

**STUDY ON THE WORKING OF  
SPECIAL COURTS UNDER THE POCSO ACT, 2012  
IN ASSAM**

**BY**



**CENTRE FOR CHILD AND THE LAW,  
NATIONAL LAW SCHOOL OF INDIA UNIVERSITY  
BANGALORE**

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## About the Centre for Child and the Law, National Law School of India University (CCL-NLSIU)

The Centre for Child and the Law, of the National Law School of India (CCL-NLSIU) is a specialized research centre working in the area of child rights, since 1996. The main thrust of the work is on Juvenile Justice and Child Protection, Universalisation of Quality Equitable School Education, Child Labour, Protection of Children from Sexual Offences, Justice to Children through Independent Human Rights Institutions, Right to Food, and Child Marriage. The mission of CCL NLSIU is to institutionalize a culture of respect for child rights in India.

The Juvenile Justice Programme at CCL-NLSIU engages in multi-disciplinary direct field action with children and families in the juvenile justice system, as well as multi-disciplinary research, teaching, training, and advocacy in order to positively impact policy, law and professional practice on issues concerning children and their families. The team adopts a human rights and multidisciplinary approach in general and a constructive, yet critical collaborative approach with the state.

CCL-NLSIU has been working on laws relating to child sexual abuse since 2004. One of the legal researchers in the team was a member of the Working Group constituted by the NCPCR to draft the Protection of Children from Sexual Offences Bill, 2010. More recently, a dedicated team of legal researchers have been researching and writing on the Protection of Child from Sexual Offences Act, 2012. The team has authored *Frequently Asked Questions on the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013* (2<sup>nd</sup> ed, reprint December 2016). The Hindi and Kannada translations of this publication are underway. The team also authored *Law on Child Sexual Abuse in India – Ready Reckoner for Police, Medical Personnel, Magistrates, Judges and Child Welfare Committees* (November 2015). Members of the team have also conducted capacity building programs on the POCSO Act and The Criminal Law (Amendment) Act, 2013, relevant to child sexual abuse, for judges, police, Child Welfare Committees and other stakeholders and taken lectures at programs organized by NIPCCD, Karnataka State Commission for Protection of Child Rights and other authorities/organizations.

On 29 January 2016, CCL-NLSIU published a *Report of the Study on the working of Special Courts under the POCSO Act, 2012, in Delhi* which can be accessed at <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf>

## Acknowledgments

This report has been authored by Swagata Raha, Senior Legal Researcher (Consultant), (who has authored Chapters 2, 4 and 5); with assistance from Anjali Shivanand, Legal Research Assistant, (who has authored Chapter 1). Chapter 3 has been co-authored by Ms. Raha and Ms. Shivanand.

A team comprising Ms. Raha and Ms. Shivanand, conducted the study with assistance from Priyanka Lal, Legal Research Assistant (Consultant). The report has benefited from comments by others in the Juvenile Justice team at CCL NLSIU - Arlene Manoharan, Shruthi Ramakrishnan<sup>1</sup>, Priyanka Lal, and Anuroopa Giliyal.

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Seventeen participants<sup>4</sup> participated in the consultation organized by CCL NLSIU on 1 December 2016 in Guwahati, on the preliminary findings of the study. The inputs provided by these participants, helped the team validate the findings and finalize the recommendations that emerged from the study.

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<sup>1</sup> Ms. Ramakrishnan, was a former Legal Researcher - Consultant with the Juvenile Justice team at CCL NLSIU, and had contributed to the CCL NLSIU Study of the Special Courts under the POCSO Act, 2012, in Delhi

<sup>2</sup> UTSAH (Universal Team for Social Action and Help), is based in Guwahati, Assam.

<sup>3</sup> 7 Sisters Home is a project under Asian Rural Life Development Foundation, based in Guwahati, Assam.

<sup>4</sup> List of participants include A. Kaushik, Grade 1 Judicial Officer, Assam Judicial Academy; Runumi Gogoi - Chairperson - ASCPCR; Sewali Borbora - CWC Chairperson, Dibrugarh; Geetanjali Doby, APS, DySP, CID - Assam; Ved Prakash Gautam, Child Protection Specialist, UNICEF - Assam; Miguel Queah, Founder - UTSAH; members of the ASCPS - including Ashok S, Nafisa Ali, Anamika Baishya; Dr. Renuka R; Dr. Richa Pande; Sauradeep Dey - HRLN; Adv. Rashmi Rekha; Indrajit Deka - GOLD; staff of UTSAH including Subhankar B, Afsana Y, and Bhaghyalaxmi Dutta.

## About the Study

### ***Normative Framework***

Under Section 28 of the Protection of Children from Sexual Offences Act, 2012, (POCSO Act), the State Governments should, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act. This is with a view to facilitate speedy trial. If a Session's Court has been notified as a Children's Court under the Commissions for Protection of Child Rights Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act.

The POCSO Act requires judges, prosecutors, and lawyers to modify their practice and attitudes in order to ensure that the proceedings are sensitive to the needs and rights of children. Without mandating a change in the structure of the courtroom, it requires that measures be adopted to prevent the child from being exposed to the accused while ensuring that the rights of the accused are not compromised. It requires the Central Government and State Government to take measures to ensure that government servants, police officers and other concerned persons are imparted periodic training on matters related to the implementation of the Act.

At the international level, the *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, 2005* encapsulate core good practices that can be adopted by States in accordance with domestic law and judicial procedures to, *inter alia*, "guide professionals...in their day to day practice", and to "assist and support those caring for children in dealing sensitively with child victims and witnesses of crime."<sup>5</sup> The term "professionals" has been defined to include judges, law enforcement officials, prosecutors, defence lawyers, support persons, and others in contact with child victims and witnesses of crime.<sup>6</sup> "Child-sensitive" has been defined to mean "an approach that balances the child's right to protection and that takes into account the child's individual needs and views."<sup>7</sup> In a criminal trial, the views of a child are rarely considered. The limited extent to which the views of a child are relevant is in the context of removal from custody of the family by the Child Welfare Committee (CWC) and the place where his/her statement is to be recorded. The rights and needs of a child victim, however, should be taken into account by judges, prosecutors, and others while examining a child in court.

A more elaborate definition of "child-friendly justice" can be found in the *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010*<sup>8</sup> that stipulate the ingredients of child-friendly justice before, during and after judicial proceedings. It has been defined to mean:

...justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, ... and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including

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<sup>5</sup> Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Guideline 1, paras 3(c) and 3(d) ECOSOC Resolution 2005/20. <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>

<sup>6</sup> *ibid*, Guideline 9(b).

<sup>7</sup> *ibid*, Guideline 9(d).

<sup>8</sup> Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) – edited version 31 May 2011, [http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20\\_4\\_.pdf](http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf)

the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

The aspects of “child-friendly justice” that the POCSO Act emphasizes upon are speedy trial as well modified procedures to cater to the special needs of children. It is left to individual judges to ensure that children are dealt with and questioned in an age-appropriate manner and the atmosphere is child-friendly.

### **Scope**

The Study on Special Courts established under the POCSO Act in Assam was initiated by the Centre for Child and the Law, National Law School of India University, in June 2016 to understand if these Courts were facilitating “child-friendly justice” and to identify critical issues of concern related to the implementation and interpretation of this Act. To do this, the structural and procedural compliance with the POCSO Act and Rules was examined and judgments of Special Courts were studied to map the outcomes, interpretations, and emerging trends. Though they were interviewed for the study to understand their experience in the Special Court, the study does not focus on the functioning of the police, doctors, and investigating authorities under the POCSO Act. Though these aspects are equally important, it is beyond the scope of the study.

### **Objectives**

The objectives of the study are to

1. Examine the extent to which Special Courts in Assam are “child-friendly.”
2. Examine whether the Special Courts are structurally and procedurally compliant with the POCSO Act and Rules.
3. To understand the interpretation of provisions, application of presumption, appreciation of testimony of the child, disposal rate, conviction rate, factors affecting conviction and acquittal, response to ‘romantic relationships’, compensation orders, use of medical evidence, and investigation lapses.
4. Identify gaps and challenges in the functioning of the Special Courts.
5. Identify good practices that can be adopted by Special Courts to ensure a child-friendly trial.
6. Articulate recommendations for practice guidelines and system reform based on the above.

For the purpose of this study, the term “child-friendly” in the context of Special Courts signifies the following:

- *Respect for and protection of rights of children* contained in the Indian Constitution, domestic laws, and the United Nations Convention on the Rights of the Child, 1989 (UNCRC) which was ratified by India in 1990, by all actors in contact with child victims during the trial, in an age and developmentally appropriate manner.
- *Adherence to the legal procedures* stipulated in the POCSO Act and the Criminal Law (Amendment) Act, 2013 during the trial.
- *Structural changes to the courtroom* in order to make the ambience child-friendly. Although, this is not expressly mandated in the law, the study seeks to document the initiatives, if any, taken by High Courts and State Governments to alter the design and atmosphere of these courtrooms.

## Parameters of Analysis

To analyze the child-friendliness of Special Courts, three factors were examined:

### A. Assessment of Structural Compliance in two Special Courts

1. Have Special Courts been designated?
2. Have Special Public Prosecutors (SPPs) been appointed? Are these SPPs exclusively dealing with POCSO cases?
3. Have any initiatives been taken to make the design of the courtroom child-friendly?
4. Are tools and facilities available to prevent exposure of the child to the accused?

In addition to the statutory mandate, the following were also examined:

5. Are Special Courts exclusively trying cases under the POCSO Act?
6. Is there a separate entrance for children into the courtroom so that they can avoid the crowds and exposure to the police and accused persons?
7. Is a waiting room available in all court complexes for children and their families?
8. Are toilets located in the vicinity of the courtroom?
9. Is there a separate room in which the evidence of the child can be recorded?
10. Are the courtrooms accessible to person with disabilities?

### B. Assessment of Procedural Compliance

1. Are cases coming to the Special Court directly or are they being committed by the Magistrate?
2. Are all questions to the child routed through the judge of the Special Court?
3. Are frequent breaks usually permitted by Special Courts?
4. What measures have been taken by the Judges to create a child-friendly atmosphere in the court?
5. Are children called repeatedly to court?
6. What is the extent to which aggressive questions are prohibited?
7. What measures are taken to protect the identity of the child?
8. To what extent is compensation ordered by Special Courts? What are the challenges with respect to award of compensation?
9. Is evidence recorded within 30 days?
10. What measures have been taken to prevent the exposure of the child to the accused?
11. Are trials being held *in camera*?
12. Is the assistance of experts, special educators, interpreters and translators taken?
13. Is a Support Person provided to the child?
14. What is the extent to which the trial is completed within 1 year?

Additionally, the following was also examined:

15. What is the experience of child victims before a Special Court?
16. What measures have courts taken to protect child victims from threats or intimidation by the accused?
17. Is there any linkage between the Child Welfare Committee and the Special Court?
18. Are private lawyers allowed to participate in the proceedings?
19. Is the exposure to the accused prevented at all times?
20. Is there a support gap?

### C. Assessment of Findings, Challenges and Gaps

The judgments were analyzed with a view to gather information on the following:

- Rate of conviction and acquittal and reasons for the same.



- Appreciation of testimony of children by judges.
- Rate of alleged perpetrators known/unknown to the victim and its relation to the testimony of the child and the outcome.
- Rate of cases in which the survivor and the accused were married or in a romantic relationship, testimony in such cases, and the outcome.
- Age profile of the victims/survivors and the nature of their testimony.
- Sentencing pattern and charges
- Disposal rate and the time taken to dispose cases
- Application of presumption
- Interim and final compensation being awarded by Special Courts
- Treatment of 'romantic cases' by Special Courts
- Treatment of hostile witnesses
- Treatment of medical evidence
- Age-determination
- Investigation lapses highlighted by Special Courts

### ***Research Methodology***

The principal methods adopted for the study were:

- Interviews with judges, prosecutors, lawyers, Support Persons, police officers, doctors, NGOs, JJBs, CWCs, Magistrates, children, families, and other experts involved in legal proceedings concerning child victims of sexual abuse.
- Analysis of judgments of the Special Courts to ascertain application of child-friendly procedures in determining competence of child victims, appreciating evidence, ordering compensation, and in arriving at the decision.
- RTI applications to the Hon'ble High Court and District and Sessions Court seeking information about pendency, disposal and compensation.
- RTI application to the Assam State Legal Services Authority seeking information about compensation disbursed in cases under the POCSO Act.
- Letters to all District and Sessions Judges, seeking information about the structure of the Special Court.
- Consultation with stakeholders on the provisional findings of the study.

Field interviews were carried out in July 2016 by Anjali Shivanand and Priyanka Lal; and in October 2016 by Swagata Raha, Anjali Shivanand and Priyanka Lal in Guwahati and Dibrugarh. 32 interviews were carried out with a range of stakeholders including:

- Judges of Special Courts
- State Judicial Academy
- Public Prosecutors
- Member-Secretary, State Legal Services Authority
- Member-Secretary, District Legal Services Authority
- Chairperson, State Commission for Protection of Child Rights
- Representatives of State Child Protection Society
- Chairperson/Members of Child Welfare Committees
- Principal Magistrates, Juvenile Justice Boards
- Magistrates who record statements u/s 164, CrPC

- Investigating Officers
- District Child Protection Officers
- Childline representatives
- Court staff
- Doctors in government hospitals
- NGOs and community-based organisations
- Child victims and their families
- Private advocates
- Defence lawyers
- Representatives of Kishori Clubs (adolescent girls club) in tea estates in Dibrugarh

While the voices of children who journey through the criminal justice system are vital to a study like this, ethical concerns prevented the researchers from approaching child victims and their families directly. Two children were interviewed with the assistance of NGOs providing them support. Care was taken to ensure that the child victim was interviewed in the presence of a family member/support person and the questions were asked by the person who provided support to them in the course of the case, in the presence of one researcher.

The districts of Guwahati City and Dibrugarh were selected based on the district-wise data of cases registered under the POCSO Act, 2012 between 2013 and 2015 as per which they recorded the highest and second highest number of cases, respectively.<sup>9</sup>

A census approach was adopted with respect to the analysis of judgments of the Special Courts. The team studied 172 judgments passed by Special Courts in 24 districts, from 1 January 2013 till 31 August 2016. However, no judgments were found for 2013. The judgments were downloaded from the respective District Court websites as well as <http://ecourts.gov.in>

#### **District-wise Total Number of Judgments Analysed**

S.No.	District	Number of Cases	S.No.	District	Number of Cases
1.	Barpeta	6	13.	Kamrup (Amingaon)	-
2.	Bongaigaon	1	14.	Kamrup (M)	5
3.	Cachar	15	15.	Karimganj	3
4.	Chirang	-	16.	Kokrajhar	4
5.	Darrang	3	17.	Lakhimpur	2
6.	Dhemaji	1	18.	Morigaon	14
7.	Dhubri	6	19.	Nagaon	3
8.	Dibrugarh	37	20.	Nalbari	10
9.	Goalpara	-	21.	Sivasagar	12
10.	Golaghat	3	22.	Sonitpur	12
11.	Hailakandi	-	23.	Tinsukia	16
12.	Jorhat	8	24.	Udalgiri	11
<b>Total</b>					<b>172</b>

<sup>9</sup>This data was provided by UNICEF-Assam.

Cases of four districts were inaccessible on the e-courts website. These were Chirang, Goalpara, Kamrup (Amingaon), and Hailakandi.

Letters were sent to all District and Sessions Judges seeking information about the structure of the court complex in which the Special Courts are located. Responses received from Dibrugarh, Lakhimpur, Kokrajhar, and Sonitpur, have been incorporated in the report.

A consultation on the provisional findings of the study was held in Guwahati on 1 December 2016, that was attended by 17 people. The participants represented a range of stakeholders comprising the Assam Judicial Academy, State Child Protection Society, police, doctors, Child Welfare Committees, State Commission for Protection of Child Rights, UNICEF-Assam, and NGOs. Views and insights of the participants have been incorporated into the report, along with details about issues and recommendations that were discussed.

### ***Limitations***

The researchers acknowledge the following limitations of the study:

- The study focuses only on the functioning of Special Courts, which is admittedly only one part of the criminal justice system that child victims will encounter throughout their experience with any case registered under the POCSO Act.
- The study is confined to the working of Special Courts. It also examines the manner in which Juvenile Justice Boards deal with cases under the POCSO Act, but in a limited manner.
- The analysis of the proceedings in the case have largely been dependent on the text of the final judgment of the Special Court, as the researchers were unable to witness actual court proceedings which are held *in camera*. The decisions of the JJBs were not analysed nor were bail orders passed by the Special Courts.
- Only judgments uploaded on the official website of the District Courts and <http://ecourts.gov.in> formed part of the analysis. It is indeed possible that more cases were decided during the period under the study. All reasonable efforts have however been made by the researchers to ensure that no judgment in a POCSO case during this period was excluded from the analysis.
- Finally, any errors or gaps in the data collected is inadvertent and unintentional.

## Summary of Findings

### I. Structural Compliance

The table captures the status of structural compliance of Special Courts in two court complexes in Kamrup (Metro) district and Dibrugarh district with the provisions of the POCSO Act.

Parameters of Analysis	Kamrup (Metro)	Dibrugarh
<i>Special Courts exclusively try offences under the POCSO Act, 2012</i>	X	X
<i>Special Courts are accessible to persons with disabilities</i>	X	X
<b>Designation of Special Courts under POCSO Act</b>	√	√
<b>Special Public Prosecutors appointed</b>	*	*
<b>Special Public Prosecutors exclusively try offences under the POCSO Act, 2012</b>	X	X
<i>Separate entrance for children into the courtroom</i>	X	X
<i>Separate waiting room for children and families</i>	X	X
<i>Toilet located in the vicinity of the courtroom</i>	√	√
<i>Toilets are accessible to persons with disabilities</i>	X	X
<i>Audio-visual facilities to record evidence of the child available</i>	X	X
<b>Means available to prevent exposure of the child to the accused <u>in</u> the courtroom</b>	√	√
<i>Separate room for recording the evidence of child witness</i>	**	**

\* In Assam, by a notification dated 3 August 2013<sup>10</sup>, provision was made to “temporarily” appoint the Public Prosecutor of each district to act as Special Public Prosecutor under Section 32 of the POCSO Act. In Dibrugarh, the Public Prosecutor (PP) continues to handle POCSO cases along with other criminal cases tried by the District and Sessions Court judge, while the PP in Kamrup Metro deals with heinous crimes like dacoity, murder and rape. No Special Public Prosecutors are available to try exclusively POCSO cases in Sonitpur and Kokrajhar. This is not in compliance with the POCSO Act, which requires the appointment and not designation of SPPs.

\*\* While no separate room is available to record the testimony of the child, it is usually recorded in the judge’s chamber in Kamrup Metro and Dibrugarh. Responses received from the District Courts in Sonitpur, Kokrajhar, and Lakhimpur reveal that this practice is also followed by the Special Court in these districts. This is a good practice that has been adopted by Special Courts.

<sup>10</sup>Notification No.JDJ.220/2013/62

## II. Procedural Compliance

The researchers examined the compliance of the Special Courts with Sections 33, 35, 36, 37, 38, and 40 of the POCSO Act, 2012, as well as Rule 4(7), POCSO Rules, 2012. The findings are as follows:

- **Direct cognizance by Special Court:** Section 33(1) of the POCSO Act expressly empowers the Special Court to take cognizance of an offence based on a complaint or upon a police report, without the accused being committed to it for trial. In 94 of the 172 judgments studied i.e., 54.65% cases, the matter was committed by the Magistrates to the Special Courts in breach of Section 33(1), POCSO Act. This indicates the need for intensifying the awareness about Section 33(1) among the police, Magistrates, prosecutors, as well as Special Courts.
- **Questioning Children:** Section 33(2) of the POCSO Act prohibits the Special Public Prosecutor and the defence lawyer from putting questions to the child directly. All questions during the examination-in-chief and cross-examination must be routed through the Special Court. Interviews with PP and defence lawyers in Kamrup (Metro) and Dibrugarh revealed that they pose questions to the child directly. The Special Court intervenes, if the child has not understood the question or the question is posed in an intimidating or a tricky manner. A respondent from the judicial fraternity was of the view that questions have to be asked directly by the PP or the defence lawyer without the disruptions caused by frequent communication between the defence lawyer and the judge on what the following questions should be as that would interrupt the flow.
- **Minimizing appearances in court and permitting breaks during the trial:** As per Section 33(3) of the POCSO Act, frequent breaks should be allowed to the child during trial, if necessary. Special Courts should ensure that children are not called repeatedly to testify in the court under Section 33(5). This is mostly complied with, as the members of the judiciary shared that they record the entire statement of the child in one day, in order to avoid their repeated appearance in the court. Breaks are also given if the judge deems it necessary. A defence lawyer shared that adjournments are rarely granted and Section 309 Cr.P.C is applied to avoid multiple visits of the child to the court.
- **Creation of child-friendly atmosphere:** Section 33(4) requires the Special Court to create a child-friendly atmosphere by allowing a family member, guardian, friend, or a relative, in whom the child has trust or confidence, to be present in the court. An interview with a respondent from the judiciary in Dibrugarh suggests that the Special Court exercises discretion in this respect. If the child responds in a confident manner, the parent is not allowed inside the chamber of the judge. On the other hand such person is allowed to accompany if the victim appears nervous. The parents are made to sit at a distance from the victim to ensure they do not hear what the child is saying, but they are close enough to provide emotional support. The purpose of this provision is to ensure the child is not intimidated at any point while recording the evidence. A child may feel confident initially but as questions are posed s/he may feel uncomfortable. It is therefore important that a child is always accompanied by a trusted person of their choice into the judge's chamber.
- **Protection of identity:** Section 33(7), POCSO Act requires the Special Court to protect the identity of the child during the investigation and trial. For reasons recorded in writing, the Special Court can permit disclosure if it is in the interest of the child. An explanation to section 33(7) states that the identity of the child includes information about the child's family, school, relative, neighbourhood or any information through which the identity of the child may be revealed. Of the 84 cases where the identity was revealed in one form or the other, in 39 cases

the name of the victim was not indicated in the judgment, but was mentioned in the list of prosecution witnesses accompanying the judgment. In 49 judgments, while the victim was not named, her father, mother, or other family members were named. Thus, in a total of 133 judgments (i.e, 77.32%), the identity of the victim was disclosed by either naming her or her family members.

- **Award of compensation:** Section 33(8), POCSO Act empowers the Special Court to direct payment of compensation, in addition to punishment, for physical or mental trauma caused to the child or for immediate rehabilitation. Rule 7(1), POCSO Rules states that interim compensation can be awarded by the Special Court on its own or based on an application by or on behalf of the child, at any time after the FIR has been registered. Compensation was awarded in 38 cases out of 172 cases i.e., 22.09% cases. In 16 cases i.e., 42.10% cases, the DLSA was directed to determine the quantum of compensation even though the Special Court is empowered under the POCSO Act to determine compensation. In nine cases, the Special Court directed that compensation should be paid to the victim if the fine amount is realized and hence making the receipt of compensation contingent on the convicted person's ability to pay the amount.
- **Prompt recording of evidence and disposal of case:** As per Section 35(1), POCSO Act, evidence should be recorded within 30 days of the Special Court taking cognizance of the offence, and reasons for delay (if any) should be recorded. Interviews revealed that due to practical reasons, the testimony of the child could not be recorded within the stipulated period as medical reports, charge-sheet and materials seized by the I.O were not ready and made available to the accused within this time frame. Delays have also been caused due to non-functional SJPU, lack of funds and non-availability of transport to escort the victim and accused for medical examination.

Section 35(2) states the trial should be completed within one year of the court taking cognizance of the offence. In 132 judgments (76.74%), the date on which the Special Court took cognizance was not mentioned. 50 cases i.e., 29.06% were disposed within a year of filing the FIR which implies, these cases were disposed within a year of the Special Court taking cognizance. 40.11% of cases were disposed within one to two years from date of FIR and 20.34% were disposed within two to three years from the date of FIR. Conviction was recorded in 26% of cases disposed within one year from the date of FIR, 21.73% in one to two years and 34.28% within two to three years.

- **Avoiding exposure to accused:** Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused while testifying. The Special Courts in Kamrup (Metro) and Dibrugarh record the child's statement in the judge's chamber. The child normally enters the chamber first and the accused is made to stand outside the door. Screens are used in Dibrugarh to prevent exposure of the accused to the child during recording the statement, but the accused can hear the child's testimony. The photo of the accused is shown in Dibrugarh for the purpose of identification, but it is not clear if it is followed in all cases, as one respondent stated the accused is identified in the courtroom before recording the testimony in the chamber. In Kamrup (Metro) the accused is made to stand at the back of the court hall facing the judge while the victim is made to stand in the witness box. Interviews revealed the accused and the victim may confront each other before the deposition begins. In the absence of a separate waiting room, the victim and the family wait inside the courtroom where they witness proceedings in other cases and are exposed to the courtroom atmosphere, police officials and accused persons.

- **In-camera trials:** Section 37, POCSO Act requires the Special Court to conduct the trial *in camera* and in the presence of the parents of the child or any other person in whom the child has trust or confidence. The child can also be examined in a place other than the courtroom if the Special Court deems it fit.<sup>11</sup> The testimony of the victim is recorded in the judge's chamber, in the presence of the Public Prosecutor, defence lawyer, and a parent or guardian. Other witness testimony is recorded in the open court, unless their testimony is scheduled on the same day as the victim's testimony.
- **Assistance of interpreters, experts, and special educators:** Section 38, POCSO Act, requires the Special Court to take the assistance of a qualified translator, interpreter, special educator, or a person familiar with the manner of communication of a child if it is necessary. It was identified through interviews that no such list exists, and if any such situation arises the Special Court intends to take the assistance of parents or guardians or any person in the courtroom aware of the language. In *State v. Kusbram Medhi*<sup>12</sup>, a physically disabled victim did not mention the details about the actual sexual assault but stated that she feared darkness in the house and got frightened with small incidents. It is possible that the services of special educator or psychologist could have benefited the prosecution case.
- **Assistance of private legal practitioners:** Section 40, POCSO Act, recognizes the right of the family or guardian of the child to take assistance of a legal counsel of their choice in proceedings under the POCSO Act. The Legal Services Authority is required to provide them with a lawyer in case they are unable to afford one. As per the interview with the DLSAs in Guwahati and Dibrugarh, no Legal Aid Lawyer has been provided to child victims of POCSO cases.
- **Appointment of Support Persons:** According to Rule 4(7) POCSO Rules, 2012, the CWC may provide a support person to provide assistance to the child throughout the process of investigation and trial. The interviews revealed that no support person has been present with the child in the court in any of the cases and a panel of support persons is not available. The CWC in Kamrup (Metro) connects children to NGO's running residential institutions for child victims of sexual abuse. Village Defence Organisation (VDO), a statutory authority in Assam conceived in 1949, assist the police in maintenance of law and order, peace and tranquility in the State<sup>13</sup>. In few POCSO cases in Dibrugarh, members of the Village Defence Party under the VDO, bring the families to police station for lodging the FIR

### III. Findings based on Judgment Analysis

A snapshot of the key findings that emerged from an analysis of the judgments is as follows:

#### Profile of Informants

- The FIR was lodged primarily by mothers, fathers and victims. In two cases the FIR was lodged by the Chairperson of the CWC and an activist.

#### Sex profile of the victim and accused

- Of the 178 victims, 98.87% of cases involved a female victim, whereas only 1.12% of the cases involved a male victim.

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<sup>11</sup> Proviso to Section 37, POCSO Act, 2012.

<sup>12</sup>Sess. Spl. Case No.28/2015 decided on 16.05.2016.

<sup>13</sup>Assam Police, VDO, <http://assampolice.gov.in/departments/vdo/vdo.php>

- Of the 188 accused persons, 97% of the accused were male while the remaining 3% were female.

### **Pregnant victim**

- The victim was pregnant in 15 cases when the FIR was registered. Pregnant victims testified against the accused in nine cases and turned hostile in six cases. Conviction was awarded in five cases and in three cases the testimony was found unreliable. Aggravated penetrative sexual assault was filed in seven cases and the remaining cases failed to reflect the aggravated nature of offence.

### **Age profile of the victim**

- In 50.58% of cases, age was determined by way of medical examination that included physical, dental, and secondary sexual characteristics.
- Among the 85.46% of cases where the age was specified, 63.81% of cases involved victims between the age group of 12 to 18 years.
- In 33.55% of cases, the victim was below 12 years.
- The 12 to 15 age group formed the largest group, consisting of 40% of the cases (71 cases); followed by the 16 to 18 age group, which comprised 14% of the cases (26 cases). Children below 5 years constituted only 7% of the total victims.
- In 11 cases, whether or not the victim was a minor when the alleged offence was committed was contested. In all these cases, the victim claimed to be in a romantic relationship with or married to the accused.

