012 was enforced on 14th November 2012.

Scope of the POCSO Act, 2012

In India, POCSO Act, 2012 is not the only legislation which deals with child sexual abuse cases. The POCSO Act cannot be called a complete code in itself and provisions of the Code of Criminal Procedure, 1973, Indian Penal Code, 1860, Juvenile Justice Act, and Information Technology Act, 2000 overlap and encapsulate the procedure and specify the offences.

Applicability of the POCSO Act, 2012

POCSO Act, 2012 is divided into 46 sections. It was published in the official gazette on 20th June 2012 but came into force on 14th November 2012 which raises the question of its applicability to the cases prior to its enforcement date.

In the case of *M. Loganathan v. State (2016)* MANU / TN / 1755 / 2017 , the offence of rape was committed on 28.09.2012 i.e., before the Act was enforced, but the trial court convicted the accused under Section 4 of the POCSO Act. Consequently, the High Court of Madras declared that conviction being violative of Article 20(1) of the Constitution of India, 1950 was unconstitutional and it was modified to punishment under Section 376(1) of the Indian Penal Code, 1860.

In another case of *Kanha v. State of Maharashtra (2017)*, the accused was convicted under Section 376 of the Indian Penal Code and Section 6 of the POCSO Act for having committed aggravated penetrative sexual assault upon the victim which resulted in her pregnancy. The accused contended that unless there is proof of age of foetus, the date of the commission of offence was not in proximity with 14.11.2012 and thus, he cannot be prosecuted under Section 6 of the POCSO Act. The High Court of Bombay accepted the argument and acquitted the accused of all the charges. Therefore, it is apparent that when the applicability of the POCSO Act is questioned, the courts either alter the conviction of the accused or acquit them.

The Act enunciates the punishment where the offences have been committed against a child. Section 2(1)(d) of the POCSO Act contains the definition of child. It states that, “ a child means any person below the age of eighteen year”. This implies that offences perpetrated against anyone of the age less than eighteen years are punishable under the POCSO Act.

Importance of the POCSO Act, 2012

1. POCSO Act, 2012 was enacted when the cases of sexual abuse against children were rising. It contains provisions regarding the protection of children from sexual assault and pornography and lays down the procedure for the implementation of these laws.
2. Incidents of sexual abuse against children occur at schools, religious places, parks, hostels, etc and the security of children is not guaranteed anywhere. With such emerging dangers, it was significant to introduce separate legislation which could provide a

reliable system for mitigating the number of such offences and punishing the perpetrators.

3. The Act has been instrumental in providing a robust justice mechanism for the victims of sexual abuse and has highlighted the significance of child rights and safety. The reporting of cases of child sexual abuse has also surged as a consequence of awareness. The Act covers punishment for both non-penetrative sexual assault and aggravated penetrative sexual assault.

Features of the POCSO Act, 2012

Some of the salient features of the POCSO Act are discussed as follows:

- Confidentiality of the victim's identity: Section 23 of the POCSO Act provides for the procedure of media and imposes the duty to maintain the child victim's identity unless the Special Court has allowed the disclosure. Section 23(2) states, "no reports in any media shall disclose the identity of a child including his name, address, photograph, family details, school, neighbourhood and any other particulars which may lead to the disclosure of the identity of the child". In the landmark case of *Bijoy @ Guddu Das v. The State of West Bengal (2017) MANU/WB/0140/2017*, the Calcutta High Court reiterated the law made under Section 23 and declared that any person including a police officer shall be prosecuted if he/ she commits such a breach.
- Gender-neutral provisions: Another glaring feature of the POCSO Act is that it does not create any distinction between the victim or the perpetrators on the basis of their gender. This overcomes one of the biggest shortcomings of the Indian Penal Code's provisions. The definition of child includes anyone below 18 years of age and in several cases, the courts have even convicted women for engaging in child sexual abuse incidents.
- Mandatory reporting of child abuse cases: Sexual abuse cases happen behind closed doors and the elders attempt to hide these incidents due to the stigma that is attached to these crimes. Consequently, for the proper implementation of the POCSO Act, reporting of these incidents by the third parties who have the knowledge or apprehension of such offences, has been made mandatory under Sections 19 to 22 of the POCSO Act. These

laws have been made on the basis of assumptions that children are vulnerable and helpless and society has the duty to protect the interests of the children.

In the case of *State of Gujarat v. Anirudh Singh and Another (1997) MANU/SC/0749/1997*, the Supreme Court had observed that it is the duty of every citizen to aid and cooperate with the investigative agencies and give information regarding the commission of cognizable offences. In various instances, schools and teachers help the child victims by reporting the sexual abuse cases to the authorities. For example, in the case of *Nar Bahadur v. State of Sikkim (2016) Neutral Citation: 1998 INSC 240; MANU/SC/0369/1998*, teachers received information that her student is pregnant due to repeated sexual assaults on her by elderly accused. The teachers informed the panchayat who lodged an FIR in the police station.

Shankar Kisanrao Khade v. State of Maharashtra (2013) Neutral Citation: 2013 INSC 281; Manu ID: MANU/SC/0476/2013 is an important case where the Supreme Court laid down guidelines regarding reporting the offence. In this case, rape was committed on an 11-year-old child with moderate intellectual disability, but it was neither reported to the police nor to the juvenile justice board. The Court observed that children with intellectual disabilities are more vulnerable and therefore, the institutions which house them have the responsibility to report sexual abuse incidents against them. Furthermore, it was laid down that non-reporting of crime in accordance with the provisions of the POCSO Act is a serious offence.

•**The last seen theory:** The theory of last seen is applied in the child sexual abuse trials. According to this theory, the person who is last seen with the victim is assumed to be the perpetrator of the offence when the time gap between the point when they were last seen alive is so minute that it is not possible that any other person could have committed the crime. In the case of *Shyamal Ghosh v. State of West Bengal (2012) 2012 INSC 281; MANU/SC/0544/2012*, it was observed that when the time gap is large then it is not reasonable for the Courts to apply the last seen theory.

•**Child-friendly investigation and trial:** Sections 24, 26 and 33 of the POCSO Act lay down the procedure of investigation and trial which has been formulated keeping in mind the needs of a child. The following points are taken into consideration while investigating any crime under POCSO Act:

- i. The statement of the child is to be recorded at his/ her place of residence and generally by a woman police officer.
- Ii. The officer who is to record the statement of the child should not be wearing a uniform.
- Iii. The officer should ensure that the child does not come in contact with the accused during the examination.
- iv. A child is not to be detained in the police station at night.
- v. The officer should ensure that the identity of the child is not revealed.
- vi. The statement of the child is to be recorded in the presence of a person in whom the child has trust, for example, their parents.
- Vii. The statement of the child is to be recorded via audio-video electronic means.
- Viii. The assistance of the translators or interpreters should be taken wherever necessary.
- Ix. Frequent breaks are to be allowed during the trial.
- x. The special court has to ensure that the child is not called to repeatedly testify in the trial court.
- Xi. Aggressive questioning of the child is not permitted during the trial.

Overview of the POCSO Act, 2012

The POCSO Act, 2012 is comprehensive legislation containing 9 chapters dealing with the offences, punishment and procedure.

Child sexual abuses

- **Penetrative sexual assault:** Section 3 of the POCSO Act defines penetrative sexual assault and Section 4 lays down the punishment which was made more stringent by the 2019 amendment. In the case of *Bandu v. The State of Maharashtra (2017)* **MANU/MH/2046/2017**, a person was committed under Sections 4 and 6 of the POCSO Act along with some provisions under the Indian Penal Code, 1860 for having committed penetrative sexual assault on a physically and mentally challenged 10-year-

old girl. In *Pranil Gupta v. State of Sikkim* (2015) MANU/SI/0035/2015, the victim aged 15 years stayed with the accused and injuries were found in her genital area. The High Court relied on the statement of the accused that the accused opened her clothes and raped her 5 times in one night. The contention of the accused that he was not aware of the victim being a minor was not accepted, and the accused was prosecuted under Section 3 of the POCSO Act.

- **Aggravated penetrative sexual assault:** Section 5 of the POCSO Act lays down the cases in which penetrative sexual assault amounts to aggravated penetrative sexual assault. For example, penetrative sexual assaults on a child by a police officer within the vicinity of a police station, by armed forces within the limits of their area, by a public servant, by the staff of jails, hospitals or educational institutions are considered aggravated penetrative sexual assault and are punishable under Section 6 of the POCSO Act.

- **Sexual assault:** Section 7 of the POCSO Act defines sexual assault as, “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”. In *Subhankar Sarkar v. State of West Bengal* (2015) MANU/WB/0208/2015, on medical examination of the victim, it was found that there was no evidence of penetrative sexual assault but scratch marks on the body of the victim were found which proved the use of force and thus, the accused was convicted under Section 8 and 12 of the POCSO Act.

