



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Can POCSO Act be Quashed - A Question Mark on the Indian Judicial System?

Gagandeep Singh Narula^a

^aCCS University, Meerut, India

Received 25 November 2022; *Accepted* 06 December 2022; *Published* 15 December 2022

It is poignant to see the barbaric incidents of sexual abuse and offences including child pornography, aggravated and penetrative sexual assaults, and brutal atrocities against minor child victims during the age in which they must be nurtured and educated effectively. The occurrence of such heinous acts has reduced to some extent after the enactment of the POCSO (The Protection of Children from Sexual Offences) Act in 2012. The act provides stringent measures to prevent children from the savage atrocities of habitual offenders and the perpetrators at a larger scale. It involves the provisions for punishment against various categories of sexual assaults and child pornography as stated under the guidelines of the POCSO Act, 2012. The article also describes the landmark judgments in the context of the POCSO Act, 2012 to ensure speedy justice for child victims. Besides this, the readers are made aware of the case laws based on the quashing of orders against the accused thus imposing the question mark on the Indian Judiciary.

Keywords: *sexual abuse, sexual assault, pocso act, penetration.*

INTRODUCTION

The incidents of exploitation dealing with child sexual abuse cases are increasing at an alarming rate nowadays. Though various laws have been passed in black and white, their implementation in the real world is creating a heavy burden on the shoulders of the Indian Government to

mitigate the heinous issues of child sexual abuse on a larger scale. A ray of hope came in 2012 when the Indian Parliament introduced the POCSO (The Protection of Children from Sexual Offences) Act¹ to protect the harassment of children against offences like sexual abuse, lustful behavior, indulgence in erotic activities, and many more. The act is gender-neutral legislation that considers a child as someone who has not attained the age of 18 years.

This act takes different types of sexual conduct and amusement acts into consideration that can be turned into an assault if a child is being abused under coercion by a person in a position of trust or authority including public officials, police authorities, or other personnel. Special courts and prosecutors are assigned to handle such cases by providing special protection and care to the child victims. A female officer is made to record the statements in cases of girl child abuse. The POCSO Act is an encapsulation of the Criminal Procedure Code (CrPc) 1973, Indian Penal Code (IPC) 1860, and Juvenil Justice Act, 2015.

Thus, the act contains everything from recording the statement of a child and medical examination to the assignment of special friendly courts. All these measures lead to the prevention of re-traumatization and the ensuing child-friendly criminal justice system. In this article, the readers will get acquainted with the guidelines and punishment provisions to be followed under the POCSO Act, 2012. Some of the landmark judgments are also discussed to get a concise view of the working of the aforementioned gender-neutral statute. In addition to this, the article also puts a question mark on the Indian Judicial System by portraying the recent case laws related to the quashing of the POCSO Act, 2012 followed by a conclusion and recommendations.

GUIDELINES TO BE FOLLOWED TO MITIGATE THE CHILD SEXUAL ABUSE

The POCSO Act, of 2012 acts as a lethal weapon to mitigate the socio-legal issues and heinous incidents of child sexual abuse and sabotage including a minor girl and boy child on a larger

¹ Protection of Children from Sexual Offences Act 2012

scale. The Supreme Court in this respect issued a set of guidelines² to pacify the incidents of sexual abuse among the masses. They are listed below:

- The courts should establish a child welfare committee³ to keep track of the complaints filed and those complaints shall be communicated to nearby police authorities within 24 hours.
- It must be ensured that the police authorities shall record the statements of the child victim in civil or casual dress to avoid the fear of interrogation⁴.
- The medical examination of the child should be done under the proper guidance of a lady specialist and legal guardian of the child victim as mentioned under Section 27 of the POCSO Act⁵.
- The complaints must be transferred to the special courts for ensuring speedy and timely justice.
- The identity of the minor should not be disclosed during the police investigation as stated in Section 23 (2) of the POCSO Act⁶. The section describes the media procedure of not disclosing the identity of a child victim including the name, address, and other particulars of the victim. If it does so, it will lead to an infringement of Article 21 of the Indian Constitution.
- The cases involving sexual abuse, harassment, atrocities, sabotage, etc. should not be held indefinitely and are disposed of within a year. Such cases must be reported under section 19⁷ of the Act to the police or Special Juvenile Unit (SJU) by any person (including the child) who has a fear or knowledge of commitment to the offence. The failure to report such offence by any person shall lead to imprisonment of up to 6 months or a fine or both under Section 21 (1) of the POCSO Act⁸. It is observed in *Dr. Maroti v The State of*