### **Conviction rate and factors affecting conviction**

- Conviction was awarded in 42 cases under the POCSO Act between 2014 and August 2016 and the large majority (i.e. 130 cases) ended in acquittal. This pegs the rate of conviction at 24.41%. The conviction rate in 2015 was 20.93%, well below the national conviction rate of 41.9%.<sup>14</sup> Out of the 82 cases decided between January - August 2016, the conviction rate was 25.60%
- In 10 cases, the accused was convicted under IPC and the POCSO Act.
- In nine cases, the accused was acquitted under the POCSO Act but convicted under the IPC. The principal reason for the same is the absence of the ingredients necessary to constitute the offence or establish that the victim was a minor.
- Majority of convictions were recorded in cases in which the judges found the testimony of the victim/prosecutrix or eye-witnesses and the corroborative evidence consistent.
- Conviction was also awarded in cases where the accused failed to discharge the burden of proof.
- The prosecutrix/victim turned hostile in 32% of the cases (57 cases) and testified against the accused in 91 cases i.e., 51% cases. In 9 cases, the prosecutrix/victim did not appear or testify in court.
- Of the 91 children who testified against the accused, the testimony of 37 children was found unreliable (i.e., 40.65%), while that of 54 cases (i.e., 59.34%) were found reliable.

### **Factors affecting acquittal**

- The accused was acquitted in all cases in which the victim turned hostile. In 44.44% of the cases in which the victim turned hostile, the testimony was recorded a year after the incident or

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<sup>14</sup> National Crime Records Bureau, *Crime in India -2015*, Table No. 6.4. Disposal of Crimes Committed against Children Cases by Courts during 2015.



after it was reported. Victims turned hostile on the point of offence, point of identity and point of age.

- Cases also ended in acquittal when the medical evidence did not corroborate the testimony of the victim, the ingredients of the offence were not established, the parties compromised, or the prosecution failed to establish the victim was below 18 years.

### **Charges**

- Charges of penetrative sexual assault were framed in 83 cases (48%), aggravated penetrative sexual assault in 27 cases (15%), sexual assault in 45 cases (26%), aggravated sexual assault in 10 cases (6%), and sexual harassment in nine cases (5%). Charges were also framed under Sections 14, 17, 18 of the POCSO Act.
- In 95 cases i.e. 55.23%, charges were framed under POCSO and IPC, of which rape charges were framed in 35 cases (37%), sexual harassment charges in 13 cases (14%) and kidnapping charges in 39 cases (41%).
- No case of sexual assault or penetrative sexual assault by a police officer, member of the armed forces, or management or staff of child care homes was decided by the Special Courts during the period under study.

### **Sentencing Pattern**

- Out of the 42 cases that resulted in conviction under the POCSO Act, the accused was sentenced under the POCSO Act in 37 (88.09%) cases.
- The accused was released on probation in three cases and was sentenced under IPC and IT Act in one case each.
- Sentences were passed under 17 cases of penetrative sexual assault; four cases of aggravated penetrative sexual assault; 13 cases of sexual assault; two cases of sexual harassment and one case of attempt to commit penetrative sexual assault.
- In 30 cases, the minimum mandatory sentence under the POCSO Act was imposed. In four cases the convict was sentenced between the minimum and maximum sentence provided for under the Act. Maximum prescribed punishment was ordered in two cases where the accused was convicted under penetrative sexual assault and aggravated penetrative sexual assault. In one case the convict was sentenced to a period already undergone in custody.
- Fine was imposed in all cases where the convict was sentenced under the POCSO Act.

### **Profile of the accused and its implication on testimony of the victim and outcome of the case**

- The accused was known to the victim in 78% cases, and to a stranger in 10% of the cases. His profile was not specified in 12 % cases.
- In cases where the accused was known to the victim, the accused was an employer, teacher, father/stepfather/mother, husband, boyfriend, relative, acquaintance and neighbor.
- As regards numbers, the acquaintances constituted the largest group (28%), followed by neighbor (24%). Relatives also formed a significant proportion of accused known to the victim (16%), which included cousins, uncles, and a brother-in-law. Acquaintances included person from neighbouring village, videographer at sister's wedding, shopkeeper, husband's friend, former boyfriend, friend, Imam of mosque, employer, and a daily wage earner in the victim's house.
- In 20% of cases, the victim stated that she was in a relationship with the accused or married to him. In all the cases where the victim was married to the accused, she admitted the relationship and neither testified against the accused nor turned hostile. In 27 cases, the prosecutrix admitted she was in love with the accused; and out of these, in five cases she turned hostile and

in three cases she testified against the accused and in 19 cases she merely admitted the relationship and did not say anything else.

- Conviction was zero in cases where the accused was married to the victim; followed by boyfriend (12%), parent (14%), teacher (20%), relative (21%) and stranger (21%).
- Conviction was highest in cases where the accused was an acquaintance and neighbor (32% each), followed by relative and stranger (21% each).
- The highest percentage of cases in which the victim turned hostile were those in which the accused was a teacher (56%). This was followed by cases in which the accused was an acquaintance (43%), relative (42%), parent (40%) and stranger (40%).
- The highest number of cases in which the victim testified against the accused were in cases where the accused was a neighbor (78%), stranger (60%), father/step-father (60%), acquaintance (57%) and relative (53%).

### **Application of Presumption**

- Presumption was expressly applied in 19 cases and conviction was recorded in 16 of these cases.
- Presumption was referred to in three cases, but was not applied because the victim's statements were found unreliable or the prosecution failed to establish the offence.

### **Outcomes in 'romantic cases'**

For the purpose of the study, 'romantic' cases refer to cases in which the victim claimed to be in a relationship with the accused.

- Of the 27 cases in which the victim was admittedly in a relationship with the accused, in 14 cases, charges under Section 366 and 366A IPC were filed, in addition to that under the POCSO Act.
- In five cases, the victim was pregnant when the FIR was lodged and in 11 cases she was 'married' to the accused. Convictions resulted in two cases and acquittals in 25 cases.
- Conviction was awarded in only two cases in which the offence was established and it was proved the victim was a minor. In both cases, the accused had sexual intercourse with the victim under the promise to marry her.
- The accused was acquitted in the remaining 25 cases, as the ingredients of the offence were not established, victim was not a minor, victim had reached the 'age of discretion,' or the victim turned hostile and married the accused.

### **Special Courts response to delay in filing FIR**

- Delays in filing FIR were mainly because the offence was reported after it was discovered the victim was pregnant; or the complainants chose to settle the matter through a non-formal system. Only when the matter was not solved amicably, was the offence then reported.

### **Consideration of Medical Evidence**

- In several cases the medical examination report corroborated the testimony of the victim and resulted in conviction.
- Cases where medical reports have confirmed the act of sexual assault have automatically not led to conviction, more so in cases where the testimony of the victim and other witnesses was inconsistent or unreliable, or the prosecution failed to establish the case.
- Few cases have resulted in acquittal as the medical evidence did not corroborate the testimony of the victim.

#### **IV. Challenges and Issues**

The challenges that emerged based on the interviews and analysis of judgments are as follows:

##### **Institutionalization of children before recording of statement u/s 164 CrPC**

Interviews with stakeholders revealed- the magistrate directs that the child should be placed in State Home for Women for 'reflection' when they are produced to record the Section 164 Code of Criminal Procedure (CrPC) statement. The child in this situation is removed from the custody of the parents or child care institution and subsequently the statement of the child is recorded after three days of 'reflection'. In some instances, the child who was placed by the CWC in a Children's Home, was removed from there and sent to the State Home. This practice illustrates a deep disconnect between the child protection system and the criminal justice system that results in the unnecessary institutionalization of child victims under the guise of giving them time to 'reflect'.

This practice also contradicts the Supreme Court's ruling in *State of Karnataka v. Shivanna*,<sup>15</sup> which requires the police to take the victim of a sexual offence within 24 hours to any Metropolitan/Judicial Magistrate (and preferably a lady) for the purpose of recording the statement under Section 164, CrPC. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate. Section 164(5A)(a) of the CrPC also requires Judicial Magistrates to record the statement of a victim of any sexual offence as soon as the commission of the offence is brought to the notice of the police.

Wanton institutionalization amounts to harassment of the victim, who is detained for no fault of her own and is separated from her family or a setting that she is familiar with and in which she can receive better care and protection. It offends the protection against arbitrary deprivation of liberty and detention as a measure of last resort enshrined in Article 37(b) of the UN Convention on the Rights of the Child (UNCRC) as well as the principle of institutionalization as a measure of last resort under Section 3(xiii) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJAct). The Magistrates also do not seem to consider whether it would be in the best interest of the child to separate her from her parents or guardian or remove her from the Children's Home.

##### **Gaps in age-determination:**

- In majority of cases, birth certificates or other documents were not available to establish the victim's date of birth. This is pertinent to ensure the child has access to justice and rights and it is entirely contingent on her/his status as a "child". Medical tests were the default method to determine age in 87 cases i.e., 50.58%.
- Margin of error in medical examination conducted to determine age have been interpreted to acquit the accused in some cases and convict him in other cases. In few cases where the victim admitted the relationship, the margin of error was considered on the higher side. Special Courts have therefore been found to have adhered to different approaches based on the facts of the case.
- In *State v Md. Abdul Kalam*<sup>16</sup>, the Special Court considered the margin of error on the lower side stating that if the benefit of doubt of age variation is given to the accused in POCSO cases, any child who does not possess a birth certificate and who is above 16 years, cannot get justice under the provisions of POCSO Act.

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<sup>15</sup> SLP (Crl.) NO. 5073/2011. Dated 25.04.2014

<sup>16</sup> Special (POCSO) Case no. 23 of 2015 decided on 10.03.2016

## Issues related to appreciation of testimony of victims

In *State v. Krishna Sabu*<sup>17</sup>, the accused, a neighbor, was acquitted of committing rape on a girl aged 15 years (16-18 years as per medical examination) who became pregnant as a result of the assault. The FIR was filed after the accused failed to pay Rs.10,000 that he had agreed to pay. The matter came to light only after the girl missed her period and told her mother. The Special Court observed:

It is hard to believe that accused, who was known to the victim before the incident, will enter in her house and commit rape on the victim, in evening hours and victim will not raise alarm for her help when she admitted in her evidence that there are houses of many people near her house. Further, there is no evidence that she resisted the alleged rape by the accused. Victim in her evidence did not state sustaining of any injury on her person as a result of resistance of rape on her person. No doubt, in a rape case, accused can be convicted on the sole testimony of the victim but it must be trustworthy, cogent, reliable and it should inspire confidence before same can be acted upon.

This is a problematic ruling, as primacy was given to the absence of injury/resistance over the clear testimony of the victim. The victim had been gagged by the accused in this case and yet the Special Court expected her to raise an alarm. The Special Court appears to have imported the archaic notion of resistance attached to rape under Section 375, IPC even though it has been displaced by the Criminal Law (Amendment) Act, 2013 which clarifies that “a woman who does not physically resist to the act of penetration shall not by that reason only of that fact, be regarded as consenting to the sexual activity.” This judgment also portrays a poor appreciation of the provisions of the POCSO Act, under which the consent of a person below 18 years is not a relevant factor.

## Gaps in the award of compensation

- Compensation was ordered in 38 cases and the DLSA was directed to determine the quantum in 16 of these cases. This is an issue as the DLSA is then required to conduct another assessment to determine loss and injury, resulting in further delay, defeating the purpose of providing timely relief to the victim.
- Interim compensation has not been awarded except in one case, despite it being crucial for immediate rehabilitation and relief to the child victim.
- Compensation was awarded in only four out of the 15 cases in which the victim had become pregnant as a result of penetrative sexual assault.

## Investigation Lapses

- Lapses in seizing the required materials by the police officials were noted by the Special Court. It emerged during the interview that police sometimes tell the parents that the child's garments are not required.
- In several cases the police failed to collect documents that would establish the age of the child. Interview with the child forms an important part of the prosecution case. In certain cases the Special Court has acquitted the accused due to omission of material facts by the victim in the Section 161 CrPC statement, which were stated in their testimony in court. While in some cases, the testimony may genuinely be unreliable, the need for vigorous training to the police on interviewing child victims cannot be ignored. A child may not feel comfortable in sharing information immediately after a traumatic incident. The setting, tone, and how questions are framed are all very relevant in gathering information from children.

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<sup>17</sup> G.R. Case No. 870 of 2014 decided on 27.07.2016.

### **Filing of incorrect charges**

- In 15 out of 19 cases, where the accused was a relative, the relevant aggravated provisions were not charged.
- Of the 15 cases where the child became pregnant as a consequence of the offence, in 8 cases the charges did not reflect the aggravated nature of the offence.
- Of the 44 cases in which the age of the victim was undisputedly below 12 years, in 31 cases the charges did not reflect the aggravated nature of the offence and were filed under penetrative sexual assault or sexual assault.

### **Support Gap**

- The lack of support system was highlighted during the interview with respondents from Kamrup (Metro) and Dibrugarh. A list of support persons had not been prepared by the DCPU.
- Public Prosecutors must understand the distinction between preparing a child for testimony and tutoring. Most often the PP's refuse to meet the child on the assumption that the defence will allege that the child has been tutored.

### **Hostile Victims**

- 32% of the victims in the cases analyzed turned hostile while testifying before the Special Court.
- In 44.44% of the cases in which the victim turned hostile, the testimony began a year after the incident took place or was reported.
- Respondents stated that delay in completion of trial contributed to victims turning hostile and stressed on the need to ensure speedy trials.

### **Challenges posed by romantic relationships between the victim and the accused**

- The varied approach of the Special Courts in romantic cases has been a challenge. Factors such as grooming, age gap between the victim and the accused, age of the victim, or an offer of marriage to evade punishment, are rarely considered while acquitting the accused.
- The unfairness of treating the girl as a victim and the boy involved in the case as an alleged offender was highlighted by some respondents.

### **Structural gaps and challenges posed jurisdiction of the Special Court**

- The Special Public Prosecutors and the Special Courts are not exclusively dealing with POCSO cases.
- In the absence of waiting room and separate entrance for children, most child victims not only encounter the accused in their own case, but also the accused who are allegedly involved in other cases while waiting to testify. This is indeed a very intimidating experience for anyone, leave alone a child.

### **Procedural Gaps**

- Committals took place in 54.65% cases, even though the POCSO Act requires Special Courts to take direct cognizance.
- Questions are posed by the defence lawyer and the PP directly to the child in most cases.
- No formal orientation is given to children or their families about the procedures nor is their queries addressed.
- Support Persons are rarely assigned to children and there is little awareness of the vital service that they can provide to victims.

- There is no reference to interim compensation except in one case.
- Identity of the victims was poorly protected as 77.32% victims were identified in the judgment.
- Evidence was rarely recorded within 30 days and the disposal time of one year was met in only 29% cases

### **Other issues**

- Probation was ordered in cases of penetrative sexual assault and aggravated penetrative sexual assault even though the POCSO Act does not prescribe the same.
- In certain cases the complainants have approached the *gaonbura* (village head), tea estate manager, *bichar* (meeting) before formally filing the complaint. These complaints have been filed only if the settlement was not amicable. It emerged during the interview, that families are pressurized to compromise. In cases where the girl is pregnant, the families inevitably compromise and get her married to the perpetrator. While the community is undoubtedly a source of strength in most parts of Assam, in cases of sexual violence, there is a definite need to build awareness about the law, restorative justice principles, and the criminal justice system.
- The court complexes are not disabled friendly. Minimal steps have been taken to identify interpreter, translators, special educators and experts.
- There is no separate entrance to the waiting room for child victims attending JJB proceedings and no means to prevent confrontation between the child victim and child alleged to be in conflict with law (CICL).
- The Child Welfare Officer (CWO), Probation officer (PO) and other social workers face hostility in the community while preparing Social Investigation Reports.
- The functionaries responsible for preparing SIRs do not have adequate transport facilities to enable them to access the victim's house located in tea garden areas.

## Chapter I. Structural Compliance

The POCSO Act prescribes structural aspects of the courtroom in a limited way. It requires the designation of Special Courts, appointment of Special Public Prosecutors, and prescribes some tools that should be available to prevent the exposure of the child victim to the accused at the time of evidence. With respect to the ambience of the courtroom, the POCSO Act vests the Special Courts with the responsibility of ensuring that it is child-friendly. The sections below capture the extent to which the Special Courts in Kamrup (Metro) and Dibrugarh were compliant with the provisions relevant to structure under the POCSO Act.

### 1.1. Establishment of Special Courts

According to Section 28(1), POCSO Act, State Governments should, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act, to facilitate speedy trial. However, if a Sessions Court has been notified as a Children’s Court under the Commissions for Protection of Child Rights Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act.<sup>18</sup>

In Assam, by a notification dated 12 July 2013<sup>19</sup>, the Governor of Assam, in consultation with the Chief Justice of Gauhati High Court, designated the Court of District and Sessions Judge in each Judicial District as a “Special Court” to try offences under POCSO Act, 2012.

The POCSO Act does not expressly require Special Courts to exclusively deal with offences under the POCSO Act or offences against children. In Kamrup (Metro), the District and Sessions Court deals with cases under POCSO Act along with cases of civil and criminal nature, such as title appeal, Railway Property (Unlawful Possession) Act, 1966, Arms Act. 1959 and adoption under the JJ Act, to name a few. The District and Sessions Court in Dibrugarh deals with divorce matters, motor accident claims, probate of wills and other criminal cases, in addition to cases under the POCSO Act.

Responses to a written questionnaire from three other districts revealed that in Sonitpur, the District and Sessions Court deals with criminal revision matters and POCSO cases; and in Lakhimpur, the District and Sessions Court, deals with other cases as well. In Kokrajhar, the Special Court tries only cases under the POCSO Act.

In Kamrup (Metro) and Dibrugarh, no specific days have been assigned to hear POCSO cases and the matters are heard on all working days.

### 1.2. Appointment of Special Public Prosecutors

All cases before the Special Court have to be prosecuted by a Special Public Prosecutor (SPP). According to Section 32(1), State Government should appoint a SPP “for conducting cases *only* under the provisions of [POCSO] Act.” Advocates with a minimum of seven years practice are eligible to be appointed as an SPP. The language of the provision clearly suggests that the SPPs must exclusively handle POCSO cases.

In Assam, by a notification dated 3 August 2013<sup>20</sup>, provision was made to “temporarily” appoint the Public Prosecutor of each district to act as Special Public Prosecutor under Section 32,

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<sup>18</sup> Section 28(2), POCSO Act, 2012.

<sup>19</sup>Notification No.JDJ:220/2013/43

<sup>20</sup>Notification No.JDJ.220/2013/62

POCSO Act. In Dibrugarh, the Public Prosecutor (PP) continues to handle POCSO cases along with other criminal cases tried by the District and Sessions Court judge, while the PP in Kamrup Metro deals with heinous crimes like dacoity, murder and rape. No dedicated Special Public Prosecutors are available to try only POCSO cases in Sonitpur and Kokrajhar. This is not in compliance with the POCSO Act, which requires the ‘appointment’ and not ‘designation’ of SPPs.

### **1.3. Design of the courtroom**

According to Section 33(4), POCSO Act, the “child-friendly atmosphere” of the courtroom can be created “by allowing a family member, a guardian, a friend or relative, in whom the child has trust or confidence, to be present in the court.” This is a narrow construction of “child-friendly atmosphere” and bears no reference to the physical dimension of the courtroom or the behavioural modifications required to ensure that the child’s interaction with the criminal justice system is child-friendly.

In Kamrup(Metro) and Dibrugarh, there is no separate waiting room for child victims and their family members. A respondent from the judiciary in Dibrugarh shared it was difficult to implement child friendly measures as provided in the Karkardoma Special Court in Delhi, due to lack of infrastructure. There are no separate entrances to these courtrooms and the child victim has to navigate the crowds and access the courtroom like any other person. A child victim and her mother interviewed for the study shared that they were frightened by the courtroom atmosphere and were intimidated when faced with people in handcuffs.

While no separate room is available to record the testimony of the child, it is usually recorded in the judge’s chamber in Kamrup (Metro) and Dibrugarh. Responses received from the District Courts in Sonitpur, Kokrajhar, and Lakhimpur reveal that this practice is also followed by the Special Court in these districts. This is a good practice that has been adopted by Special Courts.

The mother of a child victim who had accompanied her to the Special Court in Kamrup (Metro) shared that there was a common washroom for the both males and females, and it was not clean.

As regards being disabled friendly, the court halls in both the districts are located on the ground floor, with three to four steps to enter the court hall. The Sessions and District Courts complexes in Kamrup (Metro) and Dibrugarh did not have any ramps that could enable access of persons with physical disabilities to the court hall.

Visits were also made to the Juvenile Justice Boards (JJBs) in Kamrup (Metro) and Dibrugarh, before whom matters involving a child alleged to have committed an offence will lie. Though a provision has been made for a waiting room in Kamrup (Metro), it is common for both children alleged to be in conflict with the law, (CACL) children in need of care and protection, (CINCP) and child victims. This is because both the CWC and JJB are in the same building. There are no separate entrances for a child victim and no measures appear to have been undertaken to ensure that the child victim is not exposed to the child alleged to be in conflict with law during the course of the proceedings. One respondent from a JJB stated it was not possible to make such arrangements, as the proceedings are conducted in a small room. In Dibrugarh, no provision has been made for a waiting room in the district and child victims, CNCP and CACL wait outside the proceedings room.

### **1.4. Tools and facilities to record testimony and prevent exposure**

Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused at the time of recording the evidence and for this purpose it can record the evidence



using video conferencing, single visibility mirrors or curtains or any other device. However, such arrangements have not always been made in courts. In an interview with a respondent from the judiciary in Kamrup(Metro) it emerged that “the accused is not called to the chamber when the child’s statement is being recorded”, the mother of a child victim also reiterated the point that during her daughter’s chief examination, the accused was not present in the judge’s chamber. This practice will interfere with the right of the accused to hear the child’s statement under Section 36(1), POCSO Act. In Dibrugarh, 2 respondents stated that the accused is made to stand outside the judge’s chamber when the statement of the child is recorded inside the chamber. A curtain is drawn to ensure the child does not encounter the accused while providing the statement. See Section 2.8 for more details.

**Table No.1.1. Status of Structural Compliance of Special Court under the POCSO Act, 2012 in Kamrup (Metro) and Dibrugarh**

The table below captures the status of structural compliance of Special Courts in the two court complexes i.e., in Kamrup (Metro) and Dibrugarh, with the POCSO Act. While the points in italics are not statutorily mandated, they were included to highlight aspects of structure that may have a bearing on a child victim’s experience in the court. An explanation of the symbols is contained in the sections above.

Parameters of Analysis	Kamrup (Metro)	Dibrugarh
<i>Special Courts exclusively try offences under the POCSO Act, 2012</i>	X	X
<i>Special Courts are accessible to persons with disabilities</i>	X	X
Designation of Special Courts under POCSO Act	√	√
Special Public Prosecutors appointed	*	*
Special Public Prosecutors exclusively try offences under the POCSO Act, 2012	X	X
<i>Separate entrance for children into the courtroom</i>	X	X
<i>Separate waiting room for children and families</i>	X	X
<i>Toilet located in the vicinity of the courtroom</i>	√	√
<i>Toilets are accessible to persons with disabilities</i>	X	X
<i>Audio-visual facilities to record evidence of the child available</i>	X	X
Means available to prevent exposure of the child to the accused <u>in</u> the courtroom	√	√
<i>Separate room for recording the evidence of child witness</i>	*	*

“It is difficult to have any child-friendly measures here, due to lack of infrastructure. You must have seen in Delhi court, Karkardoma, they have a waiting room with teddy bear and Pepsi. They can afford to do that, but it is not possible in such small places.”

- Respondent from judiciary

## Chapter II. Procedural Compliance

The POCSO Act outlines in detail the procedure that must be adhered to by Special Courts while trying sexual offences under the Act. The Special Court can take up the case directly without it being committed by the Magistrate Court. Questions to the child have to be put by the judge during the hearing on evidence. The Special Court has been vested with the responsibility of ensuring that the proceedings are *child friendly*. The Act does not explain the term ‘child-friendly’, but has introduced several procedures aimed at making a child comfortable in court. For instance, video conferencing, curtains or one-way mirror should be used to prevent the child from seeing the accused while child’s evidence is being recorded. Further, the child is entitled to have a parent, guardian, or any other person whom she or he trusts to be present during the recording of the evidence. The child must be questioned in a child friendly manner. The court has to ensure that child is not called repeatedly to testify in court. The child’s identity has to be protected throughout the proceedings. The permission to disclose the identity of the child must be given only if it is in her/his best interest. The trial should be held *in camera* and the matter should be disposed within one year, as far as possible.

The sections below detail the findings on procedural compliance based on judgment analysis and interactions with stakeholders.

### 2.1. Direct cognizance by Special Court

As per the CrPC, unless it is expressly provided for in the CrPC or any other law in force, cases cannot lie directly before the Sessions Court and have to be committed to it by a Magistrate for cognizance. Section 33(1), POCSO Act, expressly empowers the Special Court to take cognizance of an offence based on a complaint or upon a police report, without the accused being committed to it for trial. Therefore, the police must bring the matter directly before the Special Court instead of initiating committal proceedings before the Magistrate. This is in furtherance of the objective of facilitating speedy trial of sexual offences against children, as committal proceedings will only delay trial.

In 94 of the 172 judgments studied, i.e. 54.65% cases, the matter was committed by the Magistrate to the Special Courts in breach of Section 33(1), POCSO Act. This points to the need for intensifying the awareness about Section 33(1) among the police, Magistrates, prosecutors, as well as Special Courts. Committals in POCSO matters will unnecessarily delay trial and frustrate the objective of speedy trial.

### 2.2. Questioning Children

Section 33(2), POCSO Act, prohibits the Special Public Prosecutor and the defence lawyer from putting questions to the child directly. All questions during the examination-in-chief and cross-examination must be routed through the Special Court. It is the judge of the Special Court who can pose the questions to the child. Under no circumstances, can the questions be posed by the Special Public Prosecutor, defence lawyer, or the Investigating Officer. Further, under Section 33(6), POCSO Act, the Special Court should not allow aggressive questioning or character assassination of the child and should ensure that dignity of the child is maintained at all times during the trial.

Interviews with Public Prosecutors, and defence lawyers in both Guwahati and Dibrugarh revealed that they usually pose questions to the child victim directly. According to a respondent from the judicial fraternity, “[t]he defence and PP state it orally, [they] cannot hand the questions in advance, as the questions are in flow with one another and based on the response of the victim. Idea of the provision is to see child is not intimidated by the lawyer.” He also shared that the Special Court intervenes if the child does not understand the question or if the defence lawyer poses the questions in an intimidating or tricky manner. One defence lawyer was of the view that victims should be cross-examined by them directly, as “it is an art [and] routing the question through the judge may change it and reduce the effect [of the questions]. Discretion appears to be exercised by the Special Courts while applying this provision. For instance, an eight-year-old child victim who was interviewed, shared that the questions were put to her politely by the judge and not by the defence lawyer or the Prosecutor.

The defence lawyers confirmed that the Special Court steps in when the questions are aggressive in nature. One defence lawyer shared:

There is not much of a difference (between POCSO and other criminal cases). I have to be polite in questioning the child in POCSO cases. I should make sure that I do not instill fear in the child during cross-examination.

In the JJBs in Kamrup (Metro) and Dibrugarh, the questions are usually posed by the Principal Magistrate to the child; but if the defence lawyer requests, they are allowed to question the child directly.

### **2.3. Creation of child-friendly atmosphere**

Section 33(4) POCSO Act, requires the Special Court to create a child-friendly atmosphere by allowing a family member, guardian, friend, or a relative, in whom the child has trust or confidence, to be present in the court.

Apart from the parent or guardian, however, no Support Person has accompanied a child victim to the Special Courts in Kamrup (Metro) or Dibrugarh. Although the POCSO Act requires that a family member, guardian, or person whom the child trusts accompany the child, an interview with a respondent from the judiciary suggested that the Special Court exercises its discretion in this respect. If the child responds confidently then the parent is not allowed inside the chamber. The parents are allowed if the victim appears to be nervous. One respondent from the judiciary shared that parents are usually present when the statement is recorded, but are made to sit at a distance from the victim so that they cannot hear what the child is saying. They are close enough to provide support. This respondent agreed that “unless you make the child feel comfortable she will not be able to provide her statement. She needs to feel close [to the parent], even physical distance matters, air of formality is there in courtrooms where the witness is asked to stand in a corner. Chamber is like a drawing room atmosphere.” In cases where the parent is also a witness, she/he is examined first and then the child is called so as to ensure that the child is not influenced by their statement.

The purpose of this provision is to ensure that children do not feel intimidated or overwhelmed at any point in time while recording the evidence. A child may feel confident at the start, but may feel differently as questions about the offence are posed. It is therefore important that the child always be accompanied by a trusted person of their choice into the judge’s chamber.