- **Aggravated sexual assault:** Section 9 and 10 of the POCSO Act contain provisions regarding aggravated sexual assault on a child. In the case of *Sofyan v. State* (2017) 2017:DHC:1838; MANU/DE/1408/2017, the accused who was a plant operator in the swimming pool area was convicted by the Trial Court under Section 10 of the POCSO and Section 354 of the Indian Penal Code, 1860 for having sexually assaulted a girl of 8 years old. The facts of the case are that when the victim was wearing her swimming costume in the changing room area, the accused approached her and inserted his hand in her swimming costume and touched her with sexual intent. The Delhi High Court

rejected the argument of the accused that he was implicated falsely and the conviction was upheld.

•**Sexual harassment:** Section 11 of the POCSO Act defines sexual harassment. It includes six cases which constitute sexual harassment of a child.

1.First, if anyone utters any word or makes any sound or exhibits any object with sexual intent to a child.

2.Second, if anyone makes a child exhibits his body so that it is seen by the offender or any other person.

3.Third, if any person shows any child any form or media for pornographic purposes.

4.Fourth, if anyone constantly watches or stalks a child directly or online.

5.Fifth, if anyone threatens to use a real or fabricated depiction of any part of the body of the child or the involvement of the child in a sexual act through electronic, film or digital.

6.Sixth, if anyone entices a child for pornographic purposes.

•**Pornography:** Section 13 of the POCSO Act states that anyone who uses a child for pornographic purposes by either representing the sexual organs of the child or using a child in real or simulated sexual acts or representing a child indecently or obscenely in programmes or advertisements on television or on internet, commits the offence under this section and is liable in accordance with Sections 14 and 15 of the POCSO Act. In the case of *Fatima A.S. v. State of Kerala (2020) MANU/KE/2706/2020*, in a video on social media, a mother was seen being painted her naked body above the navel by her two minor children and she alleged that the motive of the video was to teach sex education to them. The Supreme Court of India observed in this case that, “in the initial years, what the child learns from their mother will always have a lasting impression on their mind. It is usually said that the mother will be the window of the child’s to the world”. Hence the same was covered under Section 13.

Punishment for offences covered in the POCSO Act, 2012

Section	Offence	Punishment
Section 3	Penetrative Sexual Assault	Section 4: 10 years to life imprisonment + fine
Section 5	Aggravated Penetrative Sexual Assault (by relatives, police, teachers, gang assault, etc.)	Section 6: 20 years to life imprisonment + fine
Section 7	Sexual Assault (non-penetrative)	Section 8: 3 to 5 years imprisonment + fine
Section 9	Aggravated Sexual Assault (by a person in authority, gang assault, etc.)	Section 10: 5 to 7 years imprisonment + fine
Section 11	Sexual Harassment of a Child	Section 12: Up to 3 years imprisonment + fine
Section 13	Using a Child for Pornographic Purposes	Section 14(1): Up to 5 years imprisonment + fine (1st conviction); Up to 7 years imprisonment + fine (subsequent conviction)
Section 14(2)-(6)	Aggravated Use of Child for Pornography	Section 14(3)-(6): 6 to 8 years imprisonment + fine (if involving sexual assault); 10 years to life imprisonment + fine (if involving penetrative sexual assault)
Section 15	Storage/Transmission of Child Pornography	Up to 3 years imprisonment + fine
Section 16	Abetment of Offence	Same punishment as for the offence abetted
Section 17	Attempt to Commit an Offence	Half of the maximum punishment prescribed for that offence
Section 21	Failure to Report Offence by an Authority	Up to 6 months imprisonment + fine

General principles of the POCSO Act, 2012

There are a few principles which are to be followed while the conduct of the trial under the POCSO Act. These are as follows:

- Right to be treated with dignity- Various provisions under the POCSO Act reflect that it is very crucial to treat a child with dignity and utmost compassion

- **Right to life and survival-** Right to life is a fundamental right provided by Article 21 of the Indian Constitution. It is essential that a child should be protected from the evils of society and could be brought up in a secure environment.
- **Right against discrimination-** This is also a crucial fundamental right and an additional duty under the Indian Constitution. A child should not be discriminated against on the basis of sex, religion, culture, etc and the investigative and court procedures should be just and fair.
- **Right to preventive measures-** Children being immature in their growing stages, should be well trained so that they become capable of preventing abuses against them thereby differentiating between what is right and what is wrong.
- **Right to be informed-** A child should be informed of the legal procedures that are being carried out for the conviction of the accused.
- **Right to privacy-** The main objective behind provisions like Section 23 is to protect the right to privacy of a child against whom any offence under the POCSO Act has been committed so as to maintain the confidentiality of the proceedings for the best interests of the child victim.

Abetment And Attempt to Child Sexual Abuse

Abetment of child sexual abuse

Section 16 of the POCSO Act defines the abetment of the offence. The following acts constitute abetment of offence under the POCSO Act:

- Instigating any person to commit that offence;
- Engaging in any conspiracy with one or more persons to commit any offence when any illegal act or omission takes place in consequence of that conspiracy;
- Aiding to commit that offence intentionally.

The punishment for the abetment of offence is specified under Section 17 of the POCSO Act, 2012 according to which a person who abets the commission of an offence and the offence is executed is to be punished with the punishment that has been provided for that offence under the POCSO Act.

Attempt to child sexual abuse

Section 18 enunciates that attempt to commit any offence under the POCSO Act, 2012 is also an offence inviting either of the two following punishments:

- Imprisonment provided for that offence for a term extending upto one-half of the imprisonment for life, with or without fine;
- Imprisonment provided for that offence for a term extending upto one-half of the longest term of imprisonment with or without fine.

Trial of offences under the POCSO Act, 2012

The POCSO Act specifies the provisions regarding the trial of a reported offence under Sections 33 to 38. Following are some glaring features provided under the POCSO Act regarding the conduct of trial:

Deposition of the victim

Section 33 specifies that the Special Court can take cognizance of the offence without the accused being committed to the trial. Section 36 mentions that the child should not be exposed to the accused at the time of giving evidence but this provision was not followed in the case of *Vasudev v. The State of Karnataka (2018) 2018:KHC-D:107; MANU/KA/0107/2018*. The deposition sheet reflected that the victim was aggressively questioned and only when she had got emotional while narrating the incident, the accused was sent out. The Karnataka High Court dismissed the appeal of the accused who was convicted under Section 4 of the POCSO Act.

Furthermore, in the case of *Nar Bahadur Subba v. State of Sikkim (2017) MANU/SI/0055/2016*, in the appeal before the Sikkim High Court, the Court observed that in the trial court deposition, the teachers of the victim have stated, ***'It is true that I am not well acquainted with the character of the victim'***. To this, the Court noted that gauging the character of an 11-year-old girl is of no question and the cross-examination has violated provisions of Section 33 of the POCSO Act.

The Time Limit For Disposal of Cases

Section 35 of the POCSO Act stipulates the following timelines:

- For recording the evidence of the child: 30 days from the date of taking cognizance of the offence,
- For completing the trial: 1 year from the date of taking cognizance of the offence.

In the case of *Shubham Vilas Tayade v. The State of Maharashtra (2018)*

MANU/MH/0178/2018, the Special Court allowed the prosecution for recording evidence after 30 days of taking cognizance. This order was challenged by the accused, being violative of Section 35 of the POCSO Act. However, the high court agreed with the counterargument of the APP that as the accused did not challenge the application of the prosecution so he cannot challenge the order. Furthermore, it was observed that even otherwise, the Special Court can record evidence after 30 days and the only rider provided by Section 35 is that the reasons for the delay have to be recorded.

Medical and forensic evidence

Child sexual abuse is rarely diagnosed merely on the basis of physical examination. In many instances, the scars or bruises on the body of the victim are not found either because the cases are not immediately reported or the sexual abuse does not result in such injuries.

In the case of *Pintu v. State of U.P. (2020) MANU/SC/1310/2021* , the conviction of the accused under Section 377 of the Indian Penal Code, 1860 and Section 6 of the POCSO Act were set aside and one of the reasons was that there was no mark of external injury around the anus of the victim and the Allahabad High Court opined that in case of a sexual assault on a boy of 7 years old by a person aged 23 years, there should have been some kind of external injury.

In the case of State (*NCT of Delhi*) *v. Anil (2016)*, the Trial Court and the Delhi High Court acquitted the accused from the charges under POCSO Act due to the following points:

- The victim refused her internal medical examination when she was brought to the hospital.
- The medical reports reflected that her menstrual cycle was regular and hence, her claim that she had gotten pregnant due to a physical relationship with the accused had failed. Moreover, no proof of hospitalization was provided to her.
- There were no injuries on her body.

Admissibility of the medical history of the victim

The medical history of the victim is not given much importance by the Indian judiciary. In the case of *Gangadhar Sethy v. State of Orissa (2015)* MANU/OR/0172/2015, the doctor did not find any injury marks on the body of the victim but stated that based on her medical history, here is the possibility of an attempt to sexual assault cannot be ruled out. On the other hand, the Orissa High Court paid no emphasis on the medical history and held that one cannot interpret what the victim meant by the term ‘assault’. It cannot be extended to imply that she was talking about penetrative sexual assault. Moreover, the medical or other evidence did not justify such a conclusion.