² Alok Kumar et.al, 'The Problem of child sexual abuse in India laws, legal lacuna and the bill-PCSOB' (2012) 34 (2) Journal of Indian Academy of Forensic Medicine

³ *Ibid*

⁴ *Ibid*

⁵ Protection of Children from Sexual Offences Act 2012, s 27

⁶ Protection of Children from Sexual Offences Act 2012, s 23(2)

⁷ Protection of Children from Sexual Offences Act 2012, s 19

⁸ Protection of Children from Sexual Offences Act 2012, s 21(1)

*Maharashtra*⁹ where the Bombay High Court held that non-reporting of knowledgeable sexual offences shall encourage the accused and acts as a shield against the provision of imprisonment.

- The courts should employ a translator or mediator to assist minors with special care in facing court proceedings.

PROVISIONS FOR PUNISHMENT UNDER THE POCSO ACT, 2012

The act widens the scope and definition of sexual assault by including penetrative (aggravated) and non-penetrative (aggravated) assaults under consideration. It also prescribes the following provisions related to the punishment against savage and brutal atrocities on the part of child victims.

For Penetrative Sexual Assault: The punishment for this provision is contained in Section 4 of the POCSO Act¹⁰ which states that whoever commits the offence of penetrative sexual assault against the minor child through sexual acts of penal-vaginal or penal-oral, shall be held liable for imprisonment not less than 10 years which may be extended to life imprisonment.

For Aggravated Penetrative Sexual Assault: The punishment for this provision is contained in Section 6 of the POCSO Act¹¹ which states that whoever commits the offence of aggravated penetrative sexual assault against the minor child through sexual acts of penal-vaginal or penal-oral, shall be held liable for imprisonment not less than 20 years which may be extended to life imprisonment.

For Non-Penetrative Sexual Assault: The punishment for this provision is contained in Section 8 of the POCSO Act¹² which states that whoever with sexual intention touches the vagina, penis, or breast of the victim or makes him do so to other people, shall be held liable for imprisonment not less than 3 years which may be extended to 5 years along with the fine.

⁹ *Dr. Maroti v The State of Maharashtra* (2022) LiveLaw SC 898

¹⁰ Protection of Children from Sexual Offences Act 2012, s 4

¹¹ Protection of Children from Sexual Offences Act 2012, s 6

¹² Protection of Children from Sexual Offences Act 2012, s 8

For Aggravated Non-Penetrative Sexual Assault: The punishment for this provision is contained in Section 10 of the POCSO Act¹³ which states that whoever with sexual intention touches the vagina, penis, or breast of the victim or makes him do so to other people, shall be held liable for imprisonment not less than 5 years which may be extended to 7 years along with the fine. In *Tukaram Khandare v The State of Maharashtra*¹⁴, the Bombay High Court convicted a 70-year-old man for 5 years imprisonment under Section 10 of the POCSO Act for touching the breast of a minor child of 8 years old thus contributing to non-penetrative aggravated sexual assault.

For Sexual Harassment: The punishment for this provision is contained in Section 12 of the POCSO Act¹⁵ which states that whoever commits sexual harassment against a child in any form of vulgar content or abusive gestures, shall be held liable for a maximum of 3 years imprisonment along with the fine.

For using a child for Pornographic Purposes: The punishment for this provision is contained in Section 14 of the POCSO Act¹⁶ which states that whoever uses a child for sexual gratification or represents him/her in an obscene form, shall be held liable for imprisonment not less than 5 years which may be extended to 7 years along with the fine.