The ambience of the place in which the child's testimony is recorded is also significant. As stated in Section 1.3, Chapter 1, based on responses received from the Special Courts in Dibrugarh, Lakhimpur, Sonitpur, Kokrajhar, and interviews with respondents in Dibrugarh and Kamrup (Metro), it emerged that the Special Courts in these districts mostly record the testimony of the child victim in their chambers. In some cases, it is recorded in the conference hall. One respondent from the judiciary shared that he plays with the child in his chamber to make them comfortable before recording the deposition.

“Anything that is official or formal, for example- the building of the court, the uniform of the judge, or the handcuffing of the accused in the court premises is intimidating to the child. A child may encounter, with the above, when he is taken to the court and this is in no way child-friendly. Child-friendly is not just about creating physical space but social and emotional too, to affect the child and help of the psychologists maybe taken in creating a child-friendly space in terms of the colours of the surrounding environment.”

- Representative, NGO working on child sexual abuse

Interviews revealed that the procedures are not explained to the child victim or her/his family, nor are their questions and concerns about the legal process addressed by the Prosecutor or the Special Court. A child victim and her mother interviewed for the study shared that they were frightened by the courtroom atmosphere and persons in handcuffs. While the mother's presence definitely made the child victim feel comfortable, no one had explained to them what was likely to happen in court, and the uncertainty aggravated their anxiety. One respondent from an NGO that works on child protection and provides support services to child victims stated that “[t]he courts are not child friendly at all and not different from any other regular courts.”

“Taking the statement in the chamber helped and the judge was friendly. We should not be made to wait in the court premises for so long where we can see other people in handcuff. We were made to wait long, we were hungry and not allowed to go outside for lunch. We had food once we came back home. We should not be made to wait for long.”

- Mother of child victim

The Public Prosecutors interviewed expressed concern that their prior interaction with the child victim could be dubbed as ‘tutoring’ by the defence. One Public Prosecutor shared, “I do not meet the child prior to the testimony as this will result in tutoring. The defence side will take this as an opportunity and ask the child “are you instructed by the PP to state these facts”? and the child might answer in the positive.” Another Public Prosecutor stated that caution was exercised while speaking to the child and the family and orienting them about the procedures to avoid the allegation of tutoring by the defence. According to this Public Prosecutor, “If it is a genuine case, they will recall the statement clearly. But sometimes, if there might be discrepancies in the 161, 164 [statement] and examination-in-chief. The parents may tell them to state the fact, which the defence sometimes will prove it as tutoring.” An NGO representative shared the hostile reaction from a Public Prosecutor when she went to speak to him about a POCSO case. Fearing that he may be accused of taking a bribe, he refused to speak or interact with the child.

“We need a Special Court where children should not witness hardened criminals in the court complex. It should not be the environment of court. A child should not have to wait from morning till evening for the statement to be recorded. There should be a certain time for recording the statement.”

- Representative of an institution for child victims

“The waiting hours for the victim and the family should be reduced. The judge takes the session cases in the first half of the day, and then POCSO cases are taken up. The victims come from poor background, they are mainly tea garden workers and they will lose a day’s wage by coming to the court, some provision should be made to ensure they are not made to wait for long hours.”

- Public Prosecutor

The Public Prosecutor’s prior interaction with the child is essential as it can serve as an opportunity to inform the child and the family about legal procedures and allay their fears about the legal process. It will also enable the Prosecutor to assess the language and cognitive skills of the child and whether the services of a special educator, interpreter, or translator would be required by the Special Court. Considering that support persons are rarely appointed by the CWCs in POCSO cases, the Public Prosecutors need to proactively provide the child victims and their families with necessary information.

#### **2.4. Minimizing appearances in court and permitting breaks during the trial**

Special Courts should ensure that children are not called repeatedly to testify in the court under Section 33(5), POCSO Act. At the same time, as per Section 33(3) POCSO Act, frequent breaks should be allowed to the child during trial, if necessary.

While the Act does not spell it out, the age and developmental stage and needs of the child must be considered while scheduling evidence. For instance, the evidence of the child should not be kept at a time when the child is usually napping. Care must be taken to determine if the child has missed a meal or a nap, as that can affect the behavior of the child and consequently the quality of the testimony. Recommendations by the Texas Centre for Judiciary on scheduling testimony of a child are instructive:

In criminal cases involving school-aged children, it may be best to schedule testimony during school hours. Children who are required to testify after being in school all day, may be tired and stressed from worrying about court while in school. By considering the developmental needs of child witnesses in scheduling cases, courts can easily improve the quality and coherence of their testimony.<sup>21</sup>

The members of the judiciary who were interviewed shared that they always record the statement of the child in one day to prevent them from having to come to the court unnecessarily. As per the JJB in both the districts, the evidence of the child is recorded in one day. One respondent from the judiciary mentioned that it would not be practicable to consider school holidays because the holidays are declared on similar days in courts. However, special requests from parents are considered by the Special Court while recording the testimony. For instance, if the parents states that the victim is attending school and requests for the testimony to be recorded in the afternoon after school hours, it is considered. A defence lawyer confirmed that adjournments are rarely granted by the Special Court and Section 309, CrPC is applied so as to avoid multiple visits of the child to the court. Section 309, CrPC requires the trial to be held on a day-to-day basis until all witnesses are examined and requires reasons to be provided for adjournments.

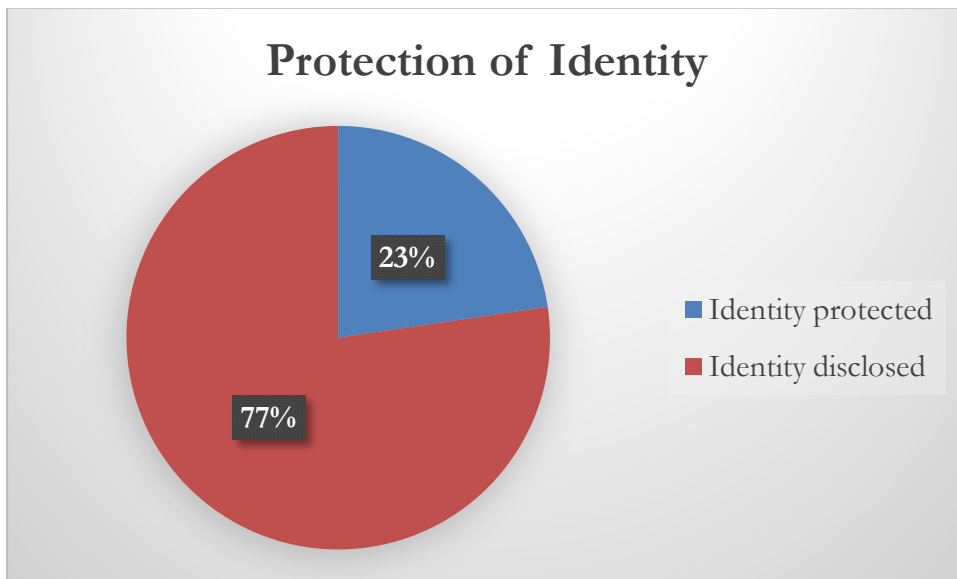
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<sup>21</sup> Texas Center for the Judiciary, “Child-friendly Courtrooms: Items for Judicial Consideration”, p.21, <http://www.yourhonor.com/assets/ic/BenchAid.pdf>. The Texas Center for the Judiciary is a non-profit organization whose objective is “to provide outstanding judicial education to Texas judges so that a qualified and knowledgeable judiciary and staff may administer justice with fairness, efficiency, and integrity.”

With respect to scheduling, however, the developmental needs of children, especially young children are not considered. Families wait for their turn from the morning even though the evidence is recorded only in the afternoon. A child victim and her mother who was interviewed shared that they could not even step out to have lunch because they had no information about when they would be called to depose.

## 2.5. Protection of identity

Section 33(7), POCSO Act, requires the Special Court to protect the identity of the child during the investigation and trial. For reasons recorded in writing, the Special Court can permit disclosure if it is in the interest of the child. The Explanation to Section 33(7) states that identity of the child would include “the identity of the child’s family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.”



In 84 out of 172 cases i.e., 48.83%, the victim’s name was disclosed in the text of the judgment. Of the 84 cases, in 39 cases the name of the victim was not indicated in the judgment, but was mentioned in the list of prosecution witnesses accompanying the judgment. In 49 judgments, while the victim was not named, her father, mother, or other family members were named. Thus, in a total of 133 judgments, (i.e 77.32%), the identity of the victim was disclosed by either naming her or her family members. Besides, in the absence of waiting rooms for children or a separate entrance, the sheer presence of a child in the courtroom leads to the assumption that the child is a victim in a POCSO case.

## 2.6 Award of Compensation

Section 33(8), POCSO Act, empowers the Special Court to direct payment of compensation, in addition to punishment, for physical or mental trauma caused to the child or for immediate rehabilitation. Rule 7(1), POCSO Rules states that interim compensation can be awarded by the Special Court on its own or based on an application by or on behalf of the child, at any time after the FIR has been registered. The purpose of interim compensation is to meet the immediate rehabilitation or relief needs of the child. Compensation can be awarded even if the accused is acquitted, discharged, or untraceable, if according to the Special Court, the child has

suffered loss or injury.<sup>22</sup> Rule 7(3), POCSO Rules, specifies 12 factors that the Special Court should consider before it awards compensation. The compensation awarded has to be paid from the Victim Compensation Fund or any other government scheme for compensating and rehabilitating victims and must be paid by the State Government within 30 days of the receipt of the order.<sup>23</sup>

Compensation was awarded in 38 cases out of 172 cases (22.09%), of which 21 cases were that of penetrative sexual assault, six cases of aggravated penetrative sexual assault, six cases of sexual assault, one case of aggravated sexual assault, one case of attempt to commit penetrative sexual assault, one case under Section 354, IPC, one case under Section 366A, IPC and one case under Sections 67 and 67B, Information Technology Act, 2000 (IT Act). Compensation was awarded in four cases in 2014, 17 cases in 2015, and 17 cases in 2016.

While compensation was mostly awarded in cases in which the accused was convicted, in four cases compensation was awarded where the accused was acquitted under the POCSO Act. In two of these cases, conviction was recorded under Section 354, IPC and Section 366A IPC, respectively and the fine amount, if realized, was directed to be paid as compensation. In two cases, the Special Court directed the District Legal Service Authority (DLSA) to determine the compensation to be paid to the victim. In *State v. Abdul Rezzak*<sup>24</sup>, the accused was charged for aggravated sexual assault. Though the victim testified against the accused, her testimony was considered unreliable by the Special Court and was also not supported by medical evidence. This did not deter the Special Court from directing the DLSA to determine the compensation to be paid to the victim. In *State v Omar Ali*<sup>25</sup>, the victim was allegedly raped by the accused. The DLSA was asked to determine compensation even though the victim, the informant her father, the mother turned hostile on point of sexual offence. While this is consonance with the spirit of the provision on compensation in the POCSO Act, no explanation was provided by the Special Court while making this order.

In 16 cases (42.10%), the DLSA was directed to determine the quantum of compensation, even though the Special Court is empowered under the POCSO Act to perform this task. In such cases, the quantum is based on the Assam State Victim Compensation Scheme, as per which the amount of compensation is Rs.3lakhs for rape and Rs.50,000 for victims of sexual assault other than rape.<sup>26</sup> The Schedule of the Scheme that was notified on 18 October 2012. was revised on 5 March 2016. The revised schedule makes no reference to “rape of minor/gang rape”. Besides, under the IPC, the definition of rape is not gender neutral qua the victim and compensation for an offence under Section 377, IPC is not listed in the Schedule. This results in the exclusion of male child victims of sexual offences from compensation. Once the DLSA is asked to determine compensation, it will verify documents, take the statement of the victim, assess the loss, fix the quantum of compensation and then send it to the Special Court for its approval. This will inevitably result in delays.

The low awareness about the availability of compensation among child victims was shared by several respondents. The State Child Protection Society and the DLSAs have undertaken measures to create awareness among the community about the Victim Compensation Scheme.

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<sup>22</sup> Rule 7(2), POCSO Rules.

<sup>23</sup> Rules 7(4) and 7(5), POCSO Rules.

<sup>24</sup>Special Case No.1/2014 decided on 09-07-2015

<sup>25</sup>Special Case no. 17/ 2014 decided on 24-06-2016

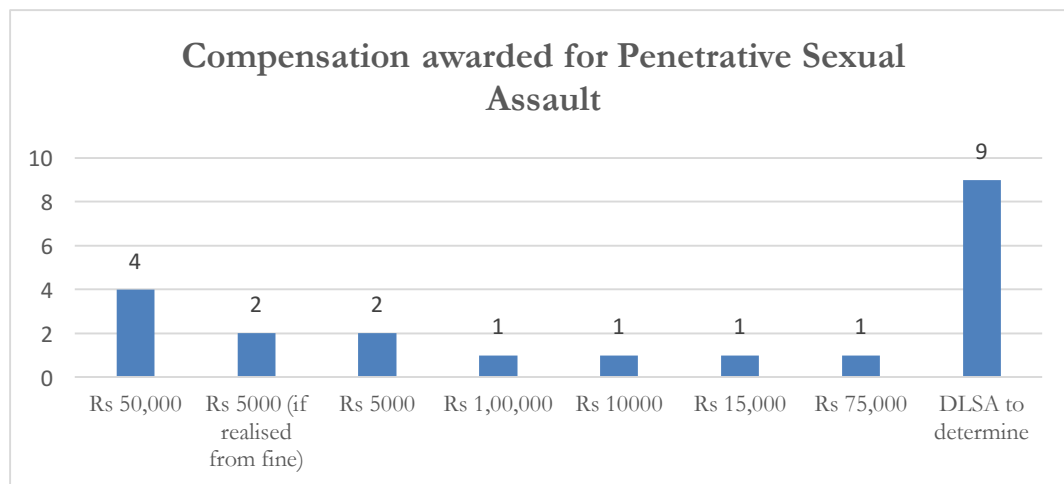
<sup>26</sup> Assam Victim Compensation Scheme, notification dated 5 March 2016, available at [http://udalgurijudiciary.gov.in/DLSA/Notice/assam\\_victim\\_compensation\\_scheme.pdf](http://udalgurijudiciary.gov.in/DLSA/Notice/assam_victim_compensation_scheme.pdf)

However, an interview with the DLSA, Guwahati, revealed that only one application for compensation had been received by them under the POCSO Act in 2016.

In nine cases, the Special Court directed that compensation should be paid to the victim if the fine amount is realized. In these cases, the payment of compensation is contingent on the recovery of the fine from the convicted person.

The reference to “interim compensation” appeared in only one judgment. In *State v. Md. Abul Kalam*<sup>27</sup>, the Special Court directed the DLSA to determine compensation within two months and to pay interim compensation of Rs.25,000 to the victim within one month. In this case, the accused had allegedly committed penetrative sexual assault under the promise to marry the victim. The matter came to light when she was five months pregnant; and the FIR was lodged when he refused to marry her. The victim testified against the accused and the Special Court convicted him.

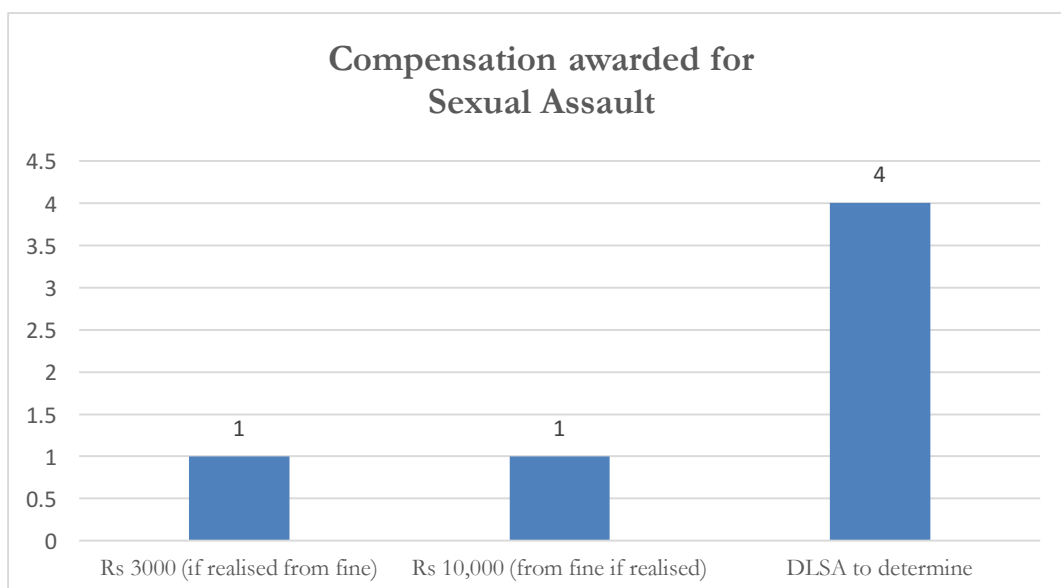
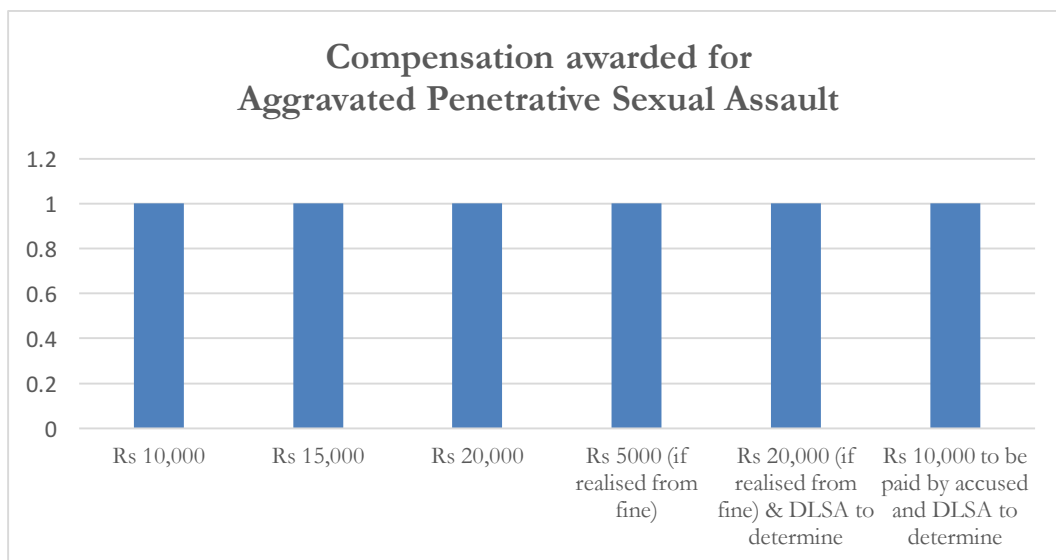
In *State v. Gour Nayek*<sup>28</sup>, the accused was directed to pay compensation of Rs. 10,000 for loss and injury caused to the victim; and the Special Court recommended further compensation to be determined by the DLSA. The victim had become pregnant as a result of the penetrative sexual assault in this case.



<sup>27</sup>Special (POCSO) Case no. 23 of 2015 decided on 10.03.2016

<sup>28</sup>Spl (POCSO) Case No. 14/2014 decided on 30.4.2015.





In *State v. MothongChutia @ Nageswar*<sup>29</sup>, the Special Court made reference to Section 33(8), POCSO Act, and the Supreme Court's exhortation to subordinate courts to award compensation to victims of sexual offences, as sexual assault violates basic human rights and Article 21, Constitution of India. It proceeded to grant Rs.50,000/- each to the two victims as compensation for penetrative sexual assault. The Special Court directed the Secretary, DLSA to ensure that the amount is given to the parents of the victims within two months from the date of receipt of the order after proper enquiry. Further, the DLSA was directed to ensure that disbursement was for the welfare and rehabilitation of the victims. Reference to Section 33(8) was also made in *State v. Satya Saikia*<sup>30</sup>, where the Special Court awarded Rs.50,000 to a victim of penetrative sexual assault and ordered the Secretary, DLSA to pay after verifying the identity of the child by the IO.

<sup>29</sup> Sessions Case No. 11 (T) of 2014 decided on 21.03.2016.

<sup>30</sup> Sessions Case No. 145 (M) of 2014 decided on 16.02.2016.

## 2.7 Prompt recording of evidence and disposal of the case

Evidence should be recorded within 30 days of the Special Court taking cognizance of the offence, as per Section 35(1), POCSO Act. Reasons for the delay should be recorded by the Special Court. None of the judgments studied indicated a reason for the delay in recording of evidence.

Several respondents shared that there were practical reasons which made it difficult for the testimony to be recorded within 30 days. According to a respondent from the judiciary, “Sometimes, there may be a genuine delay, like the defense lawyer maybe sick. I cannot forego the cross examination as it violates the rights of the accused. There should be a room for fair trial.” A Public Prosecutor mentioned that while judges should be strict while granting adjournments, they do allow adjournments on humanitarian grounds on request by the defence counsel. Defence lawyers considered it an impossible task for the evidence to be recorded within 30 days, as medical reports, charge-sheet and materials seized by the Investigating Officer are often not ready and are also not made available to the accused within this time-frame. The police, medical practitioners, and Magistrates are some of the key stakeholders responsible for ensuring that this time frame is achieved. In the absence of a functional SJPU in most districts, the police are overburdened. Delay also results due to the absence of funds and transport to escort the victim and the accused for their medical examination, which further delays the medical report and test results. Focus is also required on the challenges and gaps in the working of these actors, if delays have to be minimized.

**Table No. 2.2. Pendency of Cases before Special Courts in Assam as on 31.07.2016**

District	Pendency	District	Pendency
Kamrup (M)	27	Udalgiri	15
Kamrup (Amingaon)	58	Darrang	8
Morigaon	46	Nalbari	40
Nagaon	95	Barpeta	40
Golaghat	96	Bongaigaon	32
Jorhat	104	Kokrajhar	15
Sivasagar	79	Dhubri	24
Dibrugarh	89	Goalpara	31
Tinsukia	71	Cachar	27
Dhemaji	15	Karimganj	50
Lakhimpur	52	Hailakandi	1
Sonitpur	59	Chirang	11
Total			1085

Source: Registrar (Judicial)-Cum-Public Information Officer, Gauhati High Court through an RTI application.

Table No. 2.2. presents the data received in response to an application under the Right to Information Act, 2005 regarding the pendency in POCSO cases. The total number of cases pending under the POCSO Act, as on 31 July 2016 was 1085. The highest pendency was recorded in Jorhat, followed by Golaghat and Nagaon Districts.

Since information on the date on which the Special Court took cognizance was not available in every case, the table below provides information on the time taken from the date of FIR to record evidence. The date of FIR was specified in 148 out of the 172 cases that were analysed. As is evident from the table below, fewer children turned hostile when their statement was

recorded within six months of the FIR being registered. The percentage of children turning hostile increased to 40.42% in cases where the evidence took between six months to one year; and climbed to 48.78% when it took between one and two years to record evidence from the date of the FIR. It is crucial that this time gap be minimized so that not only can the child victim testify when the events are fresh in her mind, but also so that she/he can heal and journey ahead instead of having to recall traumatic events after a prolonged period of time.

**Table No. 2.3. Time Taken to Record Evidence from the Date of FIR**

	Within 30 days	Between 1-2 months	More than 2 months and less than 6 months	More than six months and less than 1 year	More than 1 year and less than 2 years	More than 2 years and less than 3 years	More than 3 years
Total	1	4	38	47	41	16	1
Testified against accused	1	2	25**	22	20	12***	-
Turned hostile	0	3*	4	19	20	4	-
Conviction	1	1	10	10	7	8	-
Acquittal	0	3	28	37	34	8	1

\* One case had three victims and all three turned hostile.

\*\* One case had two victims and they both testified against the accused.

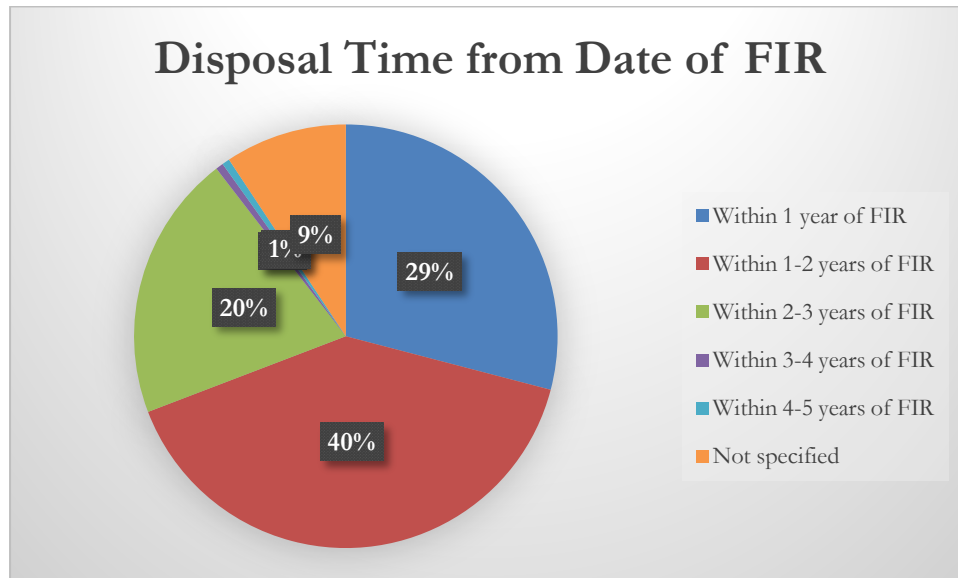
\*\*\* One case had two victims and they both testified against the accused.

Inordinate delays in recording testimony could have a deleterious impact on the case. For instance, in *State v. Dulal Das*<sup>31</sup>, the four-and-a-half year old victim of alleged penetrative sexual assault was examined one-and-a half years after the incident and could only remember being taken by the accused (neighbor) to his house and him bolting the door. Her grandmother, an eye-witness, and her mother both turned hostile and the medical report also did not reveal any injury on the body - all of which led to an acquittal. In *State v. Rangai Borah*<sup>32</sup>, a girl aged 9-15 years as per the medical report, studying in Class VIII had allegedly been raped by a co-villager when her parents were not at home. She was examined two years and three months after the FIR was lodged.

<sup>31</sup> Special (POCSO) Case No. 6 of 2015 decided on 8.9.2015.

<sup>32</sup> SESSIONS CASE NO.113(NL)2014 decided on 19.04.2016.

She turned hostile in court and stated that the accused had come home, asked for tea, and approached her in the kitchen. Sensing his bad intentions, she ran towards the paddy field to call her mother. Her mother then rebuked the accused. Her statement in court was completely different from that before the Magistrate and she said that the police had tutored her for the latter. Her parents and grandmother also turned hostile. The medical report indicated injuries to her private parts and signs of sexual assault, but the case ended in acquittal because the victim and other witnesses did not support the prosecution's case.



According to Section 35(2), POCSO Act, as far as possible, the trial should be completed within one year of the court taking cognizance of the offence. The date on which the Special Court took cognizance was not mentioned in 132 judgments (76.74%). Table No.2.4. indicates the time taken for the verdict to be delivered from the date of filing of the FIR. It indicates that 50 cases (29.06%) were disposed within one year of the FIR being lodged, which would also mean that they were disposed within one year of the Special Court taking cognizance of the matter. 69 cases (40.11%) were disposed within one to two years from the date of the FIR and 35 cases (20.34%) were disposed within two to three years from the date of the FIR. The percentage of conviction was 26% in cases disposed within one year from the date of the FIR, 21.73% within one to two years, and 34.28% within two to three years.

**Table No.2.4. Time taken by Special Courts to dispose cases from date of FIR**

	2014	2015	2016	Total	Conviction	Acquittal
Total Cases	4	86	82	172	42	131
Within 1 year of FIR	3	32	15	50	13	37
Within 1-2 years from FIR	0	42	27	69	15	54

Within 2-3 years from FIR	0	7	28	35	12	23
Within 3-4 years from FIR	0	0	1	1	0	1
Within 4-5 years from FIR			1	1	0	1

## 2.8 Avoiding exposure to the accused

Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused while testifying. The Special Courts in Guwahati and Dibrugarh record the evidence of the child victim in chambers and mostly make the accused stand outside the chambers. The child enters the chamber first and the accused is then made to stand at the door. Screens are used in the Special Court in Dibrugarh to prevent the exposure of the victim and the accused. The accused can, however, hear the child’s testimony. For the purpose of identification of the accused, the photo of the accused is shown to the victim in Dibrugarh. However, it is not clear if this is indeed a practice that is followed in all cases as one respondent stated that the victim is asked to identify the accused in the courtroom before the testimony is recorded in the chamber. In Guwahati, the victim is asked to stand in the witness box, while the accused stands at the back of the court hall facing the judge at the time of test identification.