Duties of a medical examiner

It is essential that the medical examination of a child is conducted with utmost care and precaution. Rule 5(3) of the POCSO Rules, 2012 makes the provision that no medical facility or practitioner who renders emergency medical care to a child should ask for any kind of legal or other documentation before providing such care. Apart from this, Section 27 of the POCSO Act lays down certain laws regarding the conduct of medical examinations. These are as follows:

- The medical examination has to be conducted in accordance with Section 164A of the Criminal Procedure Code, 1973.
- A medical examination of a girl is to be conducted by a woman practitioner.
- It should be conducted in the presence of a person in whom the child has trust, for example, his/ her parents, otherwise in the presence of a woman nominated by the head of the medical institution.

Jurisdiction of the POCSO Act, 2012

Section 28 of the POCSO Act lays down the provision regarding the designation of special courts. It says that the special courts also have the jurisdiction to try offences under Section 67B of the Information Technology Act, 2000. Section 33 gives the power of a Court of Session to the special courts. Furthermore, Section 42A specifies that in case of any inconsistency, the provisions of the POCSO Act would override the provisions of any other law.

In the case of *M. Kanna v. State (2018)* 2018 INSC 809; MANU/SC/1000/2018 , there were discrepancies in the professional duty of the defence counsel who violated the right to a fair trial of the accused. The Madras High Court after making note of this fact remanded the case back to the trial court to provide the opportunity to the accused to cross-examine the witness. Also, the case was transferred from the trial court in which it was pending as it was presided over by the same judge.

The burden of proof under the POCSO Act, 2012

The objective behind the legislation is to ensure that the actual offenders are behind the bars. One approach that has been inoculated in the POCSO Act is to reduce the burden on the prosecution to prove certain things by introducing presumptions. Section 29 and 30 of the POCSO Act lay down the provision with respect to the burden of proof.

According to Section 29, the person who is prosecuted for the commission of the child sexual abuse offences is presumed to have committed or abetted or attempted to commit such offence. The main issue that arises while implementing this provision is that the nature of presumption that has to be applied is at the whim and fancy of the courts. Also, this provision has been challenged to be unconstitutional in a number of cases as it intervenes with the right to be presumed innocent, right against self-incrimination and the right to remain silent.

In *Imran Shamim Khan v. State of Maharashtra (2019)* MANU/MH/0231/2019 , a child told her grandmother that she was sexually abused and her medical examination confirmed this. However, her mother told her to ignore it. The statements of the child victim and her grandmother were recorded before the magistrate. The Bombay High Court made an important observation in this case by stating that, “even if a minor in a

sexual assault case turns hostile under the POCSO Act, the onus is on the accused to establish the innocence. It is easy to say that the prosecution failed to prove the guilt of the accused. But in a case like this, the judicial approach has to see justice is imparted to the victim too”.

Further Section 30 provides the opportunity to the accused to prove his/ her innocence thereby making the presumption under Section 29 rebuttable. In the case of S. Suresh v. State of Tamil Nadu (2017) MANU/TN/1940/2017, the accused was convicted under Section 6 of the POCSO Act and he had not rebutted the presumption of Section 29. Therefore, the Court observed that the rebuttable presumption also proves the guilt of the accused.

Significant judicial pronouncements

Bijoy v. The State of West Bengal (2017)

MANU/WB/0140/2017

In this case, the accused was convicted of committing sexual assault and the Calcutta High Court laid down some directives which are to be followed by the investigating agencies to protect the dignity of the child victim. Following are some of the important directions:

- The police officer has to register the FIR as per Section 19 of the POCSO Act. Also, they have to inform the victim and their parents about their right to legal aid and representation.
- After the registration of the FIR, the child should be immediately sent for medical examination under Section 27 of the POCSO Act. In case the child falls within the definition of 'child in need of care and protection; as defined under Section 2(d) of the Juvenile Justice (Care and Protection of Children) Act, 2000, the child is to be forwarded to jurisdictional CWC.
- The identity of the victim is not to be disclosed in any media.

Further, the Court issued some guidelines regarding the compensation to the victims. Some important points are as follows:

- Compensation under Section 33(8) of the POCSO Act can be awarded by the Special Court at the interim stage.
- The compensation at the interim stage is independent of compensation to be paid by the convict upon conviction.
- The objective behind providing compensation is the relief and rehabilitation of the child victim and the reparation to the victim when the State has failed to protect the individual from crimes.

Vishnu Kumar v. State of Chhattisgarh (2017) MANU/CG/0741/2023

The Chhattisgarh High Court observed that Section 36 of the POCSO Act was not complied with in its letter and spirit while deciding the appeal of the accused. Therefore, some guidelines were issued by the Court to all the judicial officers of the state:

- The Presiding Officer must make the child witness as comfortable as possible. Along with the in-camera proceedings, the Presiding Officer should come down from the dais and engage in conversation with the child. He/ she can also offer toys and sweets to the child witness as the child must not feel that he/ she is in a majestic place.
- The strict rules of evidence can be ignored in order to search for the truth as justice should prevail.
- The Court should ensure the child's safety and the statement of the child can be recorded after 3-4 hours or the next day if necessary as the prime motive should be to make the child comfortable and record the statements free of any influence.
- A child normally tells the truth but as they are dependent beings so their statements might get influenced by other people so it is the rule of prudence and caution that the statements of a child are to be scrutinized carefully.

Dinesh Kumar Maurya v. State of U.P. (2016) MANU/UP/0883/2016

This case throws light upon the intricacies of the medical evidence of the victim. The Allahabad High Court in this case set aside the conviction of the accused under Sections 3 and 4 of the POCSO Act as there were no marks of injury on the body of the victim who was 14 years of old but the victim had stated that there was forcible sexual intercourse. The Court made the following observations in this case:

- The injuries on the body are not always sine qua non for proving the offence of sexual assault but if the victim states that she has been helplessly raped then the marks of injury on the thighs, breasts, face, wrists or any other part of the body can immensely support her statements.
- The Courts should always take into consideration the fact that false charges of rape or sexual assault are common and the parents in order to take revenge convince their minor daughters to tell lies and concoct stories.

Sunderlal v. The State of M.P. and Ors. (2017) MANU/CG/0336/2016

This is an important judicial pronouncement where the father of the minor rape victim filed a petition under Article 226 of the Constitution of India, 1950 to get permission to terminate her pregnancy. The Madhya Pradesh High Court paid emphasis on the report according to which the length of the pregnancy was 20 weeks. Following directives were issued by the High Court in this regard:

- In the case of a minor, the consent of the petitioner is enough for the termination of pregnancy and it is not essential to obtain the consent of the minor victim.
- The right to termination of pregnancy flows from Article 21 of the Indian Constitution.
- A committee constituted of 3 registered medical practitioners has to form an opinion regarding the termination of pregnancy in accordance with the Medical Termination of Pregnancy Act, 1971.
- If the Committee gives permission to terminate the pregnancy, then all the services and assistance are to be provided to the victim by the Respondent i.e. State.
- In case of termination of the pregnancy, the DNA sample of the foetus is to be kept in a sealed cover in accordance with the procedure.

Shortcomings of the POCSO Act, 2012

There are various loopholes in the procedure and implementation of the laws specified under the POCSO Act. Following are some criticisms:

- Problem with the application of the last seen theory: The last seen theory can lead to wrongful conviction in several cases and therefore, it cannot be applied without circumstantial evidence. It was held by the Supreme Court in the case of *Anjan Kumar Sarma v. State of Assam (2017)* MANU/SC/0656/2017, that the last seen theory is a weak piece of evidence and cannot be relied upon single-handedly.
- Unprepared investigation machinery: The investigation machinery in the child sexual abuse cases is not well acquainted with the procedure which leads to a faulty investigation. For instance, in the case of the *Addl. Sessions Judge, Hoingoli and Ors. v. Bhawat and Ors. (2017)*, MANU/MH/0014/2018 the High Court of Bombay acquitted the alleged accused as the frock of the victim which was in the custody of police was unsealed and therefore, the semen stains on the frock could not be relied upon for the conviction.
- Silent on consensual sexual activities: In case of sexual intercourse with consent, one of which is minor, the partner who is not minor can be prosecuted under the POCSO Act as the consent of a minor is not considered relevant under this Act.
- False complaints by children are not punishable: Section 22 of the POCSO Act provides for the punishment to the persons who file a false complaint in order to humiliate, extort, threaten or defame another person. However, a child is exempted from any such punishment which is a loophole as many people take advantage of this exemption and misuse this provision.
- Pending cases: Although, the POCSO Act specifies that “the Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence ” under Section 35(2) but the number of pending cases is rising which is creating a huge problem in making the justice mechanism effective.

•Two-finger test violates privacy and dignity: Two- finger test is administered on the victims of sexual assault while conducting their medical examination. If the vagina of a girl is capable of allowing two fingers to move freely then it is inferred that the victim has been subjected to repeated sexual intercourse. This test is conducted on the minor girls against whom any offence under the POCSO Act is committed. Although the government banned this test in the year 2012, it is still administered. In the case of *Lillu @ Rajesh and another v. State of Haryana* (2013) Neutral Citation: 2013 INSC 243; Manu ID: MANU/SC/0369/2013

, it was observed that the administration of two- finger tests breaches the right to privacy, dignity and mental integrity of a woman and hence it is unconstitutional.