A FEW LANDMARK JUDGMENTS UNDER THE POCSO ACT, 2012

In *Satish Ragde v The State of Maharashtra*¹⁷, the Bombay HC held that touching the breasts of a child or doing abusive gestures without maintaining physical contact with the victim accounts for molestation under the POCSO Act, 2012. In this judgment, the court held the accused liable for rigorous imprisonment for three years and a fine under Section 8 of the act.

In *Jarnail Singh v The State of Haryana*¹⁸, the Apex Court held that the procedure to determine the age of a child which is contrary to the Juvenile Justice rules can be solved by following the

¹³ Protection of Children from Sexual Offences Act 2012, s 10

¹⁴ *Tukaram Khandare v The State of Maharashtra* (2020) SCC Online Bom 2802

¹⁵ Protection of Children from Sexual Offences Act 2012, s 12

¹⁶ Protection of Children from Sexual Offences Act 2012, s 14

¹⁷ *Satish Ragde v The State of Maharashtra* (2021) Writ Petition (Criminal) No. 161/2020

¹⁸ *Jarnail Singh v The State of Haryana* (2013) Writ Petition (Criminal) No. 1209/2010

provisions of the POCSO act, 2012. After implementing this rule, the court convicted the accused of kidnapping and raping the minor girl's child.

In *The State of Karnataka v Shivanna*¹⁹, the court held that the recording of rape cases with a minor child is not directly covered under the POCSO Act, 2012. Such cases are to be clubbed with the provisions under section 164 (5A) of CrPc, 1973²⁰ and the victim should be presented before the magistrate within 24 hours of the sexual offence.

In *Gaya Prasad Pal @ Mukesh v The State*²¹, the appellant in Delhi High Court challenged his conviction for being termed as accused twice for the aggravated penetrative sexual assault under Section 4 of the POCSO Act, 2012. In response to this, the court gave its verdict of life imprisonment to the accused under Section 42 of the POCSO Act²² and Section 376 of the Indian Penal code, 1860²³ which is graver than punishment under Section 4 of the POCSO Act.

In *Balaji Sarjerao Kamble v The State of Maharashtra*²⁴, the court gave a landmark judgment that the evidence of a minor child cannot be ignored even if the date of the crime is not remembered or provided by the victim. The appellant was convicted of raping a minor child of 6 to 8 years and was sentenced to imprisonment of 7 years and a fine of Rs 5000 under sections 4 and 8 of the POCSO Act.

CASE ANALYSIS RELATED TO THE QUASHING OF THE POCSO ACT, 2012

When the accused is not subjected to punishment in the cases of sexual abuse, rape, and harassment against the child, and the orders are quashed based on the compromise between the parties, it imposes a question mark on the Indian Judiciary System. A few incidents are reported in the following case laws as described below:

¹⁹ *The State of Karnataka v Shivanna* (2014) Special Leave Petition (Criminal) No. 5073/2011

²⁰ Criminal Procedure Code 1973, s 164(5A)

²¹ *Gaya Prasad Pal @ Mukesh v The State* (2016) Writ Petition (Criminal) 538/2016

²² Protection of Children from Sexual Offences Act 2012, s 42

²³ Indian Penal Code 1860, s 376

²⁴ *Balaji Sarjerao Kamble v The State of Maharashtra* (2017) Writ Petition (Criminal) 28/2016

In *Mohammad Waseem Ahamad & Ors v The State of Karnataka & Anr*²⁵, the court quashed the rape and sexual harassment case against the accused that was charged under the POCSO act for having sex and impregnating his minor Muslim wife. The marriage was done under the provisions of Muslim Law which allows the girl to marry if she has attained the age of 15 years and attained puberty thus capable of delivering a child. Thus, the settlement by both parties led to the quashing of criminal proceedings.