That there are no separate entrances for the victims in these courts were confirmed by replies received from District Courts in Dibrugarh, Kamrup (Metro), Sonitpur, Lakhimpur, and Kokrajhar. It is therefore highly likely that victims encounter the accused while making their way to the courtroom, especially if the accused is released on bail. One respondent from the judiciary admitted that “one cannot ensure that accused and victim do not confront each other while waiting to depose.” The child and the family has to wait outside or inside the courtroom, where the child may not only encounter the accused in his/her case, but the accused in handcuffs in other cases, while also drawing attention from the public due to the presence of a child in a court complex.

Based on interviews with court staff in one district, it emerged that once she arrives; the victim and her family usually await her turn inside the courtroom and sit through the hearings in other cases. The victim will also inevitably be exposed to the courtroom atmosphere, police officials, accused persons, and advocates in robes while waiting. She is also likely to hear raised voices and witness the manner in which the defence questions witnesses in other cases.

According to a respondent from the judicial fraternity, “Confrontation of victim and accused is irrelevant in this part of the country, as both persons are known to each other.” However, even though the victim and the accused may be known to each other, exposure to the latter can adversely affect the confidence of the victim and can also trigger the memory of the traumatic assault. The exposure could also provide the accused with an opportunity to threaten the victim. Besides, this is a mandatory provision and does not permit any exception.

Respondents from JJBs in Kamrup (Metro) and Dibrugarh shared that due to the lack of infrastructure, no arrangements could be made to ensure that the CACL and child victim do not face each other during the inquiry. This indicates the need to ensure that basic measures such as curtains are provided to JJBs, to prevent such exposure.

## 2.9 *In-camera* trials

Section 37, POCSO Act, requires the Special Court to conduct the trial *in camera* and in the presence of the parents of the child or any other person in whom the child has trust or confidence. The child can also be examined in a place other than the courtroom if the Special Court deems it fit.<sup>33</sup>

Interviews with the respondents in Kamrup (Metro) and Dibrugarh revealed that the testimony of the child victim is recorded *in camera*, usually in the chambers of the judge, in the presence of the Public Prosecutor, defence lawyer, and a parent or guardian. In one district, the testimony of other witnesses are conducted in the open court, unless they come on the same day on which the victim's testimony is recorded.

A respondent from the JJB in Dibrugarh stated that since all cases related to CACL are held *in-camera*, POCSO cases are also heard in the same manner. In the JJB in Kamrup (Metro), the Additional Public Prosecutor (APP), defence lawyer, Principal Magistrate, social work members, CACL and the child victim are present in the room along with the child's parents. In Dibrugarh, the Principal Magistrate, two social work members, CACL and child victim are present in the room where the JJB proceedings are undertaken. A support person is allowed to be present with the child victim, if the child requires his/her presence.

## 2.10 Assistance of interpreters, experts and special educators

Section 38, POCSO Act, requires the Special Court to take the assistance of a qualified translator, interpreter, special educator, or a person familiar with the manner of communication of a child if it is necessary. It is the obligation of the District Child Protection Unit (DCPU) to prepare the list of such experts and make it available to the Special Courts.

Interviews with judges and functionaries within the child protection system revealed that no such list has been prepared by the DCPU in Guwahati and Dibrugarh. In both districts, the need to engage such an expert had not arisen. If the situation arose, according to one respondent in the judiciary, the Special Courts would depend on the parent or guardian to translate or request persons available in the courtroom who are aware of the language to do so. One District Child Protection Officer (DCPO) shared that no professional psychologists were available in the district as per the communication received from the State Health Department. Requests have been sent by the DCPOs in two districts to a government hospital and medical department for clinical psychologists and psychiatrists. Respondents from the State Child Protection Society shared that efforts are underway to prepare and publish a district-wise Child Protection Resource Directory for Assam, which would include details of special educators, psychologists, and other experts as well.

**The need for identification of experts who can assist the Special Court in interpreting the testimony of the child cannot be overemphasized.** The services of specialized experts cannot be substituted by non-certified translators, especially in cases involving children with disabilities. For instance, in *State v. Kusbram Medhi*<sup>34</sup>, the victim, a 14-year-old girl was allegedly raped by the accused who had entered her house when no one was at home. The victim was stated to be

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<sup>33</sup> Proviso to Section 37, POCSO Act.

<sup>34</sup>Sess. Spl. Case No.28/2015 decided on 16.05.2016.

physically disabled. Her grandmother returned home and found the victim crying. She filed the complaint against the accused under suspicion, because he had a bad record and had entered her house in her absence. The victim did not mention the sexual assault in court. She stated that she frequently got shocked at small incidents and got frightened of darkness in the house. She also stated that the accused did not do anything wrong to her. This is a case in which the victim could have benefited from the services of a psychologist and psychiatrist, a mental health screening as well as counselling immediately after the incident.

In *State v. Karlush Solong*<sup>35</sup> and *State v. Tinku Mahali*<sup>36</sup>, the Special Courts dispensed with the examination of the child victims aged 5 years and 4 years, respectively, because they were perceived too young to testify. The Special Court appeared to have not considered the proviso to Section 119, Indian Evidence Act as per which “if the witness is unable to communicate verbally, the Court [should] take the assistance of an interpreter or special educator in recording the statement”. The services of a special educator in these cases could have enabled the court to communicate with the children and obtain their statements.

### 2.11 Assistance of private legal practitioners

Section 40, POCSO Act recognizes the right of the family or guardian of the child to take assistance of a legal counsel of their choice in proceedings under the POCSO Act. The Legal Services Authority is required to provide them with a lawyer in case they are unable to afford one.

The District Legal Services Authority in Guwahati and Dibrugarh confirmed that no Legal Aid Lawyers (LALs) had been provided to child victims in POCSO cases. According to the Member-Secretary DLSA, Dibrugarh, there is no requirement for LALs to assist a state appointed Public Prosecutor. In the course of the study, the researchers could not locate any private lawyer who had represented a child victim or assisted the prosecution in a POCSO matter. Lawyers from one organization had, however, assisted child victims before the JJB in Kamrup.

**Private lawyers or legal aid lawyers could assist the overburdened Public Prosecutors who have been designated as SPPs in prosecuting POCSO cases. They could also provide an orientation to the child victim about the procedures.**

### 2.12 Appointment of Support Persons

As per Rule 4(7), POCSO Rules, the CWCs have been entrusted with the responsibility of appointing support persons with the consent of the child and the child’s parents, or the person whom the child trusts.

Respondents from the judiciary stated that no support persons other than the parent or guardian were present with the child victim in the court. Interviews with CWC Members in Kamrup (Metro) and Dibrugarh revealed that a panel of support persons is not available. The CWC in Kamrup (Metro) connects children and families to an NGO that runs a residential institution for child victims of sexual abuse. The State Child Protection Society is considering involving para-legal volunteers to provide support to child victims.

Interviews revealed that support is mostly limited to helping families lodge the FIR. The counsellors attached to DCPU and Childline offer assistance in lodging the FIR. Two NGOs

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<sup>35</sup> POCSO Case No. 05 (T) of 2015 decided on 14.12.2015.

<sup>36</sup> Special (POCSO) Case No. 01 of 2016 decided on 08.06.2016.

who were interviewed in Guwahati have assisted child victims with the filing of FIR and medical examination. They have accompanied child victims for the recording of the statement under Section 164, CrPC, and have produced children before the CWC. One NGO has also accompanied children for the recording of their testimony before the Special Court, while the other intends to do so when the matter comes up for hearing.

The Village Defence Organisation (VDO) is a unique authority in Assam that was conceived in 1949, to assist the police in the maintenance of law and order, peace and tranquility in the State.<sup>37</sup>The VDO comprises of Village Defence Parties (VDP) consisting of 20-25 village volunteers “responsible for safeguarding the area of that particular village jurisdiction” who act as “first responders”.<sup>38</sup> The VDP’s responsibilities include assisting the police in the prevention and detection of crimes. Interviews with the police in Dibrugarh revealed that in some POCSO cases, VDPs bring the families to the police station for lodging the FIR. Their support in POCSO cases is, however, limited to this.

In Dibrugarh, the Child Protection Committees created under the aegis of the Assam Branch of Indian Tea Association have organized exposure visits for adolescent girls to police stations and also assisted families with the lodging of FIRs in cases of sexual offences. They have not, however, received any training on the POCSO Act and provide limited support in such cases.

**Support Persons play a vital role in guiding the child victim and the family through the legal maze. Absence of support could result in families not pursuing the matter or succumbing to pressures from the accused to compromise the matter. Building on the available local resources, through capacity building of VDPs, would help be one positive step in this direction.**

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<sup>37</sup> Assam Police, VDO, <http://assampolice.gov.in/departments/vdo/vdo.php>

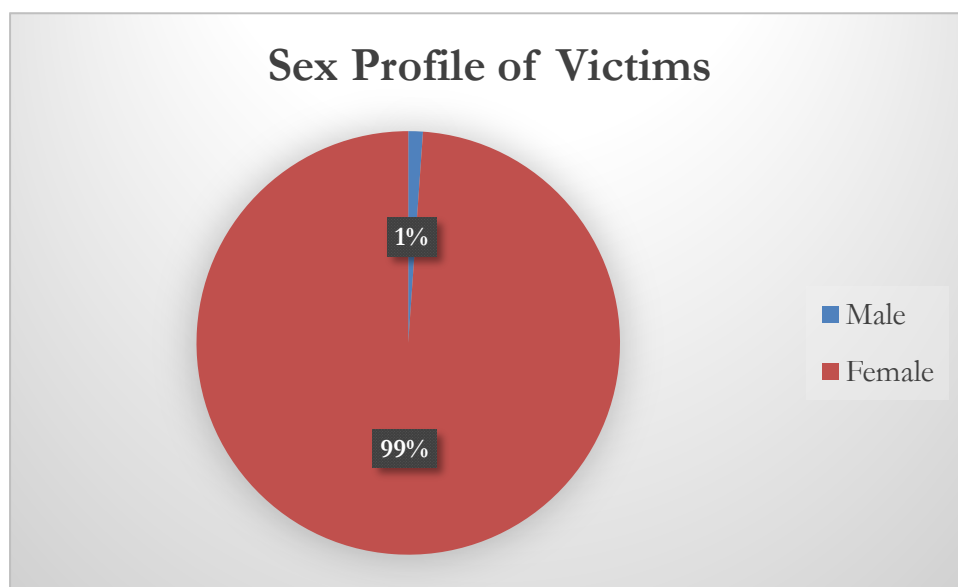
<sup>38</sup> Assam Police, VDO, <http://assampolice.gov.in/departments/vdo/vdo.php>



## Chapter III. Findings based on Judgment Analysis

### 3.1 Sex profile of the Victims

176 victims (98.87%) were females, while 2 victims (1.12%) were male. This does not reflect the findings of the 2007 *Study on Child Abuse* by the Ministry of Women and Child Development, Government of India, as per which 53.48% boys and 46.52% girls in Assam had reported having faced some form of sexual abuse.<sup>39</sup> The finding suggests that sexual abuse against boys remains underreported.



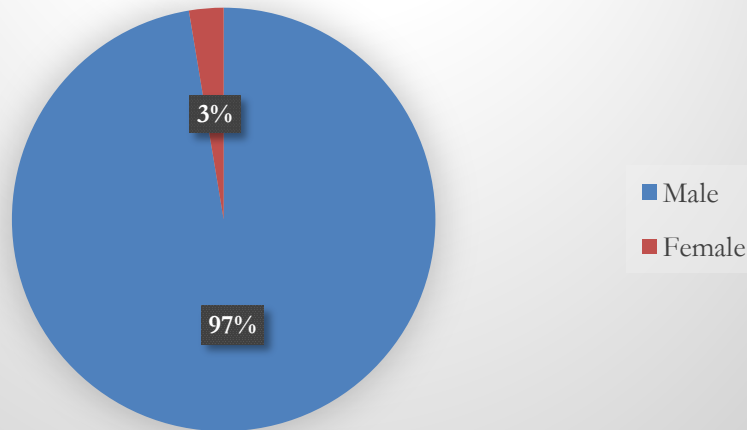
### 3.2 Sex Profile of the Accused

There were a total of 188 accused persons, of which five were female and 183 were male. In two cases, the charges against the females was that of abetment of a sexual offence.

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<sup>39</sup> Ministry of Women and Child Development, *Study on Child Abuse: India 2007*, p.75, available at <http://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>

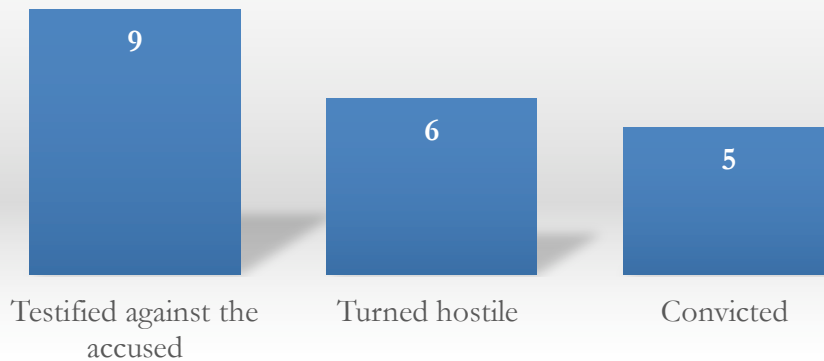
## Sex Profile of the Accused

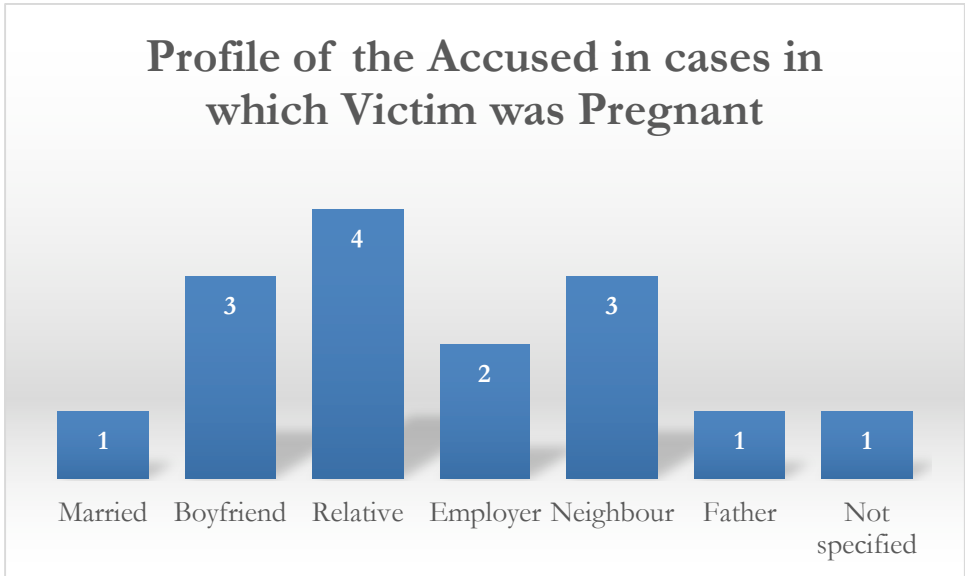


### 3.3. Pregnant Victims

In 15 cases, the victim was pregnant when the FIR was registered. The victim testified against the accused in nine cases and turned hostile in six cases. Conviction resulted in only five cases and in three cases, the testimony of the victim was found unreliable. Charges of aggravated penetrative sexual assault were filed in only seven cases, while in the remaining cases the charges failed to reflect the aggravated nature of the offence.

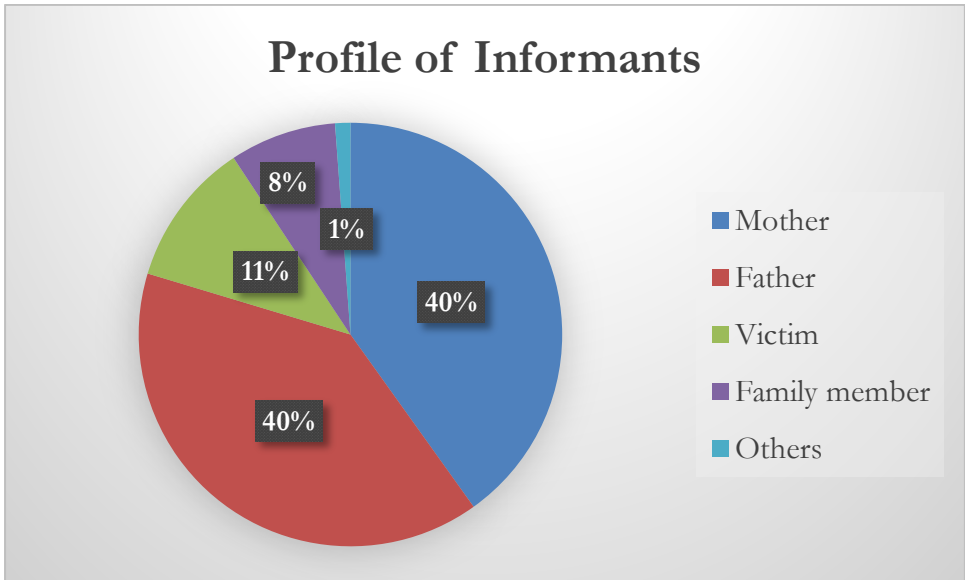
## Testimony and Outcome - Pregnant Victims





### 3.4. Profile of Informants

FIRs were mostly lodged by mothers (69), fathers (68), and victims (18). Other family members who filed them were brothers (five cases), uncles (five cases), grandmothers (two cases), sister and sister-in-law (one case each). Others included the Chairperson of the CWC and an activist. While the POCSO Act requires anyone having information about the commission of a sexual offence or an apprehension that it is about to be committed to report, the judgment analysis revealed that cases were mostly reported by family members. No doctors, principals, or staff of institutions reported any case under the POCSO Act in the judgments studied.

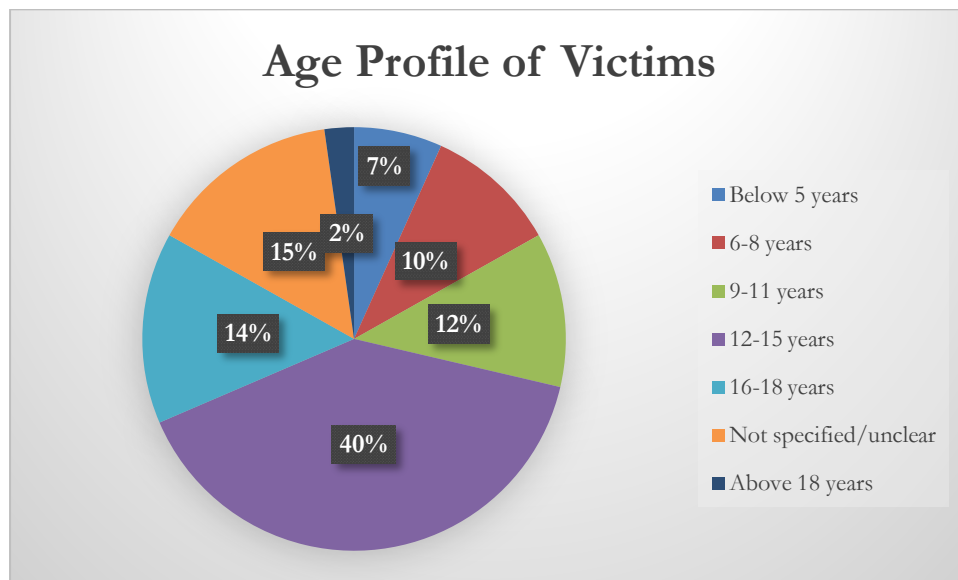


### 3.5. Age profile of victims

From the analysis of 172 cases of the Special Court in Assam, it emerged that in 87 cases (50.58%), age was determined by way of a medical examination that included physical, dental, secondary sexual characteristics examination as well as an X-ray by a radiologist. An interview with respondents from a government hospital revealed that in most cases the police routinely ask them to determine the child's age while doing the medical examination.

No Medical Board appears to have been constituted as per Rule 12(3) of the JJ Model Rules, 2007, which was applicable till the JJ Act, 2015 came into force on 15 January 2016, in the judgments studied in 2014 and 2015.

Of the 178 victims, 12 (7%) were below 5 years, 18 (10%) were between 6 and 8 years, 21 (12%) were between 9 and 11 years, 71 (40%) were between 12 and 15 years, and 26 (14%) were between 16 and 18 years. In four cases (2%), the age of the victim was stated to be 18 years or above. The age was not specified or unclear in 25 cases involving 26 victims (15%).



That the victim was a ‘child’ was contested in 11 cases (6.39%) – these were cases in which the victim was stated to be a minor when the FIR was lodged, but the victim and/or her family later testified that she was above 18 years when the offence was allegedly committed. The victims claimed to be either in a romantic relationship (five cases) or married to the accused (six cases). In all such cases, except one case, the FIR was lodged by the mother, father, or brother of the victim. In 1 case, the victim filed the FIR, but turned hostile on the point of age and claimed that she was above 18 years when she eloped with the accused.<sup>40</sup>

Of the 152 victims whose age was specified, children below 12 years constituted 33.55% of victims, while the majority (63.81%) were between 12 and 18 years.

In four cases, the victim refused to undergo medical examination, of which in three cases the victim admitted to being in a romantic relationship with the accused. An interview with a doctor who examines child victims revealed that in elopement cases, when the matter is compromised between the families, the girl is never brought for medical examination.

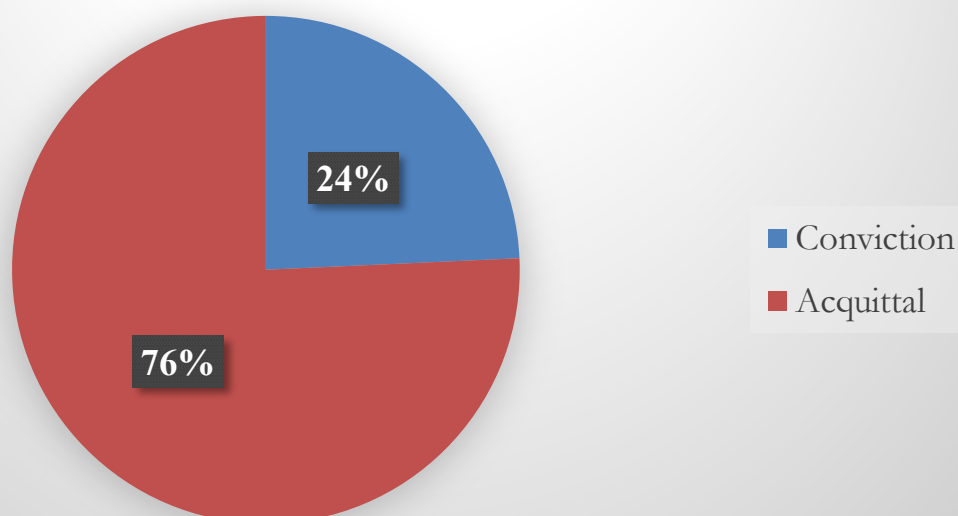
### 3.6. Conviction Rate and Factors affecting Conviction

Conviction was awarded in 42 cases under the POCSO Act between 2014 and August 2016, while acquittals resulted in 130 cases. This pegs the overall rate of conviction during the period of the study at 24.41%. In 2015, the conviction rate was 20.93%, well below the national conviction rate of 41.9%.<sup>41</sup> The conviction rate was 25.60% between January-August 2016.

<sup>40</sup>State v. Gobinda Sarkar, Special (POCSO) Case no. 27 of 2015 decided on 30.01.2016

<sup>41</sup> National Crime Records Bureau, *Crime in India -2015*, Table No. 6.4. Disposal of Crimes Committed against Children Cases by Courts during 2015.

## Dispositional Outcome



**Table No. 3.1. Year-wise disposal of cases under the POCSO Act**

	2014	2015	2016	Total
Total Number of Cases	4	86	82	174
Conviction	3	18	21	42
Acquittal	1	68	61	131
Conviction rate	75%	20.93%	25.60%	24.13%

### 3.6.1. Conviction under the POCSO Act and IPC

In 10 cases, the accused was convicted both under the POCSO Act and the IPC. In *State v. Sitesh Karmakar*<sup>42</sup>, the testimony of the victim, who was between 6 and 8 years, was corroborated by other witnesses who were present in the house in which she was allegedly sexually assaulted by the accused, her father's co-worker, and the medical report which indicated scratch marks on her chest. The allegation was that he had removed her clothes and kissed her breasts. He had been caught red-handed when the victim raised an alarm. The accused was convicted under Section 8, POCSO Act and Section 448, IPC.

In *State v. Saidul Alam Mazumdar*<sup>43</sup>, the victim who was between 14 and 16 years admitted to being in love with the accused and having sexual intercourse with him willingly. She became pregnant, but her mother refused to allow her to marry the accused and filed a complaint against him. The accused refused to marry her thereafter and gave her pills for aborting the baby. Her statement to this effect in court was corroborated by her mother's statement and the medical report. The accused was convicted even though the victim and her mother claimed they had no grievance against the accused and stated that the victim had gotten married to another person within a year of the incident. The fact that she was below 18 years was construed strictly and the accused was convicted under Section 4, POCSO Act and Section 450, IPC.

### 3.6.2. Conviction under POCSO Act and IT Act

<sup>42</sup> POCSO Case No. 06 (T) of 2015 decided on 01.12.2015.

<sup>43</sup>Spl. (POCSO) Case No. 15/2014 decided on 29.02.2016.

In *State v. Jitumoni Bora*<sup>44</sup> case, the accused was convicted under the POCSO Act and the IT Act, 2000. The victim's mother had been receiving messages in her daughter's name for nearly a year-and-a-half in which the defendant was proposing to her daughter. Around 10-12 days before the FIR was registered, the defendant allegedly called and threatened the victim to accept his proposal or else he would publish her obscene photos and humiliate her. A few days later, the victim's cousin brother received a morphed obscene image of her from his friend. Charges were filed under Sections 67 and 67B of the IT Act, read with Section 14, POCSO Act against the accused. As per the IO's inquiry, the messages and photos were sent from the defendant's phone. However, in his cross-examination the IO stated that the phone was in the name of another woman, and on inquiry she could not be found. Even though it was not clear as to how the cousin's friend received the morphed image, the defendant was held responsible and convicted under the IT Act and Section 14 POCSO Act, but sentenced only under the IT Act. At the sentencing stage, the defendant pleaded that he was below 18 years and produced a birth certificate issued by a medical authority. However, the Special Court observed that the defendant had crossed 18 years on the date on which the obscene photo was detected and was thus not entitled to the benefit of the JJ Act 2000 even though the age on the date of commission of the offence is relevant.

### 3.6.3. Acquittal under POCSO Act, but conviction under IPC

In nine cases, the accused was acquitted under the POCSO Act, but convicted under the IPC. In *State v. Jatin Boro*<sup>45</sup>, even though the victim testified that the accused had kidnapped her, forced her to marry him, and "committed misdeed on her", the Special Court acquitted the accused under POCSO Act, while convicting him under the IPC. The doctor's report stated that "no comment could be given regarding sexual intercourse and no injury mark on her private parts." This report, and the fact that the ingredients of Section 4 were not specifically stated by the victim, seems to be the basis of acquittal under the POCSO Act. The accused was however convicted for procuring a minor under Section 366A, IPC.

In *State v. Sukur Ahmad*<sup>46</sup>, a girl had allegedly been sexually assaulted by the Imam of the mosque and charges were levied under Section 352, IPC and Section 8, POCSO Act. She and all her family members except her mother turned hostile on the point of sexual assault. They claimed that she had been caned by him for not doing her homework. The Special Court examined the IO, the doctor, and the Magistrate and took the view that an FIR would not have been filed for a case of caning, as people in the locality would not have assembled in the mosque to attack the Imam unless he did something abnormal. A defence witness had also stated that the Imam had been surrounded by a crowd as there were allegations of sexual assault against him. However, since the victim did not state anything with respect to sexual assault in her statement, the accused was acquitted under the POCSO Act, but found guilty under Section 352, IPC.

In *State v. Anil Nag @ Aklu*<sup>47</sup>, the age of the victim as stated at the time of the complaint, was 14 years and could not be established through documentary proof. No medical exam had been conducted. The Special Court concluded that the prosecution had failed to prove that she was below 18 years. The court, however, proceeded to convict the accused u/s 354 IPC as "[t]he act of holding hand of a woman/girl, removing her undergarment coupled with threatening her to enter inside the garden, is such as would be an outrage to the modesty of a woman and

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<sup>44</sup>Sess. Spl. Case No.13/2014 decided on 09.10.2015.

<sup>45</sup> Special (POCSO) No.07/2015 decided on 18.8.2015.