Conclusion

The POCSO Act, 2012 is exhaustive legislation which aims at covering all the aspects of child sexual abuse. Amendment has been made in the Act via the Protection of Children from Sexual Offences (Amendment) Act, 2019, with which the punishments for the offences have been made more stringent.

The need of the hour is to sensitize the public regarding child sexual abuse so that there is no reluctance in reporting these crimes. Moreover, the investigating agencies should be well trained and professionals such as medical practitioners involved in the stages of investigation and trial should be efficient so as to leave any scope of negligence on their part. The POCSO Act already makes the procedure child friendly and this approach should be followed by the judicial officers, magistrates, and police officers so that the child victims could repose trust in them.

AGE OF CONSENT

Introduction

When one comes across the term ‘age of consent’, if it is an updated person, his mind will immediately go to POCSO. Although a normal citizen may not even be aware of the expansion of the abbreviation that is accorded to the “Protection of Children from Sexual Offences Act, 2012”, the term POCSO has become known everywhere in society. There has been a recent boom in the coverage that POCSO has been getting, and this is because of various factors. The judiciary also plays a part in this boom in coverage. The Chief Justice of India, D.Y. Chandrachud, himself vehemently urged the Parliament, and subsequently, the Law Commission of India, to revisit the provisions of POCSO that criminalise consensual intercourse among those aged between 16-18.

In this article, we shall also look into the history of the establishment of the age of consent in India and how the age of consent changed from millennia to millennia. We shall also look into the stance of the judiciary on the topic. The article will explore the differing age of consent in various Indian statutes, such as the Contract Act and others. This article shall look into the relationship between the age of consent and the age of marriage, and above all, this article aims to make the reader understand the delicate position of the age of consent by providing the historical and current situation of POCSO.

What is the age of consent in India

The expected answer to the question posed above would be “18 years”, nothing more, nothing less. This is not wrong or right. To clearly understand the current age of consent in India, we have to first take a look back at the implementation of the original Age of Consent Act, 1891 in India. This exercise is imperative as it helps us draw parallels regarding the socio-cultural issues that initially and inherently plague the age of consent.

History

Since the primary religion in India is Hinduism, it was logical that the customs that society practices would be based upon Hindu literature and beliefs. This is evident in the practices that were prevalent at the time. This includes but is not limited to Sathi, child marriage, etc. The initiation of the social reform movement was, in fact, to increase the legal age of marriage for Hindu girls. It was no secret that the majority of the opposition stemmed from the fear of an attack on Hinduism by reformists.

In 1884, it was Mr. Behram Balaji who took on the responsibility of taking action on the deplorable age of consent that was prevailing in India. He felt the dire need for action on the matter, and hence he published his famous “Notes” on “Infant Marriage in India” and “Enforced Widowhood” on August 15, 1884. These documents, although pure in intention, were hardly well reasoned. Malabari was heavily criticised for the extreme views he wrote on the matter and faced a lot of criticism for the baseless allegations he made.

But these issues did bring to the forefront the issues of child marriage and widowhood. Widowhood and child marriage were related for many reasons, some of which are listed below:

- The groom’s family desired to have a daughter-in-law young enough to adjust to the groom’s family (i.e., her new domestic surroundings).
- Some grooms were willing to pay a huge ‘bride price’. These were typically grooms who were old or generally considered unsuitable men.
- In some regions (Bengal), it was commonly believed that a girl should be married off at the first signs of puberty so that intercourse with her husband would happen before she became sexually active.

All these reasons led to the prevalence of child marriage, and this subsequently led to widowhood as the husbands of these young wives would be much older and, as a result, would die much earlier. The alarming statistics of widowhood were also showcased in the Census of 1881.

Even though Malabari issued such issues of grave significance, the efforts to implement the notes into legislation were rejected by an attendant resolution of His Excellency in Council. They stated that none of the injustices that he claimed were happening fell under existing civil or criminal crimes. They said that his notes should lead to the gradual increase in sensitisation that is imparted to students through education. As his pleadings fell on deaf ears, he decided to seek help from outside India, i.e., the British. When Malabari was in Britain, many other social reformers wanted to raise their issues in congruence with Malabari’s. In a desperate bid to make his ‘Notes’ more practical, it

was Dayaram Gidumal, Malabari's chief propagandist, who carried the Telang prescription to its logical conclusion; this ultimately became the 'Age of Consent Bill'.

Dayaram was successful in incorporating the earlier age of consent that was already included in the Indian Penal Code (IPC). The IPC already had an age limit of 10 years of age, below which sexual activity was considered rape. The government, based on the recommendations of the 'Notes', considered increasing the age limit to 12. This was criticised on a national level. Never before had a social issue gained this much attention; even the meetings of the INC (Indian National Congress) could not get this much attention. The opposition, led by Lokamanya Tilak, contended that education was the primary and most efficient deterrent tool, not legislation. Another compelling contention was that the government should not interfere in a religious matter.

The debate surrounding the Age of Consent Bill reached unprecedented proportions in the year 1890. When the proposal came up before the Governor General, Lord Lansdowne fittingly declared that "in cases where religious practices are inconsistent with individual safety and public peace and is unilaterally condemned by every legal perspective, it is religion and not morality which must give way."

Present scenario

As is evident from above, the age of consent is a dynamic topic that is subject to extensive deliberation and legislation every now and then. The age of consent for engaging in legal sexual activity as of right now in India is 18. Any sexual activity that takes place between individuals under the prescribed age constitutes an offence. The age bar for engaging in sexual activity is in line with the age of marriage for girls, but the age of marriage for boys is 21. Though there is an amendment pending, which is the Prohibition of Child Marriage (Amendment) Bill, 2021, it has not yet borne fruit as it has seen many delays that have been caused by the Parliamentary Committee that has been reviewing it. This committee has been repeatedly asking for time extensions.

The age of consent at which an individual can independently enter into a contract is 18 years old. The right to vote and many other privileges are conferred on a citizen at the age of 18. As for other statutes, the age of consent plays an enormous role in determining

the modus operandi of proceedings and the repercussions of breaking the law. This is evident in the latter part of this article.

Age of consent under the Criminal Law

The age of consent is dealt with extensively in criminal and civil law. This shall be discussed below about statutes concerned with the age of consent, with the help of landmark judgements.

Indian Evidence Act, 1872

Any individual who acts as a source of evidence before the court can be classified as a witness. The test of veracity and admissibility of the source of evidence is what is dealt with extensively in the Indian Evidence Act (hereinafter referred to as the Act).

Under Section 118 of the Act, any individual can be a witness to the court, provided they comprehend the questions put forth and provide rationale answers for the same. As is evident from reading this Section, it is clear that no minimum age has been set for an individual to be classified as a witness. However, an oath cannot be administered to a child under the age of 12, as per Section 4(1) of the Oaths Act, 1969.

In the landmark case of *Suresh v. the State of UP (2001)*, the SC held that the testimony of a 5-year-old can be admitted as evidence as the girl was able to comprehend the questions put forth to her and understood the underlying principle behind asking such questions to the girl. In another landmark judgement, *Himmat Sukhadeo v. State of Maharashtra (2009) 2009 INSC 656; MANU/SC/0704/2009* , the SC said that the child should be able to differentiate between what is right and what is wrong. If the child is capable of giving the evidence under oath, he must understand his obligation to the state and the sanctity of the court to which he is testifying. The SC has also very recently stated that a preliminary examination of child witnesses should also be taken before taking their evidence.

Under Section 114 of the Act, it is mandated that the evidence provided by a child witness be assessed with much greater caution than regular evidence, as a child witness is easily persuadable. The Supreme Court, in the case of *M.P. v. Ramesh (2011) Neutral Citation: 2011 INSC 221; Manu ID: MANU/SC/0255/2011*, held that the deposition of a child witness may require corroboration. However, in the case of

Suryanarayan v. State of Karnataka (2000) 2001 INSC 3; , *MANU/SC/0001/2001* the SC stated that the corroboration requirement mandated in *M.P. v. Ramesh* was a mere suggestion to exercise caution. If there are no material discrepancies in the child's deposition, no corroborative evidence is required, and the evidence can be admitted.

Indian Penal Code, 1860

The Indian Penal Code (hereinafter referred to as the IPC) lays down separate age categories under which an underage individual is prosecuted.

As per Section 82 of the IPC, nothing is a crime that is done by a child who is below 7 years of age; the latin maxim of *doli incapax* in the Indian context is squarely a product of this provision. Furthermore, as per Section 83 of the IPC, nothing is an offence which is committed by a child between the ages of 7 and 12, who has not attained sufficient maturity to comprehend the gravity of the crime he has committed and subsequently cannot comprehend the consequences of his actions. Section 361 of the IPC mandates that whoever entices any minor under the age of sixteen years of age for a male and under 18 years of age for a female or any individual of unsound mind from the care of their legal guardian is said to be committing kidnapping. The discrepancy in the ages in the above-mentioned Section is bad. Section 363 provides punishment for the above Section. Section 366 of the Act explicitly deals with inducing a minor girl to accompany any individual to a place or go from one place to another on her own, or undertaking any activity with her that is likely to force or seduce her into illicit sexual intercourse, which shall be punishable with imprisonment up to 10 years.