In *Hafsal Rahman N.K. v The State Of Kerala*, an accused was charged under Sections 9 and 10 of the POCSO Act for aggravated sexual assault against a minor girl child. The case was settled between the petitioner and the respondents after an affidavit from the victim's mother which states that there was no objection to the quashing of proceedings against the accused.

In *Kundan & Anr v The State & Ors*²⁶, Delhi High Court quashed FIR No. 275/2019 against the accused for rape and a sexual offence under Section 376 of IPC and Section 6 of the POCSO Act, 2012. The court made use of its inherent powers under section 482 of CrPc, 1973²⁷ to pass such orders as required.

In *Libnus v The State of Maharashtra*²⁸, the court gave a verdict in favor of the accused stating that it is a case of sexual harassment rather than aggravated sexual assault under Sections 10 and 12 of the POCSO Act, 2012. The decision turned out to be indecisive by the Nagpur bench thus quashing the POCSO Act in the Indian judicial system.

In *Shembhalang Rynghang v The State of Meghalaya*²⁹, the counsel on the petitioner's side stated that both parties were husband and wife living together with the support of family. The minor wife got impregnated and none of them wanted to initiate proceedings under POCSO Act, 2012. Thus, the court quashed FIR, orders, and proceedings against the accused under the Special POCSO case of compromise between the parties.

²⁵ *Mohammad Waseem Ahamad v The State of Karnataka & Anr* (2022) Writ Petition (Criminal) 5917/2022

²⁶ *Kundan & Anr v The State & Ors* (2022) Writ Petition (Criminal Miscellaneous) 27/2022

²⁷ Criminal Procedure Code 1973, s 482

²⁸ *Libnus v The State of Maharashtra* (2021) Writ Petition (Criminal) 445/2020

²⁹ *Shembhalang Rynghang v The State of Meghalaya* (2022) SCC OnLine Megh 67

In *Vijayalakshmi v The State*³⁰, the adolescents were in a relationship with each other and fled away to avoid the pressure of marriage by family members. The petition was filed by the members of the minor girl child accusing the boy of sexual assault under Section 6 of the POCSO Act and Section 366 of the Indian Penal Code, 1860³¹. After analysis, the Madras High Court stated that offences in this regard are purely individual and it will not override the public interest therefore, the orders and proceedings were quashed against the accused.

AMENDMENTS DONE IN POCSO ACT, 2012

The POCSO Act, 2012 was amended in 2019 to provide more stringent provisions for the offences of sexual abuse and assault against minor child victims. Its salient features are listed below:

- The incidents of the administration of hormones or steroids provided to children to achieve puberty at earlier stages of life are now included in the category of penetrative sexual assault under the amendment act, 2019.
- The amended act, 2019 clearly defines the provisions under child pornography including a visual representation of erotic images; material either in digital or hardbound form is punishable under Section 14 of the act.
- For the commitment of a grave act of penetrative sexual assault, the accused shall be liable to the minimum punishment of 10 years which was 7 years in the preceding 2012 act.
- For the commitment of a grave act of penetrative sexual assault against a child below the age of 16 years, the accused shall be liable to the minimum punishment of 20 years which may be extended to life term imprisonment.
- For the commitment of a grave act of aggravated penetrative sexual assault by any of the public servants or the police authorities done under trust, the accused shall be liable to the minimum punishment of 20 years which was 10 years in the preceding act of 2012.

³⁰ *Vijayalakshmi v The State* (2021) SCC OnLine Mad 317

³¹ Indian Penal Code 1860, s 366

The maximum punishment under this category may be extended to the death penalty under the amended act, 2019.

CONCLUSION

The article makes the readers aware of the significance and reliability of the POCSO Act, 2012 concerning the heinous incidents of sexual abuse and assault against children. The act provides provisions for punishment under Sections 3 to 10 which deal with penetrative and non-penetrative sexual assaults. Some of the landmark judgments are also discussed to get a concise view of the working of the aforementioned gender-neutral statute. In addition to this, the article also puts a question mark on the Indian Judicial System by portraying the recent case laws related to the quashing of the FIR and orders based on a compromise under the POCSO Act, 2012.