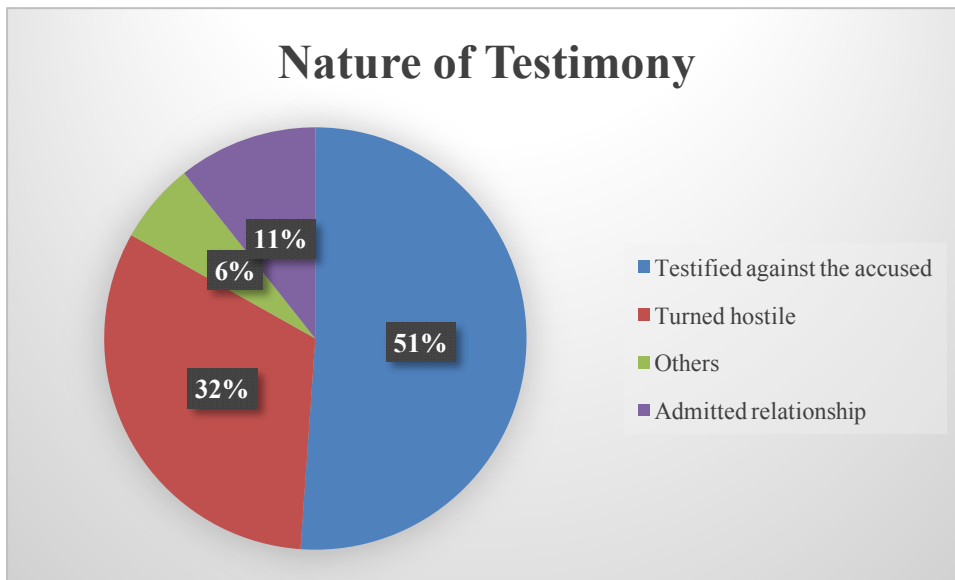
<sup>46</sup> Special (POCSO) Case No. 1/2015 decided on 21.12.2015.

<sup>47</sup> Sessions Case No. 69(M) of 2014 decided on 09.03.2016.

knowledge that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object.” He was sentenced to simple imprisonment (SI) for one year under Section 354, IPC and acquitted under Section 12, POCSO Act and Section 354A IPC.

### 3.6.4. Nature of Testimony

- There were a total of 178 child victims, of which 91 testified against the accused (51%) and 57 turned hostile (32%). 27 child victims (15.69%) admitted that they were in a ‘romantic’ relationship with the accused, of which three testified against the accused and five turned hostile. Thus, a total of 19 victims (11%) simply admitted their relationship and did not testify against the accused or turn hostile. In two cases, the victim failed to identify the accused. In nine cases, the child victim did not testify. This was because either the child had died subsequent to the alleged assault (five cases) or the child was untraceable (two cases), and the child was of tender years in two cases. In two cases, the victim committed suicide after the sexual assault and in one case the accused administered poison to the victim.
- The testimony of 37 children who testified against the accused was considered unreliable by the Special Court.
- Of the five cases in which the victim died, conviction resulted in only one case,<sup>48</sup> based on the testimony of the parents of the victim and the medical evidence (including DNA) which connected the accused to the offence.
- All the cases in which the child was untraceable or could not testify due to tender years ended in acquittal.



### 3.6.5. Reasons for conviction

Conviction resulted in cases in which the Special Court found the testimony of the child to be cogent, consistent, and reliable and corroborated by the testimony of other witnesses and/or medical evidence.

<sup>48</sup>State v. Harinath, SC No. 159/2014 decided on 07.01.2016.

### **(i) Sole testimony of child victim**

In *State v Md. Rabmat Ali*<sup>49</sup>, the sole testimony of the 15-year-old victim was the basis of conviction. In this case, the accused allegedly committed sexual assault on the victim when she went to get paddy from the field on a bicycle. The accused came from behind and touched her breast with force and also tried to remove her clothes. She protested and caught hold of a stick and hit him with it. Their altercation was witnessed by some people who testified that the accused accidentally touched her while trying to help her place the paddy on the cycle. The Special Court held that these witnesses had only seen the altercation not the sexual assault and the victim's testimony could not be disbelieved. The Special Court also observed that the victim would not have hit the accused unless she was annoyed by his conduct. That she was terrified was also evident from the fact that she left the cycle behind and ran home. The Special Court considered her testimony and the circumstantial evidence, invoked the presumption under Section 29 and convicted the accused.

### **(b) Consistent testimony and corroborative evidence**

Consistent testimony of the prosecutrix aged between 14 and 16 years in a case of alleged penetrative sexual assault that was corroborated by the testimony of other witnesses led to a conviction in *State v. Monojit Das*.<sup>50</sup> The prosecutrix had also disclosed the commission of sexual abuse to the medical officer and doctor who examined her in the emergency ward. The accused person's ornament had been recovered from her house. In the absence of fatal contradictions between her statement in court and those to the Magistrate, IO, and doctors, conviction was recorded. The accused alleged that the girl had proposed marriage to him and he had refused. The father of the girl confirmed this during cross-examination. The girl got married within four to five months of the incident to someone else. The judge concluded "It is not believable that after marriage of any victim to one other, any parent, not to speak of any victim, could endeavor to pursue any such case which is based on false allegation only for that a proposal of marriage with any accused broke down earlier," and convicted the accused.

In *State v. Dilip Deka*<sup>51</sup>, the defendant inserted his finger into his 12-year-old neighbour's vagina when her parents were not home. Her cogent testimony along with that of other prosecution witnesses and the medical report (which showed tenderness in her private parts) led to his conviction. The defendant claimed that the case had been falsely filed because of a land dispute and even produced a witness who testified about the dispute. The defence witness was considered unreliable, because she was the defendant's daughter-in-law. Besides, other prosecution witnesses did not support the claim of a boundary dispute.

In *State v. Dilip Kakoty*<sup>52</sup>, a 4 year-old girl was bitten on her chest by her neighbor, when she went to his house to watch television and they were playing a game in which the neighbor pretended to be a child and the victim pretended to play the mother. She complained about this to her mother and on the following day an FIR was lodged. While initially the accused was charged u/s 376(f) read with Section 511 and Section 506 IPC, read with Section 8 POCSO Act, the Special Court changed it to Section 4, POCSO Act after committal. The consistent testimony of the victim, her parents and other witnesses, as well as the failure of the accused to prove that he was falsely implicated due to enmity or other reasons, led to a conviction under Section 8. The presumption under Section 30, POCSO Act was also invoked.

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<sup>49</sup>Spl POCSO Case No. 12 OF 2014 decided on 9.09.2015

<sup>50</sup>Spl. POCSO Case No. 11 of 2015 decided on 07.06.2016.

<sup>51</sup> G.R. Case No.2250 of 2014 decided on 19.12.2015

<sup>52</sup> G.R. Case No. 49/2014 decided on 09.06.2016.



### 3.6.6. Reasons for acquittal

The two principal reasons for acquittals were because the victim did not support the prosecution's case and in the cases that she did, her testimony was found unreliable. There were several other grounds as well, such as, where the testimony of the victim was not corroborated by medical evidence or other witnesses; where the victim failed to identify the accused; and where the prosecution failed to connect the accused to the offence. Some grounds are explained below.

#### (a) Victim turned hostile

The accused was acquitted in all cases in which the victim turned hostile. In 24 of the 54 cases, (44.44%) in which the victim turned hostile, the process for recording the testimony began well over a year after the incident allegedly took place or was reported.

In *State v Bimal Toppo*<sup>53</sup>, the victim, aged 15 years, was allegedly subjected to penetrative sexual assault by her uncle. The victim deposed against him in the chief examination. However, during cross-examination she turned hostile on the point of sexual offence. She also stated that she was tutored by the police in response to a leading question posed to her by the defence.

In the case of *State v Sonu Deori*<sup>54</sup>, the three victims aged 6, 8 and 9 years respectively, were allegedly subjected to aggravated penetrative sexual assault by their neighbour. They testified against the accused in the examination-in-chief and turned hostile during cross-examination. The girls had initially stated that the neighbour used to rub his penis against the girls' vagina. However, during cross examination they all turned hostile, stating that they used to play in the swing in the accused's house and because of the noise they made, the accused used to scold them. The mother of all the three victims denied consent for medical examination of their daughters. All three victims made similar statements during cross examination, that the accused used to pinch their cheek and used to show them love as a "grandfather".

#### (b) Child victim's testimony considered unreliable

Of the 91 victims who testified against the accused, the testimony of 37 (40.65%) was considered unreliable.

In *State v. Rajendra Bbar*<sup>55</sup>, the victim was in a relationship with the accused and had willingly accompanied him to his house where he did a "bad thing" with her. She wanted to marry him, but his family did not accept her and turned her out of the house the following day. She later claimed that he raped her in a jungle and then took her to his house. The medical examination did not support her claim. Her age was also contested. She stated that she was 13-14 years, but the radiological examination indicated that she was between 16 and 18 years. Due to the discrepancy in her statements, the accused was acquitted.

In *State v. Barun Saba*<sup>56</sup>, according to the victim aged about 12 years, the accused (her tuition teacher) gagged her mouth, removed her top and squeezed her breasts. Although the parents of the victim corroborated her statement, the two friends of the victim, who also went to the same tuition classes, did not support her statement. According to them on the date of incident, they

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<sup>53</sup>PCSO case.5/15 decided on 09-09-15

<sup>54</sup>PCSO case 15/15 decided on 09-12-15

<sup>55</sup>Spl (POCSO) Case No. 8 of 2014 decided on 13.7.2015.

<sup>56</sup>Spl. Case No. 5(B)/2014 decided on 05.01.2015.

along with the victim went for tuitions to the house of the accused and after the class ended, all of them returned back home and the victim did not tell them anything about the incident. They also stated that they used to take tuitions in the house of the accused on Thursdays, Fridays, Saturdays and Sundays; whereas the victim and her mother stated during the trial, that the incident took place on a Tuesday.

In *State v Abdul Rezzak*<sup>57</sup>, the accused who was the 14-year-old victim's neighbour, attempted to commit rape, bit her cheeks and then hit her head with a stick. Even though the victim and her parents testified against the accused, the court acquitted him because the medical evidence did not reveal any injury and there were discrepancies between the child victim's statements to the police, the Magistrate, and the Special Court. While the victim stated in court that she was found without clothes when her parents arrived on hearing her cries, this was not mentioned in her statement under Section 164, CrPC. There were discrepancies between the statements of the victim and her parents in court and that of the police, which according to the Special Court made the victim's statement unreliable.

### **(c) Ingredients of the offence not established**

In *State v. Jowang Singpho*<sup>58</sup>, the evidence adduced did not point to penetrative sexual assault. In her statement u/s 164, CrPC, the victim aged 12 years and stated to be 14-18 years as per the radiological exam, had stated that the accused, a co-villager had "committed bad act with her by removing her clothes". Injuries were observed on her face, neck and back, but no injuries were visible on her private parts. The accused had even argued that the girl was above 18 years and hence she may have been a consenting party. The Special Court arrived at the conclusion that she was a minor and her consent was therefore irrelevant, but observed that it did not appear that there had been any penetration. The accused was acquitted under Section 4, POCSO Act but convicted under Section 354, IPC.

In *State v. Barun Barman*<sup>59</sup>, a 13-year-old girl admitted to eloping with the accused willingly and also stated that he married her in Kamakhya temple and applied vermilion on her forehead. She also stated that her mother and she both had no objection if the accused was acquitted. The Special Court concluded that the charges under Section 366A, IPC were not made out, as the victim went with him willingly. The Special Court also acquitted the accused under Section 4, POCSO Act, because the prosecution had failed to establish the ingredients of the offence

### **(d) Parties compromised**

In two judgments, there is an express reference to a compromise between the parties. In *State v. Anup Das*<sup>60</sup>, the victim filed an FIR against the accused, (her cousin), for ill treatment and outraging her modesty. However, later during trial, the victim, her mother and sister stated that, the victim had a quarrel with the accused about property and thus they filed a complaint due to a misunderstanding and denied the occurrence of any act mentioned in the charges. The court observed that - "*They have compromised the case.*"

In *State v. Chandan Baruah*<sup>61</sup>, the girl aged 16-18 years, as per the medical examination, was allegedly raped by her neighbor. In court, she turned hostile and stated that the accused had held her hand and not raped her. She also stated that "she had good relation with the family members

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<sup>57</sup>Special Case No.1/2014 decided on 09-07-2015

<sup>58</sup>Sessions Case No. 134 (M) of 2014 decided on 03.08.2015.

<sup>59</sup> Special (POCSO) No.10/2015 decided on 31.07.2015.

<sup>60</sup>Spl. POCSO Case No. 11/2015 decided on 21.11.2015

<sup>61</sup> G.R. Case No. 784 of 2013 decided on 21.09.2016.

of accused and she does not want to proceed with the case any further as her parents had arrived at a settlement between the family members of the accused.” The aspect of the settlement was not probed by the Special Court. The Special Court also did not refer to *Shimbbu v. State of Haryana*<sup>62</sup> in which the Supreme Court had observed that “Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle”, applied.

Interviews with the police and prosecutors also confirmed that in several cases, the families of the victim and the accused arrive at a compromise, after which the victim refuses to testify against the accused. Compromise is usually struck when the victim is pregnant. However, the police and prosecution continue with the case, as the offence is not compoundable.

### **(e) Failure to establish that victim was below 18 years**

In *State v Abdul Rezzak*,<sup>63</sup> the age of the victim had not been proved. Her parents claimed she was 14 years old and had been sexually assaulted by the accused, a neighbour. According to the court, there was no formal proof of the age of the victim that was produced by the prosecution like a school certificate or ossification test. The prosecution failed to prove the age of the victim to be a minor.

## **3.7. Grounds on which victims turned hostile**

As regards grounds on which victims turned hostile, 47 victims denied the occurrence of the sexual offence. 10 victims stated that the offence had not been committed by the accused and four victims claimed (without any substantiation), that they were above 18 years.

### **3.7.1. Hostile on the point of offence**

In *State v. Md. Fażar Al*<sup>64</sup>, a 9-year-old girl had been allegedly raped by a shopkeeper in her locality who has allegedly lured her by offering a snack to his house. In her testimony in court, however, she turned hostile and stated that he had slapped her for taking a packet of mixture without paying for it and had not sexually assaulted her. Similar events transpired in *State v. Kairul Islam*<sup>65</sup> where an 11-year-old girl was allegedly raped by her neighbor, but later stated in court that her had scolded her for plucking blackberries. It is pertinent to note that her testimony was recorded after over a year since the incident allegedly took place.

In *State v. Pranab Jyothi Hazarika*<sup>66</sup>, the defendant, a teacher in a school, had allegedly touched the private parts of two class II students. The girls, however, stated in court that the teacher used to show affection to all children equally and had not misbehaved with them.

In *State v. Tapin Hira*, the accused had allegedly sexually harassed his 14-year-old daughter and attempted to rape her under the influence of liquor. The complaint was lodged by his father. In her testimony in court, the victim stated that her father used to create disturbance in the house, and used to abuse and assault her physically. She did not, however, mention sexual assault. Her grandfather also deposed similarly.

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<sup>62</sup> (2014) 13 SCC 318.

<sup>63</sup> Special Case No.1/2014 decided on 09-07-2015

<sup>64</sup> G.R. Case No.139 of 2012 decided on 11.09.2015.

<sup>65</sup> Sess. Spl. Case No.16/2014 decided on 06.01.2016.

<sup>66</sup> Sess. Spl. Case No.09/2014 decided on 09.09.2015.

### 3.7.2. Hostile on the point of identity

In *State v. Nayan Medhi*<sup>67</sup>, the accused allegedly gagged the 14-year-old victim's mouth and committed rape on her in an abandoned building when she went to attend nature's call. The victim turned hostile by stating that she did not know the identity of the person who held her hand in the dark, due to which she had screamed. A similar statement was made by her parents. The victim also stated that she was not interested in continuing the case further. There were no independent witnesses other than the parents and doctor. The medical examination showed no spermatozoa or recent sign of sexual intercourse.

In *State v Shankar Prasad Rana*<sup>68</sup>, the victim aged 14 to 15 years was working as a domestic help in the accused person's house. She alleged that he had committed rape on her. She was 29 weeks pregnant when the FIR was registered and medical examination was done. In court, the victim turned hostile on the point of identity of the accused and stated that she had developed an affair with a person employed in the accused's garage and as result of their physical relationship, she was pregnant. While the FIR was lodged in August 2013, the recording of evidence commenced from December 2014, nearly 16 months later. No DNA test was ordered for or done in this case.

In *State v Subhash Sen and Sri Kusheswar Saikia*<sup>69</sup>, the victim alleged that she was subjected to sexual intercourse by her paternal uncle. The victim was impregnated and she delivered a still born baby. However, the victim and the informant, her mother, turned hostile on the point of identity of the accused and stated that the victim had a relationship with another person due to which she conceived. The statement of the victim was recorded nearly one and a half years after the incident was reported.

### 3.7.3. Hostile on the point of age

Victims turned hostile on the point of age mostly in cases in which they claimed to be in a relationship with the accused.

In *State v. Md. Ibrahim Ali*<sup>70</sup>, the victim's mother alleged that the defendant trespassed into her house and committed rape on her 12-year-old daughter. In court, however, she stated that her daughter was more than 18 years and had been taken by the accused to his house. They were married now and she had good relations with them. The victim stated that she loved the defendant, but her parents did not accept the relationship and so she eloped with the accused. They were married now and living happily. She also stated that she was above 18 years at the time of the incident. This was the basis of acquittal. Similarly, in *State v. Munia Deka*<sup>71</sup>, the informant (mother of the victim) and the victim both stated that she was above 18 years on the date of the incident. She had married the accused subsequently. The facts were similar in *State v. Nabin Deka*<sup>72</sup> and *State v. Ruak Biswas*<sup>73</sup> as well.

## 3.8. Analysis of Charges

Charges of penetrative sexual assault were filed in 83 cases (48%), aggravated penetrative sexual assault in 27 cases (15%), sexual assault in 45 cases (26%), aggravated sexual assault in 10 cases

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<sup>67</sup> SC No. 3/2014 decided on 11.02.2014

<sup>68</sup> Spl. (P) Case No.6 of 2014 decided on 10 .05.2016

<sup>69</sup> Special (POCSO) Case No. 01 of 2014 decided on 02-06-2016

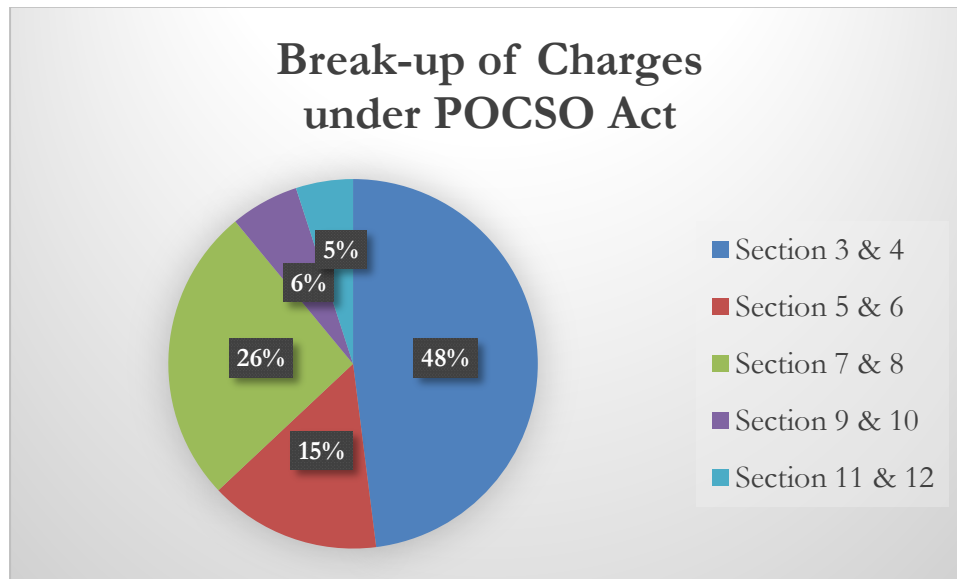
<sup>70</sup> Sess. Spl. Case No.15/2015 decided on 30.11.2015.

<sup>71</sup> Sess. Spl. Case No.23/2014 decided on 19.01.2016.

<sup>72</sup> Sess. Spl. Case No.12/2015 decided on 08.02.2016.

<sup>73</sup> Sess. Spl. Case No.15/2014 decided on 12.10.2015.

(6%) and sexual harassment in 9 cases (5%). As is evident, majority of the charges were under penetrative and aggravated penetrative sexual assault under the POCSO Act.



Charges were also framed under Sections 14 (punishment for using child for pornographic purposes) in one case, 17 (abetment) in two cases and 18 (attempt) in five cases.

In 95 cases (55.23%) charges were framed under POCSO and IPC, of which rape charges were framed in 35 cases (37%); sexual harassment charges in 13 cases (14%); and kidnapping charges in 39 cases (41%). In one case additional charges were also framed under the IT Act.

Charges revealed the following grounds under aggravated penetrative sexual assault:

- Section 5(g) – Gang penetrative sexual assault
- Section 5(j)(ii) – Making the child pregnant as a consequence of assault
- Section 5(l) - Penetrative sexual assault on a child more than once or repeatedly
- Section 5(m) – Penetrative sexual assault on a child below 12 years

Charges revealed the following grounds under aggravated sexual assault

- Section 9(g) – Gang sexual assault

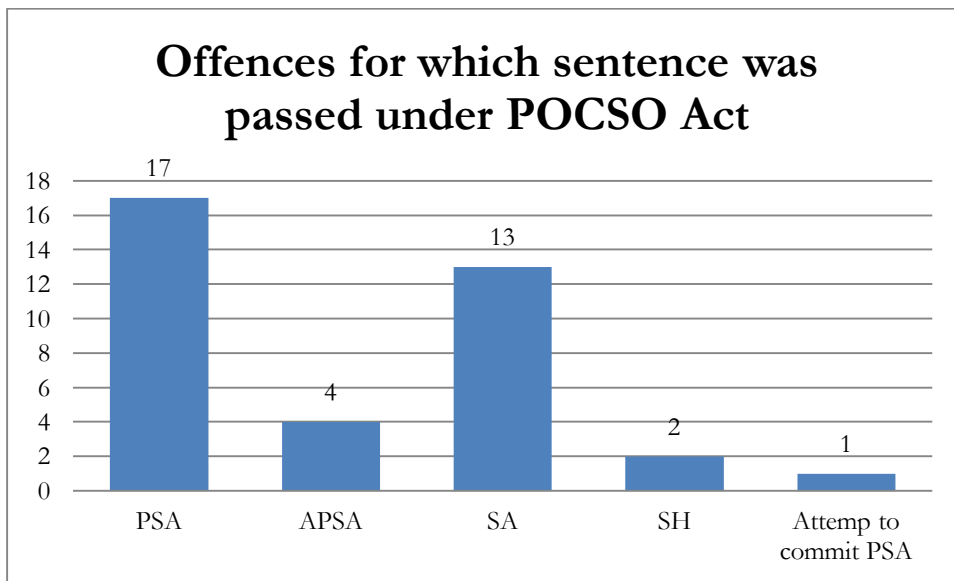
No case of sexual assault or penetrative sexual assault by a police officer, member of the armed forces, or management or staff of child care homes was decided by the Special Courts during the period under study.

### 3.9. Sentencing Pattern

#### 3.9.1. Offence-wise breakup

Of the 42 cases that resulted in conviction under the POCSO Act, the accused was sentenced under the POCSO Act in 37 cases (88.09%), released on probation in three cases (7.14%) and in one case each sentenced under IPC (2.38%) and the IT Act (2.38%). Sentences were passed under 17 cases of penetrative sexual assault, four cases of aggravated penetrative sexual assault, 13 cases of sexual assault, two cases of sexual harassment, and one case of attempt to commit penetrative sexual assault.

The offence-wise break-up of the sentencing orders is contained in the graph below.



PSA – Penetrative Sexual Assault; APSA – Aggravated Penetrative Sexual Assault; SA – Sexual Assault; SH – Sexual Harassment;

In five cases though the accused was convicted under the POCSO Act, he was not sentenced under the POCSO Act. Out of these, in three cases he was released on probation of good conduct and in one case each he was sentenced under the IPC and IT Act, respectively.

### 3.9.2. Quantum of sentence

Minimum sentences have been prescribed for all sexual offences under the POCSO Act. Where a statute has prescribed a minimum sentence, courts do not have the discretion to pass sentences lower than the minimum. The Supreme Court of India in this regard has clearly held that:

Where the mandate of law is clear and unambiguous, the court has no option but to pass the sentence upon conviction as provided under the statute...

...The mitigating circumstances in a case, if established, would authorise the court to pass such sentence of imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment.<sup>74</sup>

The mitigating factors that influenced the quantum of punishment to be minimized were, age of the accused, family responsibilities, and the socio-economic background of the accused. An aggravating factor was the relationship between the convict and the victim. In *State v Madhab Koch*<sup>75</sup>, the accused was convicted of sexually assaulting two minor girls aged 8 and 5 years respectively. The court while ordering the sentence considered the fact that the accused was partly paralyzed and he had three minor children along with a wife to be taken care of and imposed rigorous imprisonment of three years and fine of Rs.5000.

In *State v Sanjay Dey*<sup>76</sup>, the neighbor of the victim was convicted of sexual assaulting a child aged six years. The court heard the convict on quantum of sentence who stated that he was a poor

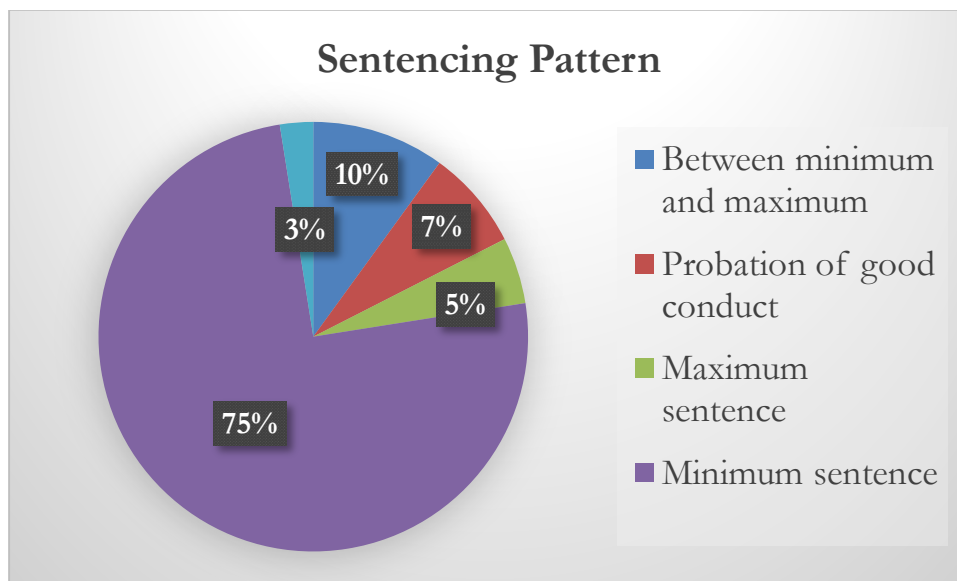
<sup>74</sup>*State of J&K v. Vinay Nanda*, AIR 2001 SC 611.

<sup>75</sup>PCSO Case no. 2/14 decided on 19.09.2015

<sup>76</sup>PCSO Case no 16/15 decided on 15.02.2016

man and the sole bread winner of the family consisting of his wife and daughter. Based on these factors he was sentenced to three years rigorous imprisonment.

The maximum prescribed sentence was awarded in two cases which comprised one case of penetrative sexual assault and another case of aggravated penetrative sexual assault. In *State v Hari Nath & Ors*<sup>77</sup>, the victim committed suicide after her parents reached a compromise with the accused. The accused, charged u/s 4 of POCSO Act, was subsequently sentenced to life imprisonment. In *State v. Nirud Phukan*<sup>78</sup> where the offence of aggravated penetrative sexual assault was committed on the victim by her father over a period of six months, the Special Court was of the view that this warranted for maximum punishment and imposed life imprisonment. The profile of the victim and the offender, the impact of the offence on the victim appeared to have a bearing in prescribing punishment in these cases



- In two cases the accused was convicted under the POCSO Act, but was sentenced under the IPC and IT Act, respectively. In *State v Jitumani Bora*, though the accused was convicted under Section 14, POCSO Act, along with Section 67/67B of I.T. Act, the Special Court sentenced the accused to five years simple imprisonment under the I.T. Act. Similarly, in *State v. Raja Dushad*<sup>79</sup>, though the accused was convicted under Section 4 of POCSO Act, he was sentenced to seven years rigorous imprisonment and in default of fine rigorous imprisonment for two months u/s 376 IPC. He was also sentenced to three years rigorous imprisonment and fine of Rs1000 and in default further rigorous imprisonment of one month u/s 366 IPC
- In 30 cases, the minimum mandatory sentence under the POCSO Act was imposed.
- The POCSO Act does not prescribe probation. However, probation was ordered in three cases, which was less than the minimum sentence prescribed for the offence.
- The convicted person was sentenced to period already undergone in one case. In *State v Mahendra Hazarika*<sup>80</sup>, the accused had been in judicial custody for a period of two years in the course of investigation, inquiry and trial. The court sentenced him to a period already

<sup>77</sup> Sessions case no.159 of 2015 decided on 07.01.2016

<sup>78</sup>PCSO Case no 18/2014 decided on 22-12 -15.