Criminal Procedure Code, 1973

After the passing of the Juvenile Justice (Care and Protection of Children) Act, 2000, a slew of measures have been introduced to resolve the offences of juvenile delinquents in an amicable manner. Section 27 of the Code of Criminal Procedure (CrPC) establishes jurisdiction in the case of juveniles. It states that any offence that is not punishable with capital punishment or imprisonment for life, committed by a person who, at the date when he is brought before the court, is under the age of sixteen, may

be tried by the Court of Chief Judicial Magistrate, by any court empowered under the Children Act, 1960, or by any other law for the time being in force providing for the treatment, training and rehabilitation of juvenile delinquents. The Juvenile Justice (Care and Protection of Children) Act 2015, succeeded the existing Juvenile Justice (Care and Protection of Children) Act 2000. The aim of the Act is to prosecute adolescents between the ages of 16-18 as adults for heinous crimes. The 2015 Act will also permit a Juvenile Justice Board, which would incorporate analysts and sociologists into deciding whether an adolescent criminal will be tried as an adult or not.

Age Of Consent Under The Pocso Act, 2012

Before delving into the POCSO Act, we have to first understand the current problems caused by the said Act. The POCSO Act has criminalised consensual sex among adolescents, whose nature it is to sexually experiment. As a result, the number of juvenile incarcerations has skyrocketed, and most of these are for consensual relationships.

The enactment of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act) has seen an increase in the age for consenting to sexual activities from 16 to 18 under Section 375 of the IPC. The age of consent had been 16 since the 1940's. The Criminal Law Amendment (CLA Act) of 2013 saw the expansion of the definition of rape from penile to vaginal penetration to a range of penetrative and non-penetrative sexual assaults without consent, including penetration of the vagina, anus, and urethra by the penis, objects or other body parts; penetration of the mouth with the penis; and application of the mouth to the vagina, urethra or anus without consent. The idea of the age of consent was brought to India from Britain through the implementation of the IPC. A further amendment was brought to the Act in 2019, where the minimum mandatory sentence for penetrative sexual assault and aggravated penetrative sexual assault was increased to ten years and twenty years, respectively and for aggravated sexual assault, the punishment for the remainder of the natural life of that person, fine or death. This functioned as a catalyst for the deterioration of the sexual rights of adolescents.

Data as reflected in Crime in India 2011, shows that 7112 instances of rape against children (Section 376 IPC) were reported at the all-India level, whereas data as reflected in Crime in India 2019, shows that 4977 instances of rape against children were reported at the all-India level. This decrease in numbers is attributed to the fact that Crime in India 2019 had a separate table for sexual offences committed under the POCSO Act. Crime in India 2019 denotes that 26,192 incidences of penetrative sexual assault (Section 4 of the POCSO Act) and aggravated penetrative sexual assault (Section 6 of the POCSO Act) were reported in 2019. The data clearly points to the manifold interest in sexual offences committed against minors; this could also be because of the wider definition of rape as compared to earlier.

The harsh age limit implemented in India is in stark contrast to other developed democracies like Canada and Japan. In Canada, the age of consent is 16 years, and in Japan, it is 13. In Uganda, the age of consent was raised from 14 to 18 in the 1990's to prevent rich people from having sex with young girls, as this was believed to be fueling the HIV epidemic.

All hospitals are mandated to report sexual offences to the police. Failure to do so is treated with 2 year imprisonment. This has resulted in doctors becoming hesitant to provide the necessary treatment to pregnant adolescents and victims of rape; the same goes for hospitals. This is just one of the implications of the downright deplorable provisions of POCSO that have stigmatised society to such an extent against sexual intercourse between adolescents that it has become extremely difficult for them to seek any form of help if any mishap happens.

The reasoning for increasing the age from 16 to 18 has not been explicitly mentioned in the Statement of Objects and Reasons of the POCSO Act. The government blatantly stated that they were just following the United Nations Convention on the Rights of the Child (UNCRC), which requires the State parties to undertake all appropriate measures to protect the children from any sexual assault, harassment or pornography and should protect the child from being induced into engaging in any unlawful sexual activity. A proper reasoning should have been provided for such a salient legislation that affects the lives of millions of adolescents, but all of them are left wanting.

Age Of Consent Under Contract Law

The minimum age for entering into a contract in India is 18 years. Section 11 of the Indian Contract Act stipulates the requirements for parties to enter into a contract that is not void. The very first mandate under Section 11 is that both of the contracting parties should have attained the age of majority. Section 11 lays down certain exceptions as to who cannot enter into a contract; these are minors, persons of unsound mind, and those the law specifically qualifies as exceptions. The age of majority in India has been set down in the Indian Majority Act, 1875. In it, a person is said to have attained majority when they reach 18 years of age. If a minor has a guardian or court of ward supervising him, they will have to attain the age of 21 to attain majority.

The contract entered into with a minor is no contract at all. No contractual obligations can be imposed upon the minor. There is no question of specific performance, as the contract will be void- ab-initio. Even if a minor commits perjury regarding his age and claims to be 18 at the time of entering into a contract, he cannot be implicated for any legal obligations arising out of the contract, i.e., the rule of estoppel would not apply to a minor. Needless to say, a minor cannot be a partner at a firm; they can, however, receive the benefits of the partnership. The same principle applies when minors are named in contracts by their parents or guardians; they can only reap the benefits of the contract and not be held liable. A minor cannot transfer property as per the Transfer of Property Act, 1882, but can receive property from another individual under a legal contract.

To better understand the relationship between the age of consent in POCSO and the age of majority in the Contract Law, we must understand the fundamental principle that backed the enforcement of the age bar in the Contract Act and subsequently the Indian Majority Act. The age of consent varies from time to time and region to region. Upon a glossary probe into the past of the age of consent, we see that the Barbarians set the age of majority at 15 because children were considered old enough to carry a weapon, but in ancient Sparta, it was 31. The reason for mandating the minimum age of 18 when entering a contract is to ensure that the parties to the contract understand the obligations

of the contract. This principle is also applied to the mentally handicapped, as they do not have the requisite mental capacity to assiduously fulfil the obligations of the contract. The age of consent should ideally change with time. With the advent and rapid spread of internet services, kids are being exposed to the world much quicker than before. They are receiving education and gaining knowledge about various things that they did not have access to earlier. The Government of Japan approved lowering the age of consent in 2022. This Bill is aimed at building a much stronger youth section in the country.

The same reasoning could be applied for the age of consent in POCSO too. The application of the same justification for age of consent to the POCSO Act would be totally false. This is because basic human biology plays into the POCSO Act and not the Contract Act. It is completely natural for adolescents to experiment with various sexual activities. This is not confined to the human race, as many species begin to copulate at their respective adolescent ages. On the other hand, it is unlikely for adolescents to develop an incessant need to undertake a business venture that would be legally binding or enter into any agreement that would legally implicate them.

Age Of Consent For Marriage

The age of consent in India as of the date of writing this article is 18 for females and 21 for males, as per the Special Marriage Act, 1954 and the Prohibition of Child Marriage Act, 2006. These Acts are unlike the Indian Majority Act as they are not gender-neutral. But there is a grey area on this subject. If a man has sexual intercourse with his wife (consensual or not), who is aged 15 years or more, it does not come under the purview of rape as it is marital rape and, as such, does not come under Section 375 of the IPC. This may seem bewildering, but the reason for the discrepancy mentioned above is because of personal laws that govern marriage. In Muslim personal law, a girl can enter into the contract of marriage after attaining puberty, which is generally considered to be 15. A discrepancy in the age of marriage and the age of consent for engaging in sexual activity has always existed. A contract of marriage that took place when a girl was below 18 but above 15 is not void but is voidable on the wish of the girl before she reaches the age of 18. The same can be applied in the case of boys, i.e., if the boy marries before he reaches 21. In the case of *Prema Kumari v. M. Palani (2011) MANU/TN/4777/2011*,

the family court held that the marriage was not a valid one as the wife had not completed 18 years of age, as per Section 5(iii) of the Hindu Marriage Act, 1955. The parties were hence required to nullify their marriage as per Section 13(2)(iv) of the Hindu Marriage Act. The difference in rights of a girl in seeking nullification of marriage is mentioned in Section 13(2)(iv) and is reproduced as under :

“A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age, but before attaining the age of 18. The girl who has attained 15 years of age and has got married can seek dissolution of marriage before she attains the age of 18 years by filing a petition under Section 13(2)(iv) of the Hindu Marriage Act.”

The SC has reiterated that marriage with a minor girl is not void but voidable, and upon reaching the age of maturity, it becomes a valid contract of marriage in the recent case of ***Yogesh Kumar v. Priya (2021), decided on August 26, 2021.***

Recently, a Bill was introduced in Parliament, which stirred up much controversy nationwide. This was the Prohibition of Child Marriage (Amendment) Bill, 2021, which proposes increasing the age from 18 to 21 for girls. This Bill has been subject to extensive deliberation, and hence there has been much delay in its passing. The delay has been largely attributed to the examination delay by the parliamentary committee that has been constituted to examine it. The government has stated that the bill will come into force 2 years after its notification.

Views Of The Law Commission On Age Of Consent In India

Over the decades, starting in 1980, the Law Commission of India (LCI) has given various opinions on this matter. The Law Commission, in its latest report, has also given its opinion on the matter, as was required of it. The mounting pressure on it to reconsider the age of consent was too much from the side of the courts. To understand the most recent stance of the Law Commission, we have to first examine the opinions of the Law Commission in the previous decades.

The Law Commission, in its 84th Report, recommended increasing the age of consent to 18 through the following dictum:

“2.20 The question to be considered is whether the age (of consent) should be increased to 18 years. The minimum age of marriage now laid down by law (after 1978) is 18 years for females, and the relevant clause of Section 375 should reflect this changed attitude. Since marriage with a girl below 18 years is prohibited (though it is not void as a matter of personal law), sexual intercourse with a girl below 18 years should also be prohibited.”

This opinion was given for the discrepancy in the age of consent and marriage laws to be levelled, as has been mentioned above. The commission was criminalising the sexual intercourse of adolescents with or without their consent.

Although not a law commission report, it is important that we analyse the Justice Verma Committee Report that was set up after the Nirbhaya incident in 2012 with the explicit aim of studying the position of women in different sectors of society, understanding the challenges they face, and recommending remedies through legislation or otherwise. The Justice Verma Committee was vehemently opposed to the idea of the age of consent being 18 years, as stated in the POCSO Act. This was done through the interpretation of Article 34 of the United Nations Convention on the Rights of the Child. This was rightly done, as the aim was to not criminalise consensual sex between two individuals but to stop sexual assault on children.

This brings us to the latest report of the Law Commission, which is the 283rd Report. The Report talks about bringing amendments to the POCSO Act, but it advises against altering the age of consent. The cause for it to even consider amending the existing age of consent is the urging of several high courts for improvement on the matter regarding consensual sex. The Karnataka High Court (Dharwad Bench) asked the Commission to rethink the age gap as the number of girls eloping with boys and having consensual sex was too many for the court not to take cognizance. The Madhya Pradesh High Court asked the commission to rethink the mandatory imposition of the statutory minimum sentence in cases where de facto consent is present on the part of the girl. The

Commission, in consultation with many stakeholders, including the National Commission for Protection of Child Rights, held that in the current scenario of child abuse, child trafficking and child prostitution plaguing our society, it was best to leave the age of consent debate alone, at least on the age bar. A slew of other measures were also introduced. These measures are:

- Amendment to Section 4 and Section 8 of POCSO Act: The Commission suggested providing discretion to the courts in imposing the minimum mandated imprisonment in POCSO cases provided a plethora of factors, which include but are not limited to; approval of the child, the age gap between the accused and child should not exceed 3 years, etc.
- Amendment to Section 18 of Juvenile Justice (Care and Protection of Children) Act, 2015.
- Amendment in Section 375 or 376 of the Indian Penal Code.
- The vital need to spread awareness about the laws of POCSO and the repercussions of not abiding by the law for the betterment of students has to be recognised. The hesitance of the Law Commission, even after the repeated urging of many High Courts and even the Chief Justice of India to reconsider the age of consent, is worrying. The Law Commission remains unperturbed on the matter and has missed the opportunity to take action on a matter of vital importance to society.

Difference Between Age Of Consent And Age Of Marriage

The age of consent and the age of marriage in the current Indian scenario may seem interchangeable, as there is no discrepancy in the age, at least for girls. But this is not a black and white matter as such, and there exist subtle nuances that spoil the entire idea behind the equity in the ages of consent and marriage that has been brought through by extensive legislation. There is not much to substantiate on this topic, as it has already been mentioned above, as to how personal laws play a predominant role in the age of consent conversation and how the age of consent and the age of marriage are linked to each other. Recently, the Bombay High Court remarked:

“The mere apprehension that adolescents would make an impulsive and bad decision, cannot classify them under one head and by ignoring their will and wishes. The age of consent necessarily has to be distinguished from the age of marriage as sexual acts do not happen only in the confines of marriage and not only in society, but the judicial system must take note of this important aspect.”

This clearly shows the wish of the courts to have an explicit demarcation between the age of consent and the age for marriage, or at the very least, all of the legal loopholes should be closed. The Bombay High Court was also of the opinion that ultimately this is a topic for the parliament to ponder upon, but cognizance should be taken of the cases that come before the courts, of which a huge chunk are about romantic relationships. Another trend that is on an upward slope is that fathers or relatives of the underaged girl would file a case against the girl’s partner when a mishap occurred, and by the time the case came to court, the couple would already be happily married after the parents reconciled their differences. This is because the girls that are usually ‘victims’ of these cases are usually on the verge of attaining majority, and by the time they attain majority, the proceedings of the case will begin. Therefore, sudden decisions by the relatives (primarily the father) would only work to the detriment of the girl and her family. It is clear from the lines above that the need to decrease the age of consent is of paramount importance in the pursuit of an egalitarian society.

Landmark Judgments Vis-à-vis Age Of Consent in India

There is a relative scarcity in the number of cases that have touched upon the topic of age of consent with regard to sexual intercourse. The reason for this is the nature of the age limit. As it is a subject with severe national implications and affects the lives of millions of adolescent teens, it is best left to the parliament to ponder and the court to opine on the same. There exist a lot of HC decisions on the matter, some of which are given below.

Varadarajan v. State of Madras, 1964

Neutral Citation: 1964 INSC 185; MANU/SC/0081/1964

This case, which is a landmark case in the realm of kidnapping, does not directly deal with the POCSO Act in any way; at least that's what a basic perusal of the judgement and ratio would suggest. This judgement was unequivocally linked to the 'enticement' factor that continues to affect minors. This case has by and large laid down the independence of a minor girl in taking decisions of her own. This case also clarifies the degree of persuasion that has to be carried out to formulate in the young mind of an underage individual the intent to leave her house.

In this case, the youngest daughter of S. Natarajan (the Assistant Secretary in the Department of Industries and Cooperation of the Government of Madras), called Savitri, developed close relations with a neighbour named Varadarajan. They were talking on a regular basis, and their friendship had transcended into something more. The parents, realising the gravity of the situation, sent their minor daughter to their relatives house. While at her relatives house, Savitri, on her own volition, called Varadarajan with the intent to elope. It is to be noted here that Varadarajan did not induce her to come to this decision. They both eloped and registered their marriage with the witness of Mr. P.T. Sami. Mr. Natarajan immediately lodged a complaint at the police station for kidnapping his minor daughter. The police found them, and subsequently, the case went to Madras High Court. Through a special leave petition, Varadarajan appealed the guilty verdict handed to him by the Madras High Court. The Supreme Court was staunchly of the opinion that this was not a case of kidnapping. The SC made the

following remarks; that the girl was on the verge of attaining the age of majority, was a senior college girl, and she had lived her life in a big city for her whole life and, as such, could not be equated to an unlettered girl.

This is of consequence to POCSO and age of consent in today's scenario, as the Varadarajan judgement is being used more frequently in acquitting POCSO accused's as the 'victim' would be on the verge of attaining majority and the relationship would be wholly consensual.

Recent Judicial Pronouncements Vis-à-vis Age Of Consent In India

Sabari v. State of T.N, 2019

Manu ID: MANU/SCOR/19670/2022

This was a case where the accused was prosecuted for consensual relations with a 17 year old girl. Upon the girl not supporting the prosecution's case, the Madras HC, while acquitting the accused, stated;

“Relationship invariably assumes the penal character by subjecting the boy to the rigours of the POCSO Act”, and “the boy involved in the relationship is sure to be sentenced to 7 years or 10 years as minimum imprisonment, as the case may be”, and suggests to the legislature that “on a profound consideration of the ground realities, the definition of “Child” under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18.”

Atul Mishra v. State of U.P, 2022

In a similar case, the Allahabad High Court, while dealing with an elopement case in which a child was born out of wedlock, noted that “the applicability of statutory provisions is not a mathematical exposition or its theorem. If the mathematical application of these statutes leads to disastrous effects, the onus falls upon the courts to mellow down the rigours of the provision to achieve a more meaningful and swallowable application of the statute.”

“If these teens decided to enter into a nuptial knot and now they have a baby out of this relationship, certainly the rigours of the POCSO Act would not come in their way. The girl is not sexually abused; no sexual assault was made upon her, nor has she been sexually harassed by the applicant, as contemplated by the object of POCSO Act.”

Anoop v. State of Kerala, 2022

The Kerala High Court, in the case of Anoop v. State of Kerala, laid down that:

“Unfortunately, the statute does not distinguish between the conservative concept of the term “rape” and the “sexual interactions” arising out of pure affection and biological changes. The statutes do not contemplate the biological inquisitiveness of adolescence and treat all “intrusions” on bodily autonomy, whether by consent or otherwise, as rape for certain age groups of victims.”