<sup>79</sup> Sessions Case No. 64/2016 decided on 27.07.16.

<sup>80</sup>Sessions case No.10(K) of 2014 decided on 11.12.2014

undergone after convicting him under Section 7 of the POCSO Act. This is less than the minimum prescribed sentence.

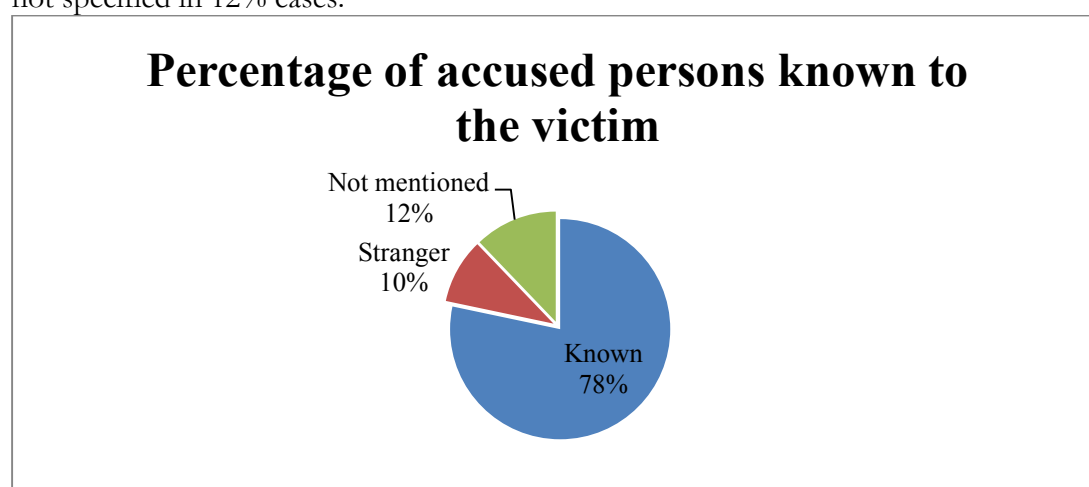
- In all the cases where the convicted person was sentenced under the POCSO Act, fine was also imposed.
- In some cases, judges convicted and sentenced the accused under provisions different from that which they had been charged under. For instance, in *State v. Subhas Nayeek*<sup>81</sup>, the accused was charged under Section 6, POCSO Act, but he was convicted under Section 4 as the prosecution failed to establish that he had any authority over the child. Though the child was three years, the court failed to consider the age of the child under Section 5(m) as an aggravating factor to convict him under Section 6. In *State v Sanjay Dey*<sup>82</sup>, the accused was charged under Section 4, POCSO Act, but considering that no penetration had taken place, the judge sentenced him to three years rigorous imprisonment under Section 8, POCSO Act.

**Table No.3.3. Types of sentences passed by Special Courts**

	PSA	APSA	SA	SH	Others	Total
<b>Probation</b>	1	2				<b>3</b>
<b>Minimum Sentence</b>	13	3	12	2		<b>30</b>
<b>Maximum sentence</b>	1	1				<b>2</b>
<b>Period already undergone</b>			1			<b>1</b>
<b>Between minimum and maximum</b>	3				1	<b>4</b>

### 3.10. Profile of the accused and its implication on testimony of the victim and outcome of the case

The accused was known to the victim in 78% cases, was a stranger in 10%, and his profile was not specified in 12% cases.

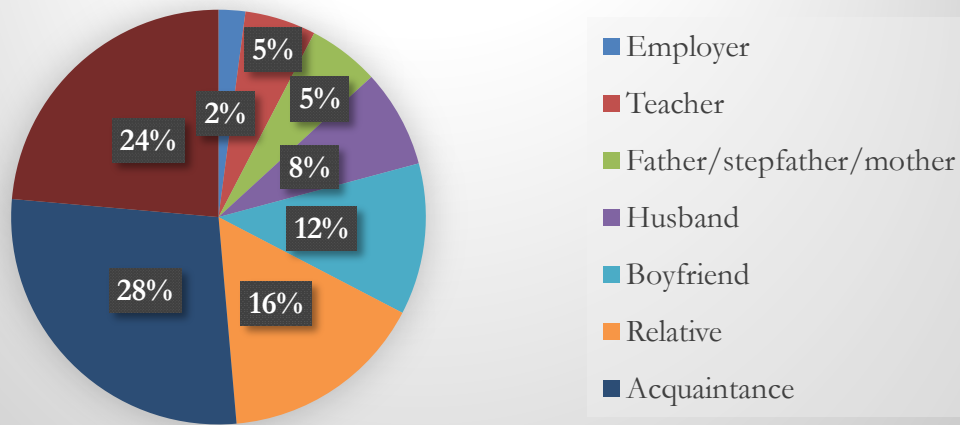


<sup>81</sup>Spl. (POCSO) Case No. 14/15. Decided on 23.11.2015

<sup>82</sup>PCSO No 16/15decided on 15-02-16

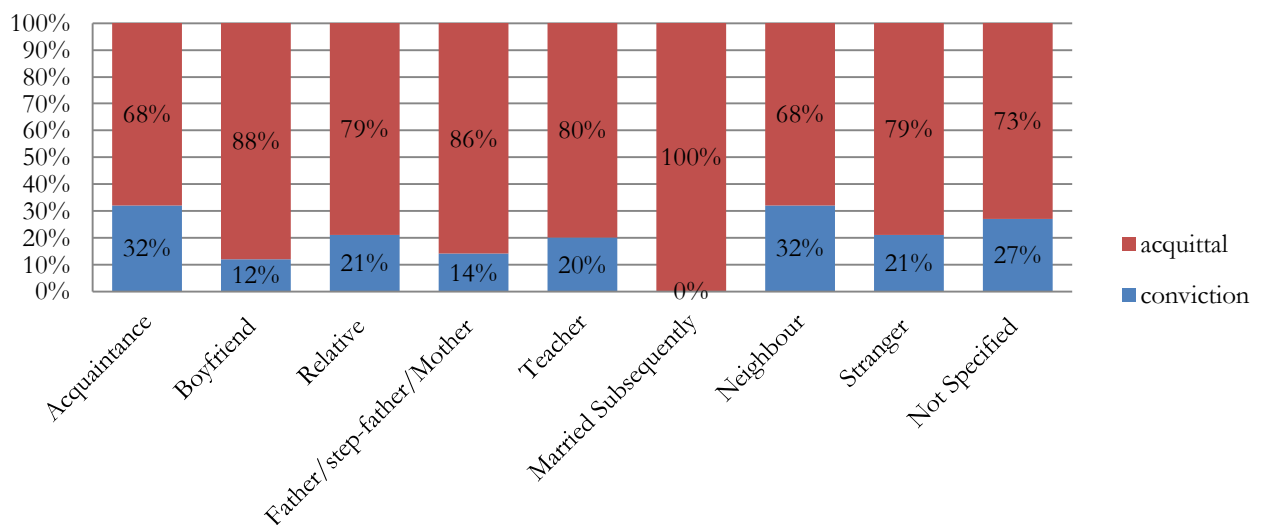


### Profile of Accused Known to the Victim



The breakdown of the profile of the accused persons known to the victim, reveals that acquaintances constituted the largest group; (28%) followed by neighbours (24%). Relatives also form a significant proportion of accused known to the victim (16%), and this includes cousin, uncle, and a brother-in-law. Acquaintances included a person from the neighbouring village, videographer at sister’s wedding, shopkeeper, husband’s friend, former boyfriend, friend, Imam of mosque, employers, and a daily wage earner in the victim’s house. Of the accused persons known to the victim, husband and boyfriend constitute 20% of cases. Teacher included tuition teacher and head master.

### Outcome of the case based on profile of the accused

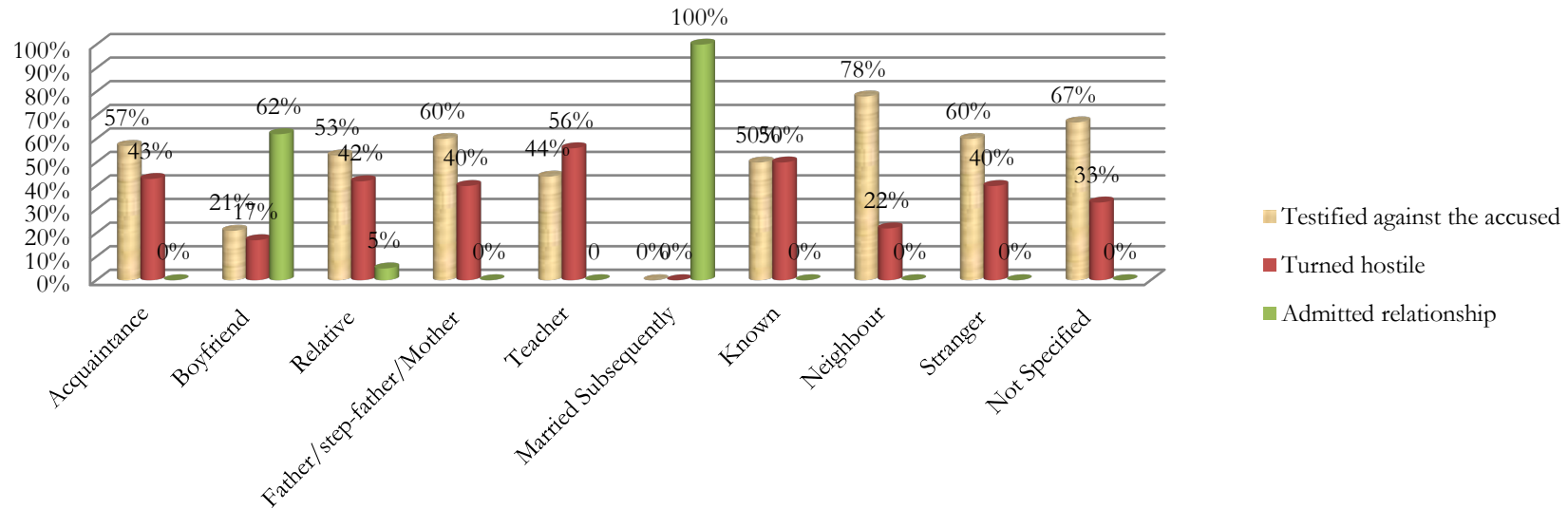


The graph above reveals that the rate of conviction was zero in cases where the accused was married to the victim (0%) followed by boyfriend (12%), parent (14%), teacher (20%), relative

(21%) and stranger (21%). Conviction was highest in cases where the accused was an acquaintance and neighbor (32%), followed by relative and stranger (21%). Acquaintance in the above graph includes employers.

The graph that follows helps understand the outcomes better as it indicates the testimony of the child based on the profile of the accused.

## Testimony of the Victim as per the profile of the accused



- The highest percentage of cases in which the victim turned hostile was those in which the accused was a teacher (56%). This was followed by cases in which the accused was an acquaintance (43%), relative (42%), parent (40%) and stranger (40%). In all the cases where the victim was married to the accused, she admitted the relationship and neither testified against the accused or turned hostile.
- The highest percentage of cases in which the victim testified against the accused, were cases in which the accused was a neighbor (78%), stranger (60%), father/step-father (60%), acquaintance (57%), and relative (53%).

- The percentage of victims who testified against the accused was lowest in cases in which they were married, (0%), followed by cases in which the accused was a boyfriend (21%).
- In 27 cases, the prosecutrix expressly admitted that she was in love with the accused. Of this, in five cases, even though she admitted the relationship, she turned hostile; in three cases she testified against the accused; and in 19 cases she merely admitted the relationship and did not say anything else.
- Of the seven cases, in which the father or step-father was the accused and the mother was the co-accused, six cases ended in acquittal and one in conviction. In these seven cases, the prosecutrix testified against the accused in three cases and turned hostile in two cases. The prosecutrix was not examined in two of these cases, because she died in one case before she could testify and was not traceable in another. In one case,<sup>83</sup> there were factual discrepancies between the statement of the mother who was the eye witness and that of the child victim. In another case<sup>84</sup>, the judge acquitted the father as there was no circumstantial evidence on record, the sexual intent of the accused was not proved and the court opined that the possibility filing the case out of grudge could not be ruled out. In the case of *State v Nirad Phukan*<sup>85</sup>, the victim testified against her father and the Special Court convicted the accused, as there was no discrepancy between the statement of the prosecutrix and other prosecution witnesses and her statement was consistent with her statement under Section 164, CrPC. Even though the I.O had not conducted the DNA test, (as the victim was pregnant), the court noted that mere failure of the I.O cannot destroy the prosecution case.
- All 11 cases in which the accused was married to the victim ended in acquittal, as the victim admitted relationship. Of the 17 cases in which the accused was the victim's boyfriend, the victim admitted the relationship and testified against the accused in five cases. The accused was convicted in *State v. Saidul Alam Mazumdar*<sup>86</sup> and *State v Md. Abdul Kalam*.<sup>87</sup> In *State v Geeny Gupta*<sup>88</sup>, the victim admitted her relationship and also stated that she was made to believe by the accused that he would marry her and had sexual intercourse multiple times based on this promise. Though the court accepted this point, it acquitted the accused, as the culpable mental state could not be proved. Four cases in which the victim admitted the relationship and turned hostile on the point of age and sexual offences resulted in an acquittal. In eight cases, the victim neither testified against the accused nor turned hostile, but merely admitted the relationship with the accused. For more details, refer to Section 3.12.
- Of the 34 cases in which the accused was a neighbor, the victims testified against the accused in 24 cases, turned hostile in eight cases and was not examined in two cases,<sup>89</sup> as the victim had died in one case and was of a tender age in another. Convictions were recorded in 11 cases. The testimony of the victim was found unreliable in 11 cases, and

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<sup>83</sup>Spl. (P) Case No.11 of 2014 decided on 1.03.2016

<sup>84</sup>Spl. (P) Case No.9 of 2014 decided on 28.04.2016

<sup>85</sup>PCSO case no. 18/14 decided on 22.12.15

<sup>86</sup> Special (POCSO) Case No. 15/2014 decided on 29.02.2016

<sup>87</sup>Special POCSO Case no. 23 of 2015 decided on 10.03.2016

<sup>88</sup>Special (POCSO) Case No. 41 of 2015 decided on 27.04.2016

<sup>89</sup>*State v. Ananda Mura* (Sessions Case No. 49 (T) of 2014) decided on 7.12.2015; *State v. Karlush Sorang*(POCSO Case no. 05 of 2015) decided on 14.12.2015.

in one case,<sup>90</sup> the identity of the accused could not be established. In two cases there were more than one victim. In *State v. Karlush Sorang*<sup>91</sup>, the victim stated that her neighbor had tried to rape her – he had taken her skirt and pant off and removed his pant and “tried to commit bad act...”. While in her statement u/s 164, CrPC, she had detailed the incident, but did not say anything beyond the name of the accused in her testimony conducted in the judge’s chamber. The Magistrate who examined her had not been produced by the prosecution. According to the prosecution, there was apparently a child peeping into the room when the incident took place, but he was not examined either. The medical report indicated that the hymen was intact and there had been no mark of assault or forceful recent sexual intercourse. The Special Court relied on judgments of the Supreme Court on the value of a statement under Section 164, CrPC, and came to the conclusion that since it is not substantive evidence, it cannot be the basis for conviction of the accused.

- Of the 19 cases in which the accused was a relative, eight victims (42%) turned hostile, one admitted the relationship and 10 testified against them. In one case, the victim did not testify because she was untraceable. The testimony of four children was found to be unreliable and as a result conviction resulted in only four cases and acquittal in 15 cases. In *State v. Biren Rajbangshi*<sup>92</sup>, the accused was convicted under Section 354, I.P.C as the offence under the POCSO Act, was not established. In *State v Pranta Jyothi Dutta*<sup>93</sup>, though the victim testified against the accused, the parents turned hostile and the Special Court held that the prosecution failed to prove the offence.
- Of the 40 cases in which the accused was an acquaintance, the victim turned hostile in 17 cases and testified against the accused in 23 cases. The testimony of five victims was found unreliable and conviction was recorded in only nine cases. In three cases the accused was an employer, of which in two cases, the victim testified against the accused and in one case, turned hostile. Conviction was awarded in one case and testimony of the victim was unreliable in another.
- There were eight cases in which the accused was a teacher. In four cases, the victims turned hostile and testified against the accused. Conviction was awarded in two cases.
- Of the 14 cases in which the accused was a stranger, the victim testified against him in eight cases and turned hostile in five cases. In two cases, the testimony was found unreliable. Conviction was awarded in only three cases. In two cases, the victim failed to identify the accused. In two cases, there were more than one victim and out of these in one case in which there were two victims, one victim testified against and the other turned hostile.
- In 22 cases, the relationship of the victim with the accused was not specified. Of these, in nine cases, the prosecutrix was not examined, in five cases she had died and in two cases she did not testify, due to tender years. In the remaining two cases, the prosecutrix was not traceable. Conviction was awarded in six cases and acquittals resulted in 16 cases.

### 3.11. Application of Presumption under the POCSO Act 2012

<sup>90</sup> *State v Amul Karmakar*, PCSO Case No. 54/15 decided on 10.08.2016.

<sup>91</sup> POCSO Case No. 05(T) of 2015 decided on 14.12.2015.

<sup>92</sup>Special (POCSO) 19(U) 15 decided on 8.10.2015.

<sup>93</sup> PCSO Case No. 29/15 decided on 23.11.2015.

Although convictions resulted in 42 cases, the presumption under the POCSO Act was expressly mentioned in only 19 cases.

#### **(a) Presumption applied and accused convicted**

The presumption was applied and conviction was recorded in 16 cases. In *State v. Sumit Puri*,<sup>94</sup> the victim aged 14-15 years had been allegedly raped by her cousin. She testified against him and her testimony was found reliable by the Special Court. The presumption under Sections 29 and 30, POCSO Act, was also applied in the case and the Special Court held that the accused had “failed to discharge the onus of proving that he had been falsely implicated in this case due to enmity or any other reason.” The accused had failed to rebut the presence of sexual intent or show that he had not committed the offence and was therefore convicted under Section 4, POCSO Act.

In *State v. Anil Gogo*<sup>95</sup>, the Special Court convicted the accused for sexual harassment based on the cogent, clear and trustworthy evidence of the 10-year old victim and on an application of the presumption of guilt under Section 30, POCSO Act. It reasoned that the act of grabbing the child, taking her to the bedroom and pushing her on the bed and giving her Rs. 10/- when she cried out, would fall under the ambit of Section 11(i), POCSO Act. The accused had failed to rebut the presumption and had proffered two contradictory defence pleas, in an attempt to justify that a false case had been filed against him. He also failed to examine witnesses who would substantiate his plea or suggest to the witnesses during cross-examination facts mentioned in his plea.

#### **(b) Presumption referred to and accused acquitted**

In three cases, references were made to the presumption provisions under the POCSO Act, but were not applied based on the facts of the case. In these cases, the statement of the victim or prosecution witnesses were considered unreliable and did not establish the factum of the offence.

In *State v. Sri Tinku Mahali*<sup>96</sup>, the accused had allegedly removed the undergarment of a four-year-old child and attempted to rape her. The Special Court stated that the victim could not speak anything and thus her evidence could not be recorded by the court. Her parents testified instead. The Special Court referred to the presumption under Section 30, POCSO Act, but expressed doubt on whether the victim understood the meaning of the term ‘rape’. Since there were no eye-witnesses, it was of the view that the testimony of the parents and an uncle did not inspire confidence. It observed that before the presumption could be drawn, the prosecution would have to prove the existence of certain facts. It cited *Kali Ram v. State of H.P.*<sup>97</sup>, in which the Supreme Court had held that:

Once those facts are shown by the prosecution to exist, the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of accused. If some material is brought on the record consistent with the innocence of the accused, which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

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<sup>94</sup> Sessions Case No. 70(T) of 2014 decided on 04.01.2016.

<sup>95</sup> Sessions Case No. 44(T) of 2014 decided on 05.03.2016.

<sup>96</sup> Special (POCSO) Case No. 01 of 2016 decided on 08.06.2016.

<sup>97</sup> AIR 1973 SC 2773.

In *State v Md. Ashmot Hussain*<sup>98</sup>, the accused had allegedly held the victim's hand when she was returning from tuitions in the evening. In her cross-examination the victim denied that the accused had misbehaved with her. The Special Court held that it had not been established that the accused had held her hand with sexual intent, and though Section 30, POCSO Act, requires that the culpable mental state be presumed, the presumption was rebutted because of the victim's statement in her cross-examination.

### **Reference to the High Court regarding the constitutionality of the presumptions under the POCSO Act**

On 2 May 2014, a Special Judge (POCSO Act) from Cachar made a reference to the High Court under Section 395, CrPC, regarding the constitutionality of Sections 29 and 30 of the POCSO Act. The reference details relevant case laws and the 180<sup>th</sup> Report of the Law Commission of India on Article 20(3) which emphasize the right of the accused to a fair trial and the requirement of the process for deprivation of liberty to be just, fair, and reasonable under Articles 14, 20 and 21 of the Constitution. The reference states that the objectives of the POCSO Act, to address sexual offences against children by creating a child-friendly system of investigation and trial with commensurate penalties, "cannot be achieved by negating the constitutional guarantees relating to fair trial as manifest in Article 14, 20, 21."

The reference states:

While age can be a reasonable basis for classification for the purpose of presuming absence of consent, ..., categorizing accused persons on the basis of age of the victims cannot amount to reasonable classification for the purpose of determining on whom the burden of proof lies, having valid nexus with the object sought to be achieved. There is nothing improbable that a girl, below the age of 18 years may also make a false complaint on being induced or led to do so by her parents or guardian for some ulterior motive.

### **3.12. Outcomes in 'romantic' cases**

For the purpose of the study, 'romantic' cases refer to cases in which the victim claimed to be in a relationship with the accused. Of the 27 cases in which the victim was admittedly in a relationship with the accused, in 14 cases, charges under Section 366 and 366A, IPC were filed, in addition to that under the POCSO Act. These were cases in which a parent or sibling reported that the victim had been kidnapped by the accused. The victim and the accused were traced by the police and charges were filed under the IPC and the POCSO Act.

In five cases, the victim was pregnant when the FIR was lodged and in 11 cases she was 'married' to the accused. Convictions resulted in two cases and acquittals in 25 cases. The reasons for conviction and acquittals are unpacked below.

#### **(a) Conviction**

The accused in "romantic" cases were convicted in only two cases in which the victim admitted the relationship and testified against the accused. In *State v. Saidul Alam Mazumdar*<sup>99</sup>, the victim, who was above 14 years and below 16 years, admitted to being in love with the accused and stated that he had sex with her forcibly and promised to marry her. She became pregnant, and informed her mother. While the accused was willing to marry, her mother refused to permit this and lodged a complaint against him instead. The accused refused to marry her thereafter and

<sup>98</sup>PCSO Case No. 16/14 decided on 01.04.2015.

<sup>99</sup>Spl. (POCSO) Case No. 15/2014 decided on 29.02.2016.

gave her pills for aborting the baby. Her statement to this effect in court was corroborated by her mother's statement and the medical report. The victim and her mother also stated that they had no grievance against the defendant. The victim married someone else within a year of the incident. This did not deter the Special Court from convicting the defendant, because the victim was below 18 years when the incident took place.

In *State v Md. Abdul Kalam*<sup>100</sup>, the accused committed penetrative sexual assault on the victim on a couple of occasions, after having promised to marry her. When the victim became pregnant, he refused to marry her in a village meeting that was called after the matter came to light. She was already five months pregnant at that time. The FIR was registered subsequently. The medical report did not specify an age range, but stated that she was below 18 years. Based on her statement and that of her parents', the Special Court concluded that she was a minor and convicted the accused under Section 4, POCSO Act. The victim testified that the accused "did bad acts with her as a result of which she became pregnant." The Special Court dismissed the defence's argument that this statement of the victim was not sufficient to convict the accused, because the ingredients of penetrative sexual assault were not specifically stated. It observed:

...this Court cannot ignore the fact that this Court is dealing with a minor victim. The victim before this Court is a child, it is not expected from a child that she will narrate the entire act of the sexual intercourse in detail as stated by learned counsel for the defence. It is also apparent that the [victim] while deposing before this Court has also stated that the accused did bad acts with her on more than one occasion and on one occasion she was taken to the kitchen where the accused removed her clothes and then he removed his clothes and committed bad acts. The phrase "bad acts" as used by victim in the instant case, if we consider it in relation to her other statements where she has stated that she became pregnant and ultimately delivered a girl child will only lead to a conclusion that she meant sexual intercourse by the phrase "bad acts".

#### **(b) Acquittal because ingredients of the offence not made out**

Several cases ended in acquittal, because the victim admitted that she loved the accused, but did not state that they had had sexual intercourse. According to the Special Courts, in such cases, the sexual offence had not been established.

In *State v. Bipul Bhowmik*<sup>101</sup>, a 15-16 year old girl had left her house and gone with the accused willingly and was with him for eight days. She stated in court that there had been no sexual contact between them. Charges under Section 366, IPC, and Section 4, POCSO Act, failed. The complainant, her father, stated during the cross that he did not want to proceed with the case and had no objection if the accused were to be released on bail. Examination of the IO and other witnesses was dispensed with, in light of the testimony of the victim and the right of the accused to a speedy trial. A similar outcome was also arrived at in *State v. Dayud Daimar*<sup>102</sup> and in *State v. Sultan Ali*.<sup>103</sup> In *Daimar*, the father stated the age of the victim to be 14 years in the FIR. Later, he claimed this was an error, and he and other family members stated that she was 18 years. As per the radiological exam, she was between 17 and 18 years.

#### **(c) Acquittal because victim not a minor**

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<sup>100</sup> Special (POCSO) Case no. 23 of 2015 decided on 10.03.2016

<sup>101</sup> Special (POCSO) No.6/2015 decided on 8.6.2015.

<sup>102</sup> Special (POCSO) No.17/2015 decided on 29.7.2015.

<sup>103</sup> Special (POCSO) No. 16/2015 decided on 11.8.2015.



In *State v. Dinesh Rana*<sup>104</sup>, the victim refused to undergo a medical examination and stated that she was 18 years of age. Her father produced the birth certificate which indicated that she was above 18 years on the date on which she had eloped with the accused. Based on this, the Special Court concluded that she had attained majority and there was no evidence of the accused having committed sexual intercourse with or without her consent.

In several such cases, however, the Special Court accepted the age stated by the victim or her family members, without considering any documentary proof or accepting the medical report on the point of age. For instance, in *State v. Prabhat Basumatry*<sup>105</sup>, the brother of the victim filed an FIR, alleging that the accused was maintaining “illicit intimacy” with his 14-year-old sister based on a promise to marry. However, in the examination-in-chief, the brother stated that his sister was more than 19 years and that the marriage of the victim and the accused had been solemnized with their consent and the consent of their family members and they were now living as husband and wife. The victim stated that a complaint had been filed based on information about a false allegations made by people of the locality to her brother. She stated that she was married to the accused and was living peacefully with him. The medical examination indicated that she was between 16 and 17 years. The statement of the informant and the victim on the point of age was accepted even though no proof of age was adduced and the Special Court concluded that ingredients of Section 6 were not made out.

In *State v. Md. Jakir Ali*<sup>106</sup> and in *State v Gobind Sarkar*<sup>107</sup>, the Special Court did not consider that as per the radiological examination, the victim was a minor and instead applied the two year margin of error, to conclude that she was above 18 years. In *Ali*, the victim’s father complained that his 14-year-old daughter had been kidnapped by the accused. Charges were filed under Section 366A, IPC and Section 4, POCSO Act. In the examination-in-chief, he stated that his daughter was 17-18 years at the time of occurrence. The radiological exam pegged her age at 16-17 years. In his cross-examination, the father stated that the matter had been resolved amicably at the village level and that the girl had eloped with the accused willingly. He indicated his desire to get his daughter married to the accused. The victim stated that she was in love with the accused and that his parents had even approached her parents, but they turned down the proposal leaving her with no alternative but to elope.

In *State v. Thumybangbrim Hmar*,<sup>108</sup> the age of the victim was contested. The victim was living with her paternal uncle, (her father’s older brother) and her mother complained that the victim had been sexually abused by him, as a result of which she was six months pregnant. While the mother initially claimed her daughter was 17 years, she later stated that the victim was above 18 years. As per the medical report, she was above 15 years and below 18 years. The victim deposed that:

...after the death of her father in her child hood she started to live with the accused, who brought up her. She used to sleep with the accused in the same bed. Out of that relation she became pregnant. After filing of FIR, a *bichar* was held where she expressed that she had no grievance against the accused. She further deposed that she had free consent in the physical relation with the accused and there was no force on the part of the accused. She was major.