Conclusion

As is evident from the data presented above, the age of consent in India is a burning topic. Why the government hastily increased the age from 16 to 18 for consensual sexual relationships is unclear. The harsh sentences handed down to unsuspecting, innocent adolescents are deplorable. As is evident from the Indian Evidence Act and other Acts, a strict age bar to distinguish between what is permitted and what is not is not feasible. The principle of proportionality has to be kept in mind not only when sentencing the offender but also when enacting substantive criminal legislation. The socio-cultural issues that plagued our nation millenia ago are still influencing our nation today. The onus lies upon each and every one of us to educate the officials on the grave injustice that is happening in society in the form of violations of the rights of adolescents. It is natural for adolescents to be inquisitive and act accordingly. The High Courts have been lately taking a step in the right direction, and the author sincerely wishes the SC or the Government took immediate cognizance of the matter and did so appropriately.

Frequently Asked Questions (FAQs)

Is consensual intercourse among adolescents under the age of 18 punishable in India?

Yes, even consensual sex is prohibited under the POCSO Act of 2012.

Is POCSO gender neutral?

Yes, POCSO is gender neutral, and if both parties are minors, the one older shall be the accused.

What is the procedure for recording statements of a victim under POCSO Act?

The child's statement must be recorded at his/her place of residence or at a place of the child's choice. The statement must be recorded in the presence of the child's parents or another person of the child's choice.

Has The Age Of Marriage Been Raised To 21 For Girls?

The Bill to raise the age of marriage for girls to 21 years has not been passed yet.

Can a minor be obligated to perform under a contract?

A minor cannot be obligated for performance but can reap the benefits of the contract he enters into.

Assault under Section 7 of POCSO Act and Section 354 of IPC

Introduction

A recent judgment of *Satish v. State of Maharashtra (2020)* given by the Bombay High Court was widely disputed. A heated debate took place to determine whether 'skin-to-skin' contact would come under the purview of sexual assault. The judgment was then overruled by the Supreme Court.

This article deals with the difference between Section 7 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and Section 354 of the Indian Penal Code, 1860. It also throws light upon whether or not a flawed interpretative method was used by the High Court to decide the case and the subsequent judgment interpreting the scope of Section 7 of the POCSO Act given by the Supreme Court.

Assault under the POCSO Act

To deal with the increasing cases of child sexual assault, harassment, and pornography the POCSO Act was enacted in 2012. It is a gender-neutral law, that is, the victim and the accused can either be a male or a female. It is a victim-centered piece of legislation and focuses on protecting children's interests through every step and stage of the judicial process. They have incorporated child-friendly mechanisms for recording evidence, reporting, investigation, and conducting speedy trials in designated special courts.

Under the POCSO Act, a child is defined as any individual who has attained the age of 18 years. It elucidates different types of sexual abuse such as penetrative and non-penetrative assault, sexual harassment, and pornography.

Section 7 of the POCSO Act

Section 7 of the POCSO Act defines the ambit of sexual abuse against children. It states that "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."

Conditions for committing the offense of sexual assault under the POCSO Act

From the above provision, four essentials to constitute the offense can be determined:

1. Sexual intent of the offender,
2. Touching the private parts of the child,
3. Making the child touch their private parts or of some other individual,
4. Commits any other act that entails physical contact without penetration.

Therefore, establishing the sexual intent of the offender is vital and the other essentials would fall into place.

Assault under the Indian Penal Code

Section 354 of the Indian Penal Code

Section 354 defines assault or criminal force on a woman to outrage her modesty. The Section states that: ***“Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”***

The offense under this Section is cognizable and non-bailable in nature with the prescribed period of imprisonment and fine, triable by the Magistrate.

Conditions For Committing The Offense Of Sexual Violence Under The Indian Penal Code

Certain conditions need to be fulfilled by the prosecution to establish that the offense has been committed. The three conditions are:

The Victim Must Be A Woman

Section 354 expressly states that the aggrieved person must be a woman and the age is not expressly fixed in the provision. Therefore, it is not a gender-neutral offense and in case a man is subjected to assault or criminal force, he would not be entitled to relief under this Section since it would not be considered as an offense.

In the case of ***Girdhar Gopal v. State (1952), Manu ID- MANU / MP / 0022 / 1952*** , the constitutionality of the Section was questioned as it violates Article 14 (Right to Equality) and Article 15 (the right not to be discriminated against) of the Constitution.

The Court referred to the case of ***Raning Rawat v. State of Saurashtra, Manu ID- MANU / SC / 0041 / 1952*** , wherein, the ambit of Article 14 was interpreted. The legislature can make certainly reasonable classifications such as treating men and women differently in terms of outraging modesty, by making it assault only when it is committed against women. Therefore, the provisions of the Code cannot be said to have infringed on the rights enshrined under Articles 14 and 15.

In Girdhar Gopal's case, the Bench stated that the offense could be committed both by a man as well as a woman. The Court further stated that the pronoun 'he' used in the provision has to be read together with the definition provided by Section 8 of the IPC, wherein the pronoun 'he' refers to both male and female individuals. Therefore, the Section clearly mentions 'whoever', and hence, is applicable to everyone. It would not absolve the liability of the offender in case she is a woman.

Assault Or Use Of Criminal Force Against The Aggrieved

The onus of proof is on the prosecution to prove whether the accused has committed an act that can be classified as an assault or criminal force against the aggrieved person. The terms 'assault' and 'use of criminal force' have been defined in Sections 350 and 351 of the Penal Code respectively.

Section 350 defines criminal force as, "***Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offense, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.***"

Section 351 defines assault as, "***Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.***"

Therefore, by merely reading the provisions it can be inferred that any gesture that causes reasonable apprehension in the mind of another or using force intentionally, would amount to an offense under these provisions.

The Act Was Intentional Or Done with The Knowledge That It Would Constitute An Offense Or Outrage The Modesty Of A Woman

There are two vital aspects of the Section:

The act must be committed intentionally or with the knowledge that it would outrage the modesty of a woman

The provision clearly states that the primary ingredient of the offense is having the intention to commit the act or having the knowledge that the act would amount to outraging the modesty of an individual. It is important to prove that the accused committed the act with this intention or knowledge. It is not sufficient for the woman to feel that her modesty was outraged. 'Modesty' is a subjective term and there is no one definition that fits all. What might be offensive to one individual might not be offensive to the other individual. Therefore, the reaction of the individual is not an essential ingredient.

The terms 'outrage her modesty' and 'intending to or knowing it to be likely that he will thereby outrage her modesty' clearly indicate that it is the intention or the knowledge of the accused that needs to be scrutinized. The consequent reaction of the victim is not relevant.

The intention and knowledge of the accused cannot be directly ascertained by using the evidence at hand. It is important to look at the facts and circumstances of each and every case. It must be ascertained whether a reasonable man would think that the act committed by the offender was committed with the intention or the knowledge to outrage the modesty of the aggrieved person.

In *State of Punjab v. Major Singh*, *Manu ID- MANU/SC/0295/1966*, a landmark judgment, the prominent issue raised was whether the accused's act of injuring the private parts of a seven and half-month-old female would fall under the purview of outraging her modesty. The Supreme Court used the test of ascertaining whether the modesty of the victim was outraged from the perspective of a reasonable man. The provisions of this Section would be applicable when a reasonable man believed that the act committed is sufficient to tarnish the modesty of the victim.

The Court held that despite the victim not having developed a sense of shame and awareness of sex, she possesses modesty from her very birth. Whatever little modesty the victim had, the accused clearly had an intention to tarnish it. Therefore, he was convicted of committing the offense within the ambit of this Section.

Interpreting the term modesty

This particular Section was laid down with the objective of protecting the interests of women and normalizing decent behaviour in public. Modesty is used as an attribute of a female, irrespective of the fact whether she is mature or has acquired sufficient understanding of the negative implications of the act.

In *Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh (1995)*, **Manu ID-MANU/SC/0080/1996**, a man slapped a woman on her posterior in front of a crowd. The question raised was whether this act would constitute an offense within this Section. To interpret the word modesty, the Supreme Court referred to the definition of modesty given in the Oxford Dictionary (1993 edition). It defined modesty as “womanly propriety of behavior; scrupulous chastity of thought, speech and conduct; reserve or sense of shame proceeding from indistinctive a version to impure or coarse suggestions”.

The Court stated that the act of blemishing the modesty of a woman must be determined keeping in mind the common notions, that is, the current societal standards. It was held that the act of the offender must be such that it shocked the sense of decency of the woman.

On applying this test to the facts of the case, the Court held that the act of slapping the woman on her posterior would fall within the purview of outraging her modesty, since not only was it an insult to the sense of decency as per the current standards, but also an insult to the dignity of the woman.

Satish v. State of Maharashtra, **Manu ID: MANU/MH/0064/2021**

In this case, the accused lured the victim to his house under false pretexts of giving her guava. He pressed the victim’s breasts while trying to remove her salwar. The question

raised before the Court was whether this act would fall under the purview of sexual assault as per Section 7 of the POCSO Act.

An appeal against the Session Judge's order was heard by a single judge Nagpur Bench of the Bombay High Court. Sections 342 (punishment for wrongful confinement), 354, and 363 (punishment for kidnapping) of the Indian Penal Code were attracted.

According to Section 7 of the POCSO Act, any individual who touches the private parts of a minor or does any other act with sexual intent has committed the offense of sexual assault. The Court acquitted the accused from the charge under Section 7 and upheld the conviction of the accused under Section 354 of the IPC.

A major distinction between the offense in the two statutes is that in Section 354 of the IPC, the wrongdoer is imprisoned for a tenure of one year, whereas as per Section 7 of the POCSO Act, the punishment is of three years. The Court acquitted the accused from Section 7 due to the following three reasons:

1. The prosecution did not present the argument that the accused removed the top of the victim before molesting her.
2. The punishment must be proportional to the offense committed. Under Section 7, more stringent punishment is given, therefore, cogent evidence is required to be presented.
3. It was unclear whether the accused put his hand inside the victim's top with the objective of molesting her. So, 'skin-to-skin' contact would prevent such an act committed from being an offense under Section 7. Stating these reasons, the Court held that the accused is guilty of outraging the victim's modesty under Section 354 of the IPC.

It was argued that 'skin-to-skin' contact is necessary to constitute the offense of sexual assault under Section 7 of the POCSO Act. In the second part of the Section 'contact' was preceded by 'physical'. Therefore, it can be inferred that skin-to-skin contact is necessary. Further, under Section 354 even touching the clothes would be considered as a criminal force.

The Court asked why there is a difference being made out between ‘touch’ and ‘physical contact’. Why would the legislature use two different terms when their meaning is the same? Can it be interpreted that physical contact is less than touch?

The counsel on behalf of the accused stated that ‘physical contact’ is necessary otherwise day-to-day activities could also be criminalized. Contact is qualified by physical contact, on the other hand, touch is not.

The Court observed that different situations must be relied upon to see if this interpretation is logical. They also stated that there is no need to stretch one’s reasoning and rely on other provisions when the offense has been clearly laid down in one provision.

The Court illustrated this with the help of an example that if an individual pokes another individual with a pen, there is no skin- to-skin contact. No sexual assault can be said to have taken place according to the arguments previously stated. However, the privacy of the child along with the modesty is violated.

The Court finally held that the accused was guilty under Section 342 and 354 of the IPC and sentenced him to rigorous imprisonment for a tenure of one year and a fine of Rs. 500 which was to be paid if the accused defaults to suffer rigorous imprisonment for one month.

Why Was The Judgment Widely Disputed

The judgment was widely disputed stating that the Courts used a flawed interpretative method while addressing the issue.

In *Jagar Singh v. State of Himachal Pradesh (2014) MANU/HP/0158/2004* , the High Court of Himachal Pradesh negated the essential of skin-to- skin contact to attract Section 7 of the POCSO Act. The Section does not provide for touching the naked private parts of an individual. Even when the victim is wearing clothes, an act of touching their private parts would be enough to attract the provisions of Section 7.

In the case of *Geetha v. State of Kerala (2020) MANU/SC/2021/2019* , the High Court of Kerala set aside the bail order that was granted by the Session Court Judge on the

grounds that the gravity of the sexual crime would not be any less if the touch was through the victim's dress. Therefore, the absence of skin-to-skin contact would not be a relevant indicator of the seriousness of the crime.

In the United Kingdom, Section 79(8) of the Sexual Offences Act, 2003, defines touching. It includes touching with any body part, through anything. It particularly includes touching amounting to penetration. It can be clearly inferred that despite the victim being clothed, touching any body part would still constitute the 'touching'. It is imperative that lawmakers take note of this fact and add a similar provision in the Indian statutes to prevent such illogical interpretations in the future.

In ***Regina v. H (2005)***, it was held by the England and Wales Court of Appeal held that "where a person is wearing clothing, we consider that touching of the clothing constitutes touching for the purpose of the Section 3 offense" of the Sexual Offences Act, 2003.

The Court's unwillingness towards punishing the accused under POCSO was on the grounds of stringent punishment of three years as compared to one year under IPC. Section 42 of the POCSO Act talks about alternative punishment and states that when an act is an offense under both IPC and POCSO, the accused, if found guilty, must be punished under the act that awards greater punishment. Therefore, the Court could have punished the offender under both provisions of the POCSO as well as the IPC. Merely reading Section 42 directs the reader's attention towards the usage of the word 'shall' which makes it mandatory for the court to award more stringent punishment. But the Court used the same fact to convict the offender of punishment to a lesser degree.

In ***Lok Prasad Limboo v State of Sikkim(2019)*** MANU/SI/0100/2019, the victims were minor girls who had been groped. The Sikkim High Court held that the sentence given under both IPC and POCSO should be awarded parallelly.

Under Section 29 of the POCSO Act, the burden of proof is not on the victim but on the accused. When an individual is accused of committing an offense under Sections 3,5,7 and 9 of the POCSO Act, it is necessary that the court assumes that the accused is guilty unless the accused is able to prove his innocence.

In *Justin Renjith v. Union of India (2020) MANU/KE/3730/2020* , the Kerala High Court held the constitutionality of Section 29 on the grounds that the victim is a minor, and the occurrence of the alleged instance once established leaves it to the accused to rebut those claims. Therefore, in the case, it was established that a minor was molested but the Court's incorrect reasoning of requiring 'strict proof and serious allegations' was incorrect since the onus was on the victim to prove the guilt of the accused.

The judgment also leads to a wrong precedent as keeping 'skin- to-skin' contact as a requisite and granting immunity to those offenders who inappropriately touch a minor who is wearing clothes. It would cause a gross miscarriage of justice and the intention of the statute, that is, preventing sexual abuses against children, is undermined.

Judgment Overruled By The Supreme Court

The Supreme Court in the case of *Attorney General for India v. Satish and another (2021) MANU/SCOR/24055/2021*, heard the appeals filed by the Attorney General of India, the National Commission of Women, and the State of Maharashtra against the above-discussed judgment of the Bombay High Court.

The bench comprising of Justice Umesh Lalit, Justice S Ravindra Bhat, and Justice Bela M Trivedi held that the entire objective of having an act to protect children from sexual offenses would be destroyed if the interpretation of touch or physical act under Section 7 of the POCSO Act is constricted. The flawed interpretation of the Bombay High Court would not only impose limits on the law to safeguard the citizens from harm but would also overthrow the intention of the legislature in its entirety.

The Supreme Court stated, the reasoning in the High Court's judgment quite insensitively trivializes – indeed legitimizes – an entire range of unacceptable behavior which undermines a child's dignity and autonomy, through unwanted intrusions.

The very object of the act would be undermined in case someone touches the sexual or nonsexual parts of the body of a child with gloves, condoms, sheets, or with a cloth. The sexual intent is present but according to the Bombay High Court's interpretation, it would not amount to an offense of sexual assault under Section 7 of the POCSO Act.

The Supreme Court stated that the most important ingredient for constituting the offense of sexual assault under Section 7 of the POCSO Act is the 'sexual intent' and not the 'skin to skin' contact with the child. The prosecution is not required to prove a skin-to-skin contact to prove that the offense has taken place.

The Supreme Court held that Section 7 of the POCSO Act would cover both direct and indirect contact, that is, irrespective of whether there was skin-to-skin contact or not, an offense under this section would be constituted. The intention of the offender to touch a child inappropriately is enough to attract the provisions of this section. Therefore, the court clarified and widened the interpretation of Section 7.

Key Differences Between Section 7 Of The PocsO Act And Section 354 Of The Indian Penal Code

The case of *Satish v. State of Maharashtra* makes the distinction between the two Sections even clearer. The key differences between Section 7 of the POCSO Act and Section 354 of the Indian Penal Code are as follows:

Offense Punishable Under The Section

Section 7 of the POCSO Act deals with intentional assault with sexual intent, whereas Section 354 of the Indian Penal Code deals with outraging the modesty (not the body) of a woman.

Gender Of The Victim

Section 7 of the POCSO Act is gender-neutral, whereas Section 354 of the Indian Penal Code is women-centric.

Quantum Of Punishment

Under Section 7 read with Section 8 of the POCSO Act, the offender is 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. On the other hand, under Section 354 of the Indian Penal Code, the offender shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Sexual Intent As A Pre-requisite

Sexual intent is an essential condition under Section 7 of the POCSO Act whereas, under Section 354 of the Indian Penal Code, the sexual gratification of the accused is irrelevant.

Burden Of Proof

Under the POCSO Act, the burden of proof is on the accused. Section 29 of the POCSO Act states that “when a person is prosecuted for committing an offense of sexual assault against a minor, the special court trying the case shall presume the accused to be guilty.” On the other hand, under Section 354 of the Indian Penal Code, the burden of proof is the accuser.

Conclusion

The reasoning of enacting a separate statute with the objective of decreasing sexual crimes against children was undermined by the High Court’s interpretative methodology. The judgment could have had far-reaching negative socio-legal implications and it would be common for offenders to take advantage of the fact that privacy, bodily autonomy, and integrity could only be violated when the victim is not wearing clothes. The final decision taken by the Supreme Court was much needed and prevented the gross miscarriage of justice.

Therefore, in the future, similar situations may arise wherein both Section 7 of the POCSO Act and Section 354 of the Indian Penal Code overlap. The key differences between the two Sections must be scrutinized to ascertain what offense has been committed by the accused.