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<sup>104</sup> PCSO Case Title No. 12/15 decided on 01.06.2015.

<sup>105</sup> Special (POCSO) Case No. 5/16 decided on 1.7.2016.

<sup>106</sup> Special (POCSO) Case No.13/16 decided on 14.07.2016.

<sup>107</sup> Special (POCSO) Case no. 27 of 2015 decided on 30.01.2016

<sup>108</sup> Spl POCSO 4 of 2015 decided on 04.07.2015.

She also stated that she was in love with the accused and wanted to live with them. The Special Court relied on her statement before the Magistrate and the Court about her “love affairs with the accused” and her mother’s statement that the girl was 18 years at the material time, in order to acquit the accused.

In *State v. Md. Sulman Ali*<sup>109</sup>, the victim’s father alleged that his 10-year-old daughter had been subjected to forcible sexual intercourse by the defendant, in a prayer hall. The FIR was filed after a few days after the incident, because the matter was first agitated before elderly persons in the village, but was not fruitful. In court, the victim said that she was in love with the defendant and wanted to marry him. She said that she had gone to the prayer hall to meet the accused and when her father got wind of the matter, he went to bring her back and brought this case against him. She further stated that the accused did nothing wrong with her. Her father also stated that he felt offended, because the accused was talking to his daughter and thus filed the case. Though medical examination was conducted, its details were not mentioned in the judgment. The Special Court failed to notice the tender age of the victim in this case and acquitted the accused, because the victim stated that he had not done anything wrong.

#### **(d) Acquittal because the victim “had reached the age of discretion”**

In *State v Saidul Ali*<sup>110</sup>, the victim in her statement before the magistrate, stated that she had gone with the accused as she was in love with him. In the examination-in-chief, the child stated that she was threatened by the accused and was forced to elope with him, but in the cross-examination she stated, that they got married one week after the alleged kidnap. She also admitted to having stated that she was in love with the accused in her statement under Section 164, CrPC. Their marriage was consummated and 17 days after the marriage, the police traced the victim. The Special Court observed that she there was no evidence that the victim had tried to escape by jumping from the bicycle of the accused. It also placed reliance on *Shyam v. State of Maharashtra*,<sup>111</sup> in which the Supreme Court found the testimony of the prosecutrix to be unreliable in the context of a case under Section 366 IPC, in which the accused had been found guilty by the trial court and High Court for taking her out of the lawful guardianship of her mother. It observed that:

She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused ..., that he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with ... the appellant on her own and in that sense there was no "taking" out of the guardianship of her mother.

Applying the *Shyam* ruling, the Special Court held that “at the time of occurrence the victim, though not reached the age of majority, had reached the age of discretion. She had developed the capacity to know the full import of what she was doing. Even then she did not try to escape by jumping from the bicycle of the accused.” The Special Court acquitted the accused under not just Section 366, IPC, but also Section 6, POCSO Act. The Special Court failed to appreciate that the context of that case was different, in that there was no charge of rape.

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<sup>109</sup> Sess. Spl. Case No. 23/2015 decided on 25.01.2016.

<sup>110</sup> Special (POCSO) Case No. 50 of 2015 decided on 22.06.2016.

<sup>111</sup> AIR 1995 SC 2169.

While the “age of discretion” has been recognized by the apex court in the context of enticement, the POCSO Act and the Criminal Law (Amendment) Act, 2013 have made the age of consent for sexual intercourse 18 years. There are no exceptions permitted under the POCSO Act and consent of the victim is entirely irrelevant if she is below 18 years. A failure to recognize this is also evident in *State v. Geenya Gupta*<sup>112</sup>, a case in which the accused had sex with the victim on multiple occasions and made her pregnant thrice. He refused to marry her after the third time she became pregnant and that is when an FIR was lodged by the victim’s mother. The Special Court acquitted the accused, because it was of the view that his culpable mental state was not established. It failed to note that unlike the offences of sexual assault and sexual harassment, “culpable mental state” is not an ingredient of penetrative sexual assault. The Special Court observed:

Admittedly in the instant case the victim girl was of 17 years of age and she was a consenting party to the act of the accused. The victim **voluntarily agreed to all the acts of the accused. Didn’t she know about the consequences of her relationship with the accused?** The so called victim girl has stated that when the accused refused to marry her the case was filed against the accused. There is no doubt that in the instant case there is cogent evidence to prove that when the accused refused to marry the victim girl, all the allegations have been made against him. (emphasis added)

...

The POCSO Act is a necessity of time. It is needed in our society where sexual offences against the children are dangerously increasing. **But this act would prove futile when young children below eighteen years of age would voluntarily go for sex.** Law is for the vigilant, not for the indolent. (emphasis added)

...

In the case in hand the victim has disclosed that initially she refused to accept the requests of the accused for sexual intercourse and told him that after marriage she will allow the him to have sexual intercourse with her. Accordingly, the accused took her to a Temple and put vermilion on her forehead. Thereafter both of them stayed together in the house of a common friend ... for a couple of days and had sexual intercourse. The victim also stated that when her brother-in-law confronted the accused on the issue of his relationship with her, he reportedly disclosed before them that at one point of time he loved the victim girl but subsequently he changed his mind and decided not to marry her. This part of the evidence remains unchallenged. It goes to prove that the accused did not have culpable mental state when he had sexual relationship with the victim.

Unlike the strict view of the Special Court in *State v. Md. Abdul Kalam*<sup>113</sup>, in *Geenya Gupta*, the Special Court believed that the victim should bear the consequences of voluntary sex, even though she was below 18 years.

In *State v. Riki Bora*, the Special Court acquitted the accused of a charge under Section 4, POCSO Act and Section 366, IPC, because the 16-year-old victim admitted that she voluntarily went with him and he did not force her to go with him. It observed, “the prosecutrix took the initiative to go with the accused with whom she was having an affair. Though she was not an adult, she was on the verge of attaining majority.” Besides, in this case the victim categorically denied having sexual intercourse with the accused and that is what resulted in the acquittal under the POCSO Act. The judgment was also silent on the findings of the medical evidence although the victim had undergone medical examination.

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<sup>112</sup> Special (POCSO) Case No. 41 of 2015 decided on 27.04.2016.

<sup>113</sup> Special (POCSO) Case no. 23 of 2015 decided on 10.03.2016

### (e) Acquittal because the victim turned hostile and married the accused

In *State v. Md. Hasamuddin Ali*<sup>114</sup>, the victim had been allegedly raped by the accused and he had threatened to kill her if she disclosed it to her parents. The FIR was lodged by the victim herself when she was six months pregnant. As per her medical examination, she was above 13 years and below 16 years and was 24.2 weeks pregnant. In her deposition before the Special Court, the victim stated that “she willfully got married with the accused out of love with him and both are living as husband and at present they have a child aged about one year.” She also stated that she lodged the FIR because of a misunderstanding with the accused as she was unsure whether he would marry her. The Special Court took note of her marriage and her explanation for filing of the FIR and observed that except for the pregnancy, there was no finding of “recent injury in her private parts at the time of examination.” It also observed that “there is also no mention regarding penetrating of penis, or touching of vagina, anus or breast of the victim or make her to touch such parts of the accused with sexual intent. There is also no circumstantial evidence available on record to hold the accused guilty with the alleged offence. There is no any eye witness of the alleged occurrence.” Finally, it noted that the victim and her mother also stated that they did not want to proceed with the case and had no objection if the accused was acquitted. The Special Court made no reference to her age or the fact that marriage or consent of a child is not recognized under the POCSO Act.

In *State v. Bikash Munda*,<sup>115</sup> the victim became pregnant and delivered a child, but when the family of the accused refused to accept her, an FIR was lodged. As per the medical report she was above 16 years and below 18 years. She stated that she loved the accused, but did not mention anything about the sexual intercourse. She had married the accused subsequent to the lodging of the case and had been accepted by his family. The Special Court held that even though the mother of the victim stated that she had become pregnant through the accused, that was not of much evidentiary value, as the victim had not made such a statement.

### 3.13. Special Courts’ response to delays in the filing of the FIR

The judgment analysis revealed that the delay in filing the FIR was mainly because the offence came to light much later, after the victim was found pregnant, or the complainants chose to settle the matter through a *bichar*, which did not result in an amicable/favorable settlement. Investigating Officers highlighted such delay as a serious challenge, because of the considerable loss of evidence and attributed it to the low level of awareness about the law within the community. In some cases, FIRs are lodged days after the incident took place at the instance of women’s groups, who bring the matter to light.

For instance, in *State v. Saidul Alam Mazumdar*<sup>116</sup>, there was a three month delay in filing the FIR, as the victim's parents realized the abuse only when her pregnancy came to light. In *State v. Gour Nayek*<sup>117</sup>, the FIR was registered after the victim was found to be five months pregnant. In *Gour Nayek*, there was a delay in filing the FIR, as the complainant brought the matter before the panchayat in anticipation of an amicable settlement in the *bichar*. However, the accused refused to accept the victim as his wife. The FIR was lodged, thereafter. In both cases, the Court condoned the delay, convicted the accused under the POCSO Act and awarded compensation for the victims. In *State v Md. Abdul Kalam*<sup>118</sup>, the Special Court observed, “it appears from the

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<sup>114</sup>Spl. (P) Case No.09 of 2015 decided on 09.09.2015.

<sup>115</sup> PCSO Case No.43/15 decided on 27.11.15.

<sup>116</sup> SC No. 15/2014 decided on 29.02.2015.

<sup>117</sup> SC No. 14/2014 decided on 30.04.2015.

<sup>118</sup> Special (POCSO) Case no. 23 of 2015 decided on 10.03.2016

evidence on record that the accused promised to marry the victim and it is only after detection of the pregnancy of the victim, he retracted from his promise and in this regard various village meetings were held. The delay in lodging the FIR was due to an expectation that the accused would marry the victim and some solution will come out in village meetings and same can be regarded as a reasonable cause for delay in lodging the FIR.”

In *State v. Benugwa Panika*<sup>119</sup>, the FIR was lodged 10 days after the incident because the complainant intended to hold a *bichar* and also because his wife was ill. The court found that the complainant had given reasonable explanation for the delay and held that the delay had no relevance to the case.

In *State v. Manmath Das*<sup>120</sup>, there was a seven day delay in filing the FIR, because the father of the victim had been turned away by three police stations, claiming lack of jurisdiction, before he could actually file the FIR. The court condoned it due to valid reasons stated by the informant and quoted an excerpt from a Supreme Court judgment<sup>121</sup>:

...delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the first information report. Delay has the effect of putting the Court on guard to search if any explanation has been offered for the delay and, if offered, whether it is satisfactory.

In *State v. Bitu Das*<sup>122</sup>, there was a two day delay in filing the FIR. In her cross-examination, the mother of the victim stated that her husband was not allowing her to lodge the FIR stating that their younger daughter had been raped by the accused, but she went ahead and lodged it. Despite this explanation, the Special Court termed the delay “inordinate”.

### 3.14. Consideration of Medical Evidence

#### (a) Convictions based on corroborative medical report

In several cases, the medical examination report corroborated the testimony of the victim and resulted in a conviction. In *State v. Raju Das*<sup>123</sup>, the medical examination report formed a crucial part of the case and led to the conviction of the accused in a case of penetrative sexual assault against a girl aged 5 years 4 months. The report indicated that her hymen was torn, blood was detected in her undergarment and clothes, and “injuries sustained on her genitals were suggestive of forceful penetration either attempted or committed.” In the cross-examination, it was stated that it was impossible for these injuries to be caused in the course of playing or because of a fall. Although the victim did not testify in her chief that she had sustained injuries in her genital area, she admitted to it when a leading question was posed to her during the cross-examination. Her testimony and that of her mother who had witnessed a part of the assault along with the medical report formed the basis of the conviction. In *State v. Sri Sitesh Karmakar*<sup>124</sup>, the testimony of the victim who was between 6-8 years was corroborated by other witnesses who were present in the house in which she was sexually assaulted by the accused, her father’s co-worker, and the medical report which indicated scratch marks on her chest. The allegation was that he had

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<sup>119</sup> SC No. 223/2013 decided on 11.09.2014

<sup>120</sup> SC No.208/2013 decided on 24.06.2015

<sup>121</sup> Dildar Singh v State of Punjab AIR 2006 SC 3084

<sup>122</sup> SC 184/2014 decided on 28.03.2016

<sup>123</sup> Spl. (POCSO) Case No. 5 of 2015.

<sup>124</sup> POCSO Case No. 06 (T) of 2015 decided on 01.12.2015.

removed her clothes and kissed her breasts. He had been caught red-handed when the victim raised an alarm.

In *State v. Akshay Sarma*,<sup>125</sup> the accused who was the 5-year-old victim's neighbor, allegedly committed penetrative sexual assault by inserting his finger into her vagina. As per the medical report, no evidence of recent sexual intercourse was found, but redness and tenderness over the area around the orifice was noticed. The victim had testified against the accused and several other witnesses had also corroborated her statement. The Special Court held that "even in absence of doctor's specific opinion in regard to whether such redness and tenderness over the area around the orifice might have been possible due to penetrative sexual assault on the victim child, cannot throw out the otherwise cogent and trustworthy evidence of the victim child, whose evidence stands at par with the evidence of an injured witness," and circumstantial evidence. The Special Court concluded that the doctor's testimony corroborated the victim's testimony and convicted the accused.

In *State v Khogen Chetri*<sup>126</sup>, a school guard had allegedly committed penetrative sexual assault against the victim, aged 8 years. He had also inserted his thumb into her vagina. The FIR had been lodged 12 days after the incident, because the male members of the victim's family were travelling when the incident took place. The medical examination took place thereafter and as per the report, the vagina was inflamed and the vaginal orifice tender. The findings were suggestive of vaginal penetration and the hymen was ruptured, and this rupture was old. No spermatozoa was seen in the vaginal smear and no evidence of recent sexual intercourse was found. The Special Court rightly observed that there had been a 12-day delay in the medical examination and that "there is hardly any possibility of finding spermatozoa". The inflammation and tenderness was considered sufficiently corroborative of the victim's testimony and the accused was convicted. In *State v. Jawngblam Narzary*<sup>127</sup>, the Special Court observed that the absence of sperm did not affect the prosecution's case and that mere penetration was sufficient. Further, the victim had not been asked "whether after penetration semen emission occurred or not. It was also not asked to the victim whether she felt or saw emission of semi liquid substance from the penis or not. If she had answered in positive the medical report of the doctor regarding the presence or absence of spermatozoa would have been a matter of issue."

In *State v. Hari Nath and Ors.*,<sup>128</sup> the accused was alleged to have committed penetrative sexual assault on the 14 year old victim, in her house, in the absence of her parents. The victim committed suicide the following day. The testimony of the parents along with DNA evidence led to the conviction of the accused.

#### **(b) Acquittals because of unreliable testimony or investigation and prosecutorial failure, despite corroborative medical evidence**

The confirmation of sexual assault in the medical report did not always result in a conviction. This was especially when the testimony of the victim and other witnesses was found to be inconsistent or unreliable, or the prosecution failed to establish the case. For instance, in *State v. Bitu Das*<sup>129</sup>, the accused allegedly entered the house of a 7-year-old victim and committed penetrative sexual assault on her. The victim testified against the accused and so did her mother, who witnessed part of the incident. The medical examination revealed that her genital findings

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<sup>125</sup> SC 252/2013 decided on 16.03.2015

<sup>126</sup> PCSO Case no.5/13 decided on 03-10-15 & 06-10-15

<sup>127</sup> Special Case No.3/2014 decided on 05.08.2015.

<sup>128</sup> SC No. 159/2014 decided on 07.01.2016

<sup>129</sup> SC No. 184/2014 decided on 28.03.2016

were suggestive of “recent forceful attempted penetration.” The doctor also clarified during the cross-examination, that these injuries could not be self-inflicted. Despite the victim’s testimony against the accused and the corroborative medical report, the accused was acquitted. This was because of the testimony of some neighbours, who stated that they heard that the victim’s older sister had been raped by the accused. The FIR was lodged two days after the incident as the victim’s father was not willing to take the matter to the police. The Special Court took this into account and expressed doubt about who the real victim was in the case and held, “in view of inconsistency and contradiction in evidence of the remaining witnesses in this regard giving rise to the inevitable question as to who was actually the victim at the hand of the accused.” It was of the view that it could not be concluded beyond doubt that the victim had not been tutored to implicate the accused.

In *State v. Rajib Mahanta & Ors.*,<sup>130</sup> the prosecutrix, aged 15 years was allegedly subjected to forceful sexual intercourse by her sister-in-law’s father and brother, that was abetted by her sister-in-law and her mother. The victim’s statement in court differed from her statement to the police and the Magistrate. In her statement before the Magistrate, she stated that she had been raped by two people, while in court she stated that she had been raped by one person. This, among other details, was considered a material omission. Though the medical evidence established that there had been forceful vaginal penetration and there was injury on her body parts, the court concluded that the testimony of the prosecutrix was unreliable and that the medical evidence did not reveal who was responsible for causing the penetration or injuries. The Special Court was of the view that this case was falsely lodged due to an ongoing family dispute.

In *State v. Rangai Borah*<sup>131</sup>, a girl aged 9-15 years, (as per the medical officer’s report,) studying in Class VIII, had allegedly been raped by another person from her village, when her parents were not at home. She turned hostile in court and stated that the accused had come home, asked for tea, and approached her in the kitchen. Sensing his bad intentions, she ran towards the paddy field to call her mother. Her mother then rebuked the accused. Her statement in court was completely different from that before the Magistrate and when questioned about it, she said that the police had tutored her for the latter. Her parents and grandmother also turned hostile. The medical report indicated injuries to her private parts and signs of sexual assault. However, in her cross-examination, the medical doctor stated that the injuries could have been caused by a fall. The accused was acquitted because she turned hostile and because of the doctor’s statement in the cross-examination.

#### **(c) Acquittals because medical report did not corroborate testimony**

In *State v Abdul Rezzak*<sup>132</sup>, the accused, attempted to rape his 14-year- old neighbour. Even though the victim, the informant, the father and the mother of the victim, all testified against the accused, the court acquitted the accused. This was because of discrepancies in their statement to the police, Magistrate, and Special Court and also because the medical report did not reveal any injury. The victim stated that the accused bit her cheeks and gave a blow to her head with a stick. The medical examination was conducted after two days of the incident and no injury was found.

#### **(d) Procedural gaps noticed**

According to Section 27(2), POCSO Act, the medical examination of a victim girl should be conducted by a woman doctor. Under Section 27(3), the medical examination should be conducted in the presence of the child’s parent or any other person whom the child trusts. In

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<sup>130</sup>POCSO case 4/14 decided on 19-08-15

<sup>131</sup> SESSIONS CASE NO.113(NL)2014 decided on 19.04.2016.

<sup>132</sup>Special Case No.1/2014 decided on 09-07-2015

*State v. Pradij Gowala*<sup>133</sup>, the Special Court observed that the victim had not been examined by any woman medical practitioner and that no explanation was given about this. The medical report was also silent about whether a person whom the child trusts was present at the time of the medical examination and whether or not consent was taken of the child or the person whom the child trusts. It considered these as procedural defects during investigation. The case ended in acquittal, because the victim's testimony was found unreliable and her identity was also in question.

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<sup>133</sup> POCSO Case No. 02(T) of 2014 decided on 30.11.2015.



## Chapter IV: Challenges & Issues

### 4.1. Institutionalization of children before recording of statement u/s 164, CrPC

Interviews with some stakeholders in Kamrup (Metro) and Dibrugarh revealed that child victims are directed to be placed in the State Home for women for “reflection” by the Magistrate when they are produced before them for the statement under Section 164, CrPC in these districts. The child is removed from the custody of the parents, or the child care institution recognized by the CWC (if she was placed there) even in cases in which the child has not eloped, or the accused is not a family member. In the former scenario, the child is not placed in the Children’s Home, but is ordered to be sent to a State Home for Women, which is established in only two districts in Assam. In the latter scenario, she is transferred to the State Home for Women for this purpose.

This practice can be traced to an order of the Gauhati High Court in *Wajed Ali v. State of Assam*<sup>134</sup>, concerning an anticipatory bail application by a person accused of kidnapping and raping a 13-year-old girl. In her statement under Section 164, CrPC, the girl stated that she was 19 years old and had an affair with the accused for two years. The petitioner claimed that he and the victim were married and living as husband and wife. Her birth certificate indicated that she was 13 years of age, while the ossification test placed her in the 18-20 years’ age bracket. The High Court was of the view that the medical opinion regarding the age was not reliable. Based on the statement of the father of the victim, age certificate by the Health Department, school certificate and the victim’s statement to the IO, it concluded that the victim was a minor when she eloped with the petitioner. The High Court was critical of the manner in which the statement under Section 164, CrPC, had been recorded in this case and expressed concern that the Additional Chief Judicial Magistrate had not questioned the victim’s assertion that she was 19 years, when as per the FIR and documents she was 13 years old.

The High Court noted the increasing sexual exploitation of girls as well as the routine nature of investigation and the non-application of judicial mind in these types of cases. It referred to the requirement of giving time to the accused to reflect before making a confessional statement under Section 164(1), CrPC, to ensure that it is voluntary and bereft of police influence and opined that “the same principle is equally applicable in case of recording of statement of victims of sexual offence and more particularly if such victims are minor girls.” According to Justice Agarwal:

This class of victims is emotionally get hold of by the accused persons and they can not come out of the psychological pressure of the accused and stress of the incident, at the time of giving statements. Hence, it is necessary to record the statements of victims with due care, who are lured away at young age or sexually abused and **after giving sufficient time for reflection.** (emphasis added)

According to the High Court, the victim had been enticed when she was 11 years old and was thus not mature enough to enter into a physical relationship or know its ill-effects. Her statement about the voluntary nature of her elopement was not acceptable, because she was below 16 years. The High Court advised the Judicial Magistrates to bear in mind the impact of kidnapping, sex, and marriage before the legal age, on the health, career, and future of girls and to thus:

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<sup>134</sup> Anticipatory Bail Application No. 1962 of 2012 decided on 05.06.2012 by Gauhati High Court.

give sufficient time for reflection to the victim girls before recording their statements under Section 164 Cr.P.C, and shall also ensure that such statements are not given under duress, influence, promise or threat from any corner. The time for reflection would depend upon the age of the victim, the period of enticement, the period spent with the accused etc.

The “time for reflection” has been construed by several Judicial Magistrates as requiring the removal of the child from the custody of parents or current place of residence to the State Home for Women. According to a representative of a community based child protection organization that also provides services to child victims of sexual offences:

In many cases, a child who is in need of care and protection and is a victim of crime, is directed into a Children’s Home through an order from the Child Welfare Committee, before the child is sent to give his or her statement u/s 164, CrPC. In such cases, the child has already been under the care and protection system of the State for a while and, therefore, it is absolutely unnecessary for the child to be ordered into any other home for “reflection”. Instead, the Court should immediately register her statement under 164, CrPC.

This practice illustrates a deep disconnect between the child protection system and the criminal justice system, that results in the unnecessary institutionalization of child victims in order to adhere to a judgment of the High Court, without application of mind . While the High Court’s order suggests that this should be done in cases where the minor girl has eloped with the accused, the Judicial Magistrates appear to adopt this practice even in other cases. For instance, in one case, a girl had been rescued from child labour and placed in a Children’s Home, based on the CWC’s order. It later emerged that the girl had also been subjected to penetrative sexual assault. An FIR was registered and she was taken to the CJM for the statement under Section 164, CrPC. The CJM however, failed to realize that the child had already spent two months in a government recognized Children’s Home and had received counselling; and instead ordered her to be sent to a State Home for reflection.

This practice also contradicts the Supreme Court’s ruling in *State of Karnataka v. Shivanna*,<sup>135</sup> which requires the police to take the victim of a sexual offence within 24 hours to any Metropolitan/Judicial Magistrate, preferably lady, for the purpose of recording the statement under Section 164, CrPC. If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate. Section 164(5A)(a), CrPC also requires Judicial Magistrates to record the statement of a victim of any sexual offence, as soon as the commission of the offence is brought to the notice of the police.

Wanton institutionalization amounts to harassment of the victim, who is detained for no fault of her own and is separated from her family or a setting that she is familiar with; and in which she can receive better care and protection. It offends the protection against arbitrary deprivation of liberty and detention as a measure of last resort, recognized under Article 37(b) of the UN Convention on the Rights of the Child as well as the principle of institutionalization as a measure of last resort under Section 3(xiii), JJ Act, 2015. The Magistrates also do not seem to consider whether it would be in the best interest of the child to separate her from the non-offending parents or guardian, or remove her from the Children’s Home, just so that she is able to reflect.

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<sup>135</sup> SLP (CrI.) NO. 5073/2011. Dated 25.04.2014

“The Magistrate was fine, she understood I was scared. The only thing I didn’t like was she sent to State Home. I had to stay in an unhygienic condition.”

-Child victim, 14 years

It also has several logistical and financial implications. For instance, the State Home closest to Dibrugarh is in Nagaon, which is approximately 300kms away. No funds are available with the police, to escort the child to the State Home and then bring her back for the recording of the statement two to three days later. It is not entirely unlikely that the family of the child may be expected to bear the obligation to finance the transport, food, and other expenses. While the High Court passed an order urging Judicial Magistrates to apply their minds to cases of kidnapping and sexual assault, it has resulted in routine orders of institutionalizing children, irrespective of the nature of cases, without having any regard for its harmful implication on the child victim, and their families.

## 4.2. Gaps in age-determination

Section 34(2), POCSO Act, requires the Special Court to determine whether a person is a child or not, if the question arises in the course of the proceedings. The Special Court should satisfy itself about the age of the person and record its reasons in writing. Section 34(3), POCSO Act, clarifies that the Special Court’s order will not be rendered invalid, if subsequent proof emerges that the age was not correct.

The process of determining whether or not a person was below 18 years was elaborated under Rule 12, JJ Model Rules, 2007. While this rule pertained to the determination of age of a person claiming juvenility, in *Jarnail Singh v. State of Haryana*<sup>136</sup>, the Supreme Court held that it “should be the basis for determining age, even for a child who is a victim of crime.” In *State v. Hiranta Mohan*<sup>137</sup>, *Jarnail Singh* was cited and reliance was placed on the medical and radiological exam which pegged the victim’s age to be between 12 and 14 years. However, this appears to be an exception as in majority of the cases, the age determination procedures outlined in the erstwhile JJ Rules were rarely observed by Special Courts in Assam.

In *Shah Nawaz v. State of Uttar Pradesh*<sup>138</sup>, the Supreme Court observed that “Rule 12 of the Rules categorically envisages that the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available.” A medical test cannot be ordered if a birth certificate is available. In *Ashwani Kumar Saxena v. State of Madhya Pradesh*<sup>139</sup> the Supreme Court held that a medical report could be asked for by the court only if the documents or certificates were found to be fabricated or manipulated.

Since the re-enactment of the JJ Act in 2015, the relevant provision on the procedure to be followed for age determination is Section 94, JJ Act 2015. The age determination process requires the JJB to seek evidence by obtaining the birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination board.<sup>140</sup> If these are not available, then the birth certificate by a corporation, municipal authority, or panchayat can be considered.<sup>141</sup> If none of the

<sup>136</sup> (2013) 7 SCC 263.

<sup>137</sup> POCSO Case No. 12 (T) of 2015 decided on 06.06.2016.

<sup>138</sup> (2011) 13 SCC 751.

<sup>139</sup> AIR 2013 SC 553.

<sup>140</sup> JJ Act, 2015, Section 94(2)(i).

<sup>141</sup> JJ Act, 2015, Section 94(2)(ii).

above-mentioned documents are available, then the JJB should order an ossification test or any other latest medical age determination test.<sup>142</sup>

From an application of the above mentioned rulings and provisions of the POCSO Act and JJ Act 2015, it would emerge that:

- The Special Courts should undertake age determination if the age of the victim or accused is doubtful;
- The Special Court should adhere to the provision of age determination specified under the JJ Act 2015; i.e Section 94, JJ Act, 2015 while determining the age of child victims as well as accused persons who claim juvenility.
- Reliance should be placed on the birth certificate from school, or matriculation or equivalent certificate from the concerned examination board. Only if these are unavailable, the birth certificate by a corporation, municipal authority, or panchayat can be considered. If no documentary proof is available, then an ossification test or any other latest medical age determination test can be ordered.

The issues pertaining to age determination that emerged are as follows:

### 1. Absence of documentary proof of age

In the large majority of cases, it emerged that there simply was no birth certificate or any other document available to establish the victim's date of birth. The importance of birth registration cannot be overemphasized, as a child's access to justice and rights depends entirely on her status as a "child" i.e., a person below 18 years of age under the POCSO Act. The Annual Health Survey 2012-2013, revealed a gap between birth registration and birth certification in Assam. While 87.1% births were registered, only 69.1% of children whose births had been registered had received a birth certificate.<sup>143</sup>

Birth records will serve as the only basis of proof of age in cases in which the victim refuses a medical examination; especially in cases in which the victim admits to be in a 'romantic relationship' with the accused and claims to be above 18 years of age. For instance, in *State v. Budheswar Bhumi*<sup>144</sup> and *State v. Hunmoni Nath*<sup>145</sup>, the victim admitted to being in a relationship with the accused and denied a medical examination. In *Nath*, the victim's father claimed that she was 14 years old, while the victim stated that she was 17 years old, and in *Bhumi*, the victim stated that she was 18 years old. In the absence of documentary proof and the medical report, the judge concluded that the victim's age was not conclusively established. In *State v Mantu Das*<sup>146</sup>, the victim admitted to the relationship with the accused and both of them got married. The victim refused medical examination and her age could not be determined as there was no documentary proof. Based on her testimony in which she stated that she voluntarily went with the accused, married him and consummated the marriage, the court acquitted the accused of the charges and concluded that the victim was a major.

### 2. Medical test is the default option

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<sup>142</sup> JJ Act, 2015, Section 94(2)(iii).

<sup>143</sup>Vital Statistics Division, Office of the Registrar General & Census Commissioner, India, "Annual Health Survey 2011-2012 Fact Sheet – Assam", p.100, [http://www.censusindia.gov.in/vital\\_statistics/AHSBulletins/AHS\\_Factsheets\\_2012-13/FACTSHEET-Assam.pdf](http://www.censusindia.gov.in/vital_statistics/AHSBulletins/AHS_Factsheets_2012-13/FACTSHEET-Assam.pdf)

<sup>144</sup>PCSO Case No. 28/15 decided on 01.08.2016.

<sup>145</sup> PCSO Case No. 24/15 decided on 21.11.2015.

<sup>146</sup>PCSO Case No. 10/16 decided on 02.08.2016

As mentioned in Section 3.2, as part of the medical examination, age was also determined in 87 cases. This was done even in the few cases in which documentary proof of age was available. In some cases, the Special Court noted the absence of documentary proof of age even though the child victim attended school and was critical of the police's failure to collect the necessary documents.<sup>147</sup>

### 3. Victim/family's statements accepted on the point of age

In some cases, the Special Court relied on the statement of the parents or the victim to make a conclusion about her age. In *State v. Tinku Rajen*<sup>148</sup>, the parents were illiterate and were not sure about the year of birth of the victim. The medical report was silent on age. The parents claimed that the victim was 10 years old. Since the defence did not challenge this, the Special Court concluded that the child was below 18 years. In *State v. Jowang Singpho*<sup>149</sup>, the Special Court relied on the statement of the parents and the village headman to conclude that the victim was around 12-13 years of age – "Parents of the girl may reasonably be expected to be naturally having direct knowledge on the birth of their daughter. Their testimony therefore, inspires confidence." This was also corroborated by the medical examination, as per which she was below 18 years.

In *State v. Md. Ibrahim Ali*<sup>150</sup>, the victim's mother alleged that the defendant trespassed into her house and committed rape on her 12-year-old daughter. In court, however, she stated that her daughter was more than 18 years and had been taken by the accused to his house. They were married now and she had good relations with them. The victim stated that she loved the defendant, but her parents had not accepted the relationship and so she had eloped with the accused. The victim also stated that they were married now and were living happily; and that she was above 18 years at the time of the incident. This was the basis of acquittal. Similarly, in *State v. Mumia Deka*<sup>151</sup>, the informant –i.e. the mother of the victim and the victim herself, both stated that she was above 18 years on the date of the incident. She had married the accused subsequently. The facts were similar in *State v. Nabin Deka*<sup>152</sup> and *State v. Ruak Bismas*<sup>153</sup> as well.

Instead of requiring that documentary proof be adduced, or in its absence, that a medical test be ordered, the Special Court accepted the testimony of the victim and the informant to acquit in most 'romantic cases'.

### 4. Different interpretations of the margin of error

In *State v Gobinda Sarkar*,<sup>154</sup> the victim admitted the relationship with the accused and along with her parents turned hostile on the point of age and stated that she was above 18 years on the date of the incident. Her age was stated to be 16 years in the FIR and determined to be below 18 years in the medical examination. The Special Court cited *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir*,<sup>155</sup> in which the Supreme Court held that "the margin of error in age ascertained by radiological examination is 2 years on either side". Based on this, the Special Court held that age determined by the doctor was not conclusive and acquitted the accused.

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<sup>147</sup>*State v. Krishna Sabu*, G.R. Case No. 870 of 2014 decided on 27.07.2016; *State v UttamGogoi*, PCSO case 25/14 decided on 01-12-15.

<sup>148</sup> PCSO Case No. 16(I) of 2015 decided on 26.05.2016.

<sup>149</sup> Sessions Case No. 134 (M) of 2014 decided on 03.08.2015.

<sup>150</sup> Sess. Spl. Case No.15/2015 decided on 30.11.2015.

<sup>151</sup> Sess. Spl. Case No.23/2014 decided on 19.01.2016.

<sup>152</sup> Sess. Spl. Case No.12/2015 decided on 08.02.2016.

<sup>153</sup> Sess. Spl. Case No.15/2014 decided on 12.10.2015.

<sup>154</sup> Special (PCSO) Case no. 27 of 2015 decided on 30.01.2016

<sup>155</sup> (1982) 2 SCC 538.

In *State of Assam v. Md. Jakir Ali*, a father complained that his 14-year-old daughter had been kidnapped by the accused. Charges were filed under Section 366A, IPC and Section 4, POCSO Act. In chief, he stated that his daughter was 17-18 years at the time of occurrence. The radiological exam pegged her age at 16-17 years. In his cross examination, the father stated that the matter had been resolved amicably at the village level and that the girl had eloped with the accused willingly. He indicated his desire to now get the girl married to the accused. The victim stated that she was in love with the accused and his parents had approached her parents, but they had turned down the proposal, leaving her with no alternative but to elope. In her cross examination, she categorically stated that she was 18 years at the time of occurrence. The Special Court observed: “Marginal error of two years is admissible on either side. Taking into account the age of “X” at the material period as disclosed in the evidence of PWs, the “X” may be treated to be major at the time of occurrence. Therefore, she is legally competent to give consent of her own to an act.”

In *State v Md. Abdul Kalam*<sup>156</sup>, the accused committed penetrative sexual assault on the victim on a couple of occasions on the basis of a promise to marry her. When the victim became pregnant, he refused to marry her in a village meeting that was called after the matter came to light. She was already five months pregnant at that time. The FIR was registered subsequently. The medical report did not specify a range, but stated that she was below 18 years. In her statement under Section 164, CrPC, that was recorded at least six months after the incident, the victim stated that she was 18 years old. Even though she had attended school and had dropped out a year before the incident, no school records were produced or sought. Her father had stated that she was around 17 years at the time of the incident. According to the Special Court, the parents’ testimony about the sequence of birth of the children and the number of years they were married would suggest that she was a minor at the time of the incident. With respect to the margin of error, the Special Court opined that

“if benefit of doubt of variation of two years in estimation of age on the basis of the Radiological report by Doctor is given to the accused in POCSO cases, no child who do not have a birth certificate and who is above the age of 16 years will get justice under the Provisions of the Protection of Child from Sexual Offences Act, 2012.” The Special Court convicted the accused under Section 4, POCSO Act.

While in *Abdul Kalam*, the margin of error was interpreted in favour of the victim, in *Gobinda Sarkar*, it was not. This points to the different approaches of Special Courts with respect to the margin of error. The difference in approach appears to be based on the nature of the facts. The Special Courts leaned in favour of acquittals in cases in which the victims were married to the accused or admitted to be in a relationship with them and turned hostile. In these cases, the Special Court did not scrutinize the age of the victim carefully or order any age determination tests.

## **5. Victim denied justice as Special Court did not invoke its authority to determine age**

The Special Court ignored the procedure prescribed under Section 34(2), POCSO Act, which vests upon it the responsibility to conclusively determine age. In *State v. Ramdev Paswan*<sup>157</sup>, no documentary proof of age was supplied and no medical test was done either. The Special Court concluded that the prosecution had failed to prove that she was below 18 years and thus the POCSO Act was not attracted. This also transpired in *State v Abdul Rezzak*<sup>158</sup> and *State v Uttam Gogoi*.<sup>159</sup> In *Gogoi*, the age of

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<sup>156</sup> Special (POCSO) Case no. 23 of 2015 decided on 10.03.2016

<sup>157</sup> POCSO Case No. 4(T) of 2014 decided on 08.04.2016.

<sup>158</sup> Special Case No.1/2014 decided on 09-07-2015.

the prosecutrix could not be proved and the judge observed that the investigating officials had not collected any documentary proof to prove the age of the prosecutrix was below 18 years. In *Abdul Rezzak*<sup>160</sup>, the accused had allegedly attempted to commit penetrative sexual assault on the 14-year-old victim and had been charged with aggravated sexual assault. Even though the victim testified against the accused, the accused was acquitted because the medical report did not indicate injuries and her age was not conclusively established by the prosecution.

## 6. Age as per medical test ignored

In *State v. Krishna Sabu*<sup>161</sup>, the accused, a neighbor, was acquitted of committing rape on a girl. The matter came to light only after the girl missed her menstrual period and told her mother. The FIR was filed by them after the accused failed to pay Rs.10,000/- as a settlement. Though the girl had failed Class IX once, no documentary proof was adduced and her mother stated that she did not remember her date of birth. As per the medical report, she was above 16 years and below 18 years. Apart from expressing its disbelief that the “accused, who was known to the victim before the incident, will enter in her house and commit rape on the victim, in evening hours and victim will not raise alarm for her help,” and that the victim had not sustained any injuries or resisted the alleged rape, the Special Court also concluded that the prosecution had failed to establish that the victim was below 18 years. The Special Court did not provide any reasons for rejecting the medical report.

In *State v. Thumybangrim Hmar*,<sup>162</sup> the age of the victim was contested. The victim was living with her paternal uncle and her mother complained that the girl had been sexually abused by him as a result of which she was six months pregnant. While the mother initially claimed she was 17 years, she later stated that the victim was above 18 years. As per the medical report, she was above 15 years and below 18 years. The victim stated that she was in love with the accused and wanted to live with them. The Special Court relied on her statement before the Magistrate and the Court about her “love affairs with the accused,” and her mother’s statement that the girl was 18 years at the material time, in order to acquit the accused.

## 4.3. Issues related to appreciation of testimony of victims

Appreciation of testimony is a subjective exercise. While considering the testimony of the victim, the Special Court should bear in mind social realities as well as the manner in which sexual offences are committed. The absence of an eye-witness cannot, for instance, be held against the victim’s word, considering that most sexual offences are perpetrated in private. In *State v Haridas Biswas*<sup>163</sup>, for instance, the victim 15- 16 years was raped by her neighbor on two to three occasions and she was impregnated. Though the child and the prosecution witness testified against the accused, the court acquitted him because there were no eye-witnesses. The victim had not reported the matter to anyone, and the incident had come to light when the accused person’s wife informed the victim’s mother. The Special Court placed reliance on the medical report which indicated that there had been no “recent” signs sexual intercourse and overlooked the fact that the incident had taken place six months before the FIR was registered and medical examination was conducted. The Special Court failed to consider that the victim may not have

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<sup>159</sup>PCSO case 25/14 decided on 01-12-15.

<sup>160</sup>Special Case No.1/2014 decided on 09-07-2015

<sup>161</sup> G.R. Case No. 870 of 2014 decided on 27.07.2016.

<sup>162</sup>Spl POCSO 4 of 2015 decided on 04.07.2015.

<sup>163</sup>Spl. (P) Case No.16 of 2014 decided on 31.03.2016

been aware of her pregnancy, or been too scared to share it with her family, and instead held it against her. It was also of the view that since the accused person's wife had an altercation with the victim's mother over the "illicit" relationship, the defence plea of previous enmity could not be ruled out. Considering that the "illicit relationship was the basis of the feud, it is surprising that the Special Court concluded that a sexual offence under the POCSO Act had not taken place.

In *State v Jibon Arandbara*<sup>164</sup>, the complicated nature of a case in which the accused is a father, was not fully appreciated by the Special Court. The father attempted to commit rape on his daughter, during which the mother intervened and he chased both the mother and the child out of the house. The accused was acquitted because of factual discrepancies between the statements of the mother and the victim. The mother deposed that when she entered the room the accused was "lying on her daughter", but the child deposed that the "father pressed her body". The child did not utter a single word regarding any attempt of the accused to touch her vagina, breast, anus or such other parts in her testimony. Neither the victim, nor the mother confided about the sexual assault to any of the other prosecution witnesses and instead told them that they were physically assaulted and turned out of the house by the accused. The Special Court did not grasp the extent of the stigma associated with a sexual offence and the shame that it brings with it, particularly when the alleged perpetrator is the father. Their failure to tell their neighbours about the reason they were chased out was held against them. The Special Court was of the view that the relationship between the parents was not good and there could be a possibility of the mother filing a false case. The Special Court concluded that "[m]ere pressing the body of the victim act cannot solely establish the sexual intent of the accused because he is not any other person but the father of the victim".

In *State v. Amir Ali*<sup>165</sup>, the victim, an orphan, had been sexually abused by her uncle from the age of 10 years. When she was 17 years old, she was married to an insane man. Because of her husband's mental condition and ill-treatment by his family members, she returned to her sister's house within four months of marriage. When she went along with her sister and her brother-in-law to cut firewood in her ancestral property, the accused (the same uncle) sent for the victim to his house. He then forcibly raped her and when she resisted, he bit her finger and hit her leg with a *lathi*. She was rescued by her older sister, who also witnessed the rape. The accused refused to accept about the incident in the village *bichar* and an FIR was filed the day after the incident. The accused claimed that this case was filed in retaliation to a case that had been filed by him against the victim and her family members regarding a property dispute. While the police had recorded the statements of three witnesses who were present at the *bichar*, it had not listed them as witnesses.

The medical examination was conducted nine days after the incident and found "no evidence of recent forceful sexual intercourse with the victim at the time of examination, there is no marks of violence on her body and private parts at the time of investigation and her age was 16-17 years ...as per radiologist report." Yet, the Special Court did not consider this delay or her age or the history of sexual abuse by the same person and observed:

The victim woman would not be just a child, who would have surrendered herself to the alleged rape without offering any resistance to the accused person. Had the accused really bite [sic] on her finger and assaulted on her leg with lathi as stated by the victim in her evidence, some sorts of injuries must have been caused to her and hence, the evidence of Medical Officer also cast a serious doubt as to the truthfulness of the prosecution allegation...

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<sup>164</sup>Spl. (P) Case No.11 of 2014 decided on 1.03.2016

<sup>165</sup>Sessions (T-2) Case No. 02(N) of 2014 decided on 23.05.2016.



The Special Court considered the testimony of the victim and her sister to be inconsistent and unreliable. The Special Court also held that the prosecution had failed to produce birth certificate or school certificate to ascertain actual age at the time of the alleged offence and had failed to prove that she was a minor, even though the radiologist pegged her age to be between 16 and 18 years. According to the Special Court, the prosecution had failed to prove the chain of circumstances to link the accused to the alleged crime beyond all reasonable doubt.

#### **Absence of resistance held against the child victim**

In *State v. Krishna Sabu*<sup>166</sup>, the accused, a neighbor, was acquitted of committing rape on a girl aged 15 years, (16-18 years as per medical examination,) who became pregnant as a result of the assault. The FIR was filed after the accused failed to pay Rs. 10,000/- that he had agreed to pay. The matter came to light only after the girl missed her menstrual period and told her mother. The Special Court observed:

It is hard to believe that accused, who was known to the victim before the incident, will enter in her house and commit rape on the victim, in evening hours and victim will not raise alarm for her help when she admitted in her evidence that there are houses of many people near her house. Further, there is no evidence that she resisted the alleged rape by the accused. Victim in her evidence did not state sustaining of any injury on her person as a result of resistance of rape on her person. No doubt, in a rape case, accused can be convicted on the sole testimony of the victim but it must be trustworthy, cogent, reliable and it should inspire confidence before same can be acted upon.

This is a problematic ruling, as primacy was given to the absence of injury/resistance over the clear testimony of the victim. The victim had been gagged by the accused in this case and yet the Special Court expected her to raise an alarm. The Special Court appears to have imported the archaic notion of resistance attached to rape under Section 375, IPC, even though it has been displaced by the Criminal Law (Amendment) Act, 2013, which clarifies that “a woman who does not physically resist to the act of penetration shall not by that reason only of that fact, be regarded as consenting to the sexual activity.” This judgment also portrays a poor appreciation of the provisions of the POCSO Act under which the consent of a person below 18 years is not a relevant factor.

In *State v. Sanjay Pandey*<sup>167</sup>, a 15-16 year old girl, (14-16 years as per medical exam,) had been allegedly raped in her home by a neighbor, when no one was at home. He had gagged her mouth with the help of clothes, tied her hands with the help of a *churni*, pressed her breasts and raped her. Her clothes were also torn by him. She told her brother about the incident. He then informed the Manager of the Tea Estate, who did not take any steps and thereafter the brother lodged a *ejabar* before the police, himself. She stated that the police seized the frock and pant when she produced it at the police station. The IO admitted that the seized articles were not sent to the forensic expert to prove whether there was any semen left in them. Despite this gap, the defendant was acquitted, because the victim’s statement differed from that of a neighbor who claimed that she had seen the victim gagged with her hands tied behind her back.. Her brother also deposed that he came to know about the incident from the neighbour and questioned his

<sup>166</sup> G.R. Case No. 870 of 2014 decided on 27.07.2016.

<sup>167</sup> G.R. Case No. 214 of 2015 decided on 12.07.2016.

sister about it based on it. Since the victim did not mention this neighbor in her statement and since the neighbor did not mention to the police that she had seen the victim being tied from the back, with cloth stuffed in her mouth, and had seen the accused running away from the victim's house, the Special Court considered this to be a contradiction. Further, the medical report did not indicate any injury on the private parts.

The Special Court observed:

It is hard to believe that accused, who was known to the victim before the incident, will enter in her house and commit rape on the victim, in broad day light and victim will not raise alarm for her help when she admitted in her evidence that nearby people can hear easily if shouted from her house. Further, there is no evidence that she resisted the alleged rape by the accused. Victim in her evidence did not state sustaining of any injury on her person as a result of resistance of rape on her person.

The above observation reveal misconception about when and how rapes are committed and how a victim should ideally respond even though this is not what actually happens in reality. That the victim did not raise an alarm is held against her. The Special Court also overlooked the fact that the victim had been gagged and could not have thus raised an alarm, even if she desperately wanted to.

#### **4.4. Gaps in compensation**

Even though the POCSO Act empowers the Special Court to determine the quantum of compensation, in 16 of the 38 cases in which compensation was ordered, the DLSA was asked to determine the amount. By doing so, the objective of ensuring that child victims receive relief immediately and without any undue delay is defeated. A recommendation to the DLSA would trigger the process of reviewing and assessing the claim by the DLSA as per the Assam State Victim Compensation Scheme. It would require the child victim and the family to appear before the DLSA, furnish documents, and go through the process of establishing the loss or injury, all of which could delay the receipt of compensation and cause undue harassment to the victim.

Interim compensation is rarely awarded by the Special Courts and this frustrates the very purpose for which it has been grafted in the POCSO Act and Rules. One respondent from the judiciary explained the difficulties in ordering interim compensation, saying that this was due to the time lapse between the lodging of the FIR and taking of cognizance. Interim compensation is crucial for the immediate rehabilitation and relief to the child victim, particularly in cases that have resulted in serious bodily injury or pregnancy.

Compensation was not awarded even though the victim sustained injuries, possibly because she turned hostile. In *State v. Md. Intaj Ali*,<sup>168</sup> the victim alleged that she had been gang raped by three men who entered her house when her parents were away. In court, she could not identify them and that led to their acquittal. Although her statement was recorded u/s 164, CrPC, and medical examination was conducted, the details of these were not stated in the judgment. If the medical report confirmed injury, compensation should definitely have been considered in this case.

Compensation was awarded in only four out of the 15 cases in which the victim had become pregnant as a result of penetrative sexual assault.

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<sup>168</sup> Special Sessions Case No. 06 of 2014 decided on 11.08.2015.

Compensation appears to be another area where convergence between the child protection system and the criminal justice system is necessary. According to one respondent, “an Individual Care Plan [for the victim] should be prepared, which should be referred by the Court to compensate” the victim.

#### 4.5. Investigation Lapses

Investigation and prosecution lapses contributed towards acquittals in many cases. Failure of the police to collect age proof documents and failure of the prosecution to examine relevant witnesses were some of the major lapses noted by Special Courts. In none of the cases, however, did the Special Court direct the initiation of departmental proceedings against the police for investigation lapses.

For instance, in *State v. Md. Taizuddin*, age proof documents were not collected from the school. A birth certificate was produced, in which the name of the child and the child’s father was different from that stated in the court records. The doctor who examined the child and indicated in the report that she was 19 years old, was not examined by the prosecution. Similarly, in *State v UttamGogoi*<sup>169</sup>, the age of the prosecutrix could not be proved to be below 18 years as the judge noted the investigating officials had not collected the documentary proof to prove the age of the prosecutrix to be below 18 years.

In *State v. Anil Nag @ Aklh*<sup>170</sup>, the Special Court observed that

...the Investigating Officers make no effort to collect documents relating to the age of the victim in border line cases where age of the victim is between 15/16 years and giving a readymade defence to the accused, to take a plea that the victim was above 18 years of age on the date of commission of the offence. This also has an adverse effect of taking the case out of the purview of POCSO Act, which prescribed more stringent punishment for offences of sexual assault and sexual harassment etc. as compared to corresponding provisions of Indian Penal Code.

Breach of procedures under the POCSO Act were noted in two cases. In *State v. Pradeep Gomala*<sup>171</sup>, the Special Court observed that the prosecutrix had not been examined by any woman medical practitioner. No explanation was given about this, and the report was also silent about whether a person whom the child trusts was present at the time of the medical examination. Further, whether consent was taken of the child or the person whom the child trusts was taken was not mentioned. It considered these as procedural defects during investigation. In *State v. Satya Saikia*<sup>172</sup>, though rape was alleged, the clothes of the victim were not seized by the police. The Special Court also noted that the statement was recorded in the police station and the procedure under Section 26, POCSO Act was not followed. However, the benefit of this could not go to the accused because the evidence of the victim and eye-witness was cogent and trustworthy and was corroborated by the medical evidence.

In *State v. Sanjay Pandey*<sup>173</sup>, the IO failed to submit the clothes of the victim for forensic examination even though the allegation was one of rape. In *State v. Krishna Sabu*<sup>174</sup>, no DNA test was conducted that could link the pregnancy to the accused. Both these cases resulted in

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<sup>169</sup> PCSO case 25/14 decided on 01-12-15

<sup>170</sup> Sessions Case No. 69(M) of 2014 decided on 09.03.2016.

<sup>171</sup> POCSO Case No. 02(T) of 2014 decided on 30.11.2015.

<sup>172</sup> Sessions Case No. 145 (M) of 2014 decided on 16.02.2016.

<sup>173</sup> G.R. Case No. 214 of 2015 decided on 12.07.2016.

<sup>174</sup> G.R. Case No. 870 of 2014 decided on 27.07.2016.

acquittal, even though the victim testified against the accused. The Special Court, however, did not pass any directions against the police on account of these failures.

Non-examination of eye-witness and unreliable testimony of the victim led to an acquittal in *State v. Babul Nath*<sup>175</sup>, in which a 13 year-old-girl had allegedly been sexually assaulted by her tuition teacher. He had held her hand and proposed marriage to her and tried to take her inside a room and bolt the door. Her testimony was contradicted by two other students in the tuition class who stated that the teacher had scolded the victim for coming late. One witness even stated that the complaint was falsely filed. The failure of the prosecution to examine two other eye-witnesses who were present in the class was held by the Special Court to be fatal to the case. In *State v. Krishna Das*<sup>176</sup>, another child was with the victim when she was allegedly sexually assaulted by the accused, but was not produced as a witness by the prosecution.

In addition to the lapses that were noticed by the Special Courts, there were some that surfaced during the judgment analysis. In *State v. Manmath Das*<sup>177</sup>, a blood-stained panty of the victim was not seized by the police. In this case, the medical examination took place seven days after the incident because the father had been turned away by three police stations on account of lack of jurisdiction. An interview with a government doctor who conducts medical examinations on victims revealed that the police most often “tell the guardians that the child’s garments are not required”. In one case, the guardian went back home from the police station and washed the garments. The doctor emphasized that the police need to be made aware of the transmission of STDs and the need to bring the accused for an STD examination, if the victim tests positive.

In *State v Manash Pratim Nath*<sup>178</sup>, though the victim and the mother turned hostile on the point of identity of the accused, the IO did not initiate procedures to get a DNA test done, inspite of the offence being reported after the victim gave birth to a still born child. Medical evidence can play a crucial corroborative role and so failure to collect and hand over to the Forensic Science Laboratory can be fatal to the case. In *State v. Raju Das*<sup>179</sup>, although vaginal swab, nail clipping, blood, semen slides and the undergarment was collected by the police and sent for forensic examination, but the DNA test could not be carried out because the articles were “not fit for comparison”. This raises concerns about the manner in which samples are collected by the police and whether they are trained to ensure that the sample is not contaminated.

As observed by the Special Court, in several cases the police failed to collect documents that would establish the age of the child. This is a fairly basic step of the investigation process. As explained in Section 4.2 above, in several cases victims have been denied relief by the Special Courts in the absence of documentary proof of age.

Another key element of the investigation process is the interview with the child victim. In several cases, the testimony of the child was considered to be unreliable because details disclosed in court were not shared with the police. For instance, in *State v Jaydev Mandal*<sup>180</sup>, the child, her mother, and her sister who was an eye-witness, testified against the accused. However, the court acquitted the accused, because the child did not state before police that the accused called her to his house, closed the door and after removing her pant inserted his penis into her vagina. She also did not state to the police that the accused had threatened her or that her younger sister had

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<sup>175</sup> Special (POCSO) No.15/2015 decided on 27.8.2015.

<sup>176</sup> SC No. 400/2013 decided on 25.03.2015.

<sup>177</sup> SC No.208/2013 decided on 24.06.2015

<sup>178</sup> Special (POCSO) Case no. 28 of 2015 decided on 15.03.2016.

<sup>179</sup> Spl. (POCSO) Case No. 5 of 2015 decided on 24.08.2015.

<sup>180</sup> Special (POCSO) Case No. 19 of 2015 decided on 28-04-2016.

seen the incident through the hole of the door of the house of the accused. The mother had not stated that on the day of the aforesaid incident, the accused had admitted to her that he was indeed guilty of the said act. The younger sister of the victim girl had also not stated that she had peeped through the hole in the door of the house of the accused and had seen the incident. She also did not state before police that she had informed her mother after she had witnessed the incident of sexual assault upon her elder sister in the house of the accused. The court was of the view that these omissions were serious contradictions that made their testimony unreliable.

While in some cases, the testimony may genuinely be unreliable, and so, the need for vigorous training to the police on interviewing child victims cannot be ignored. A child may not feel comfortable in sharing information immediately after a traumatic incident. The setting, tone, and how questions are framed, are all very relevant in gathering facts of the case/information from children.

#### **4.6. Filing of incorrect charges reflect poor understanding of POCSO Act**

Though the Act has categorized offences as aggravated based on the nature of offences, status of the accused as well as the child; and the impact of the offence on the child, there is lack of awareness while framing charges under the POCSO Act.

As per Sections 5(f), 5(n), 5(p), and Sections 9(f), 9(n) and 9(p) of the POCSO Act, whoever being management or staff of an educational institution, relative of child through blood or adoption or marriage, or having a domestic relationship with the parent of the child, or in the position of trust and authority of a child, commits penetrative sexual assault or sexual assault, respectively, the offence will be considered 'aggravated' in nature.

In 15 out of 19 cases, where the accused was a relative, the relevant aggravated provisions were not charged. In 6 out of 8 cases where the accused was a teacher, charges were filed incorrectly. In one case it was filed under Section 3 and in five cases under Section 8. In 3 out of 6 cases in which the accused was a father and in one case the parents, charges in two cases were filed under Section 4 instead of Section 6 and in one case under Section 8 instead of Section 10.

Section 5 (j)(ii), POCSO Act, states an offence will be classified as aggravated if a female child becomes pregnant as a consequence of the sexual assault. Of the 15 cases where the child became pregnant as a consequence of the offence, in 8 cases the charged did not reflect the aggravated nature of the offence.

According to Sections 5 (m) and Section 9(m) POCSO Act, where penetrative sexual assault and sexual assault is committed on a child below 12 years, it would amount to aggravated penetrative sexual assault and aggravated sexual assault, respectively. Of the 44 cases in which the age of the victim was undisputedly below 12 years, in 31 cases, the charges did not reflect the aggravated nature of the offence and were filed under penetrative sexual assault or sexual assault.

In *State v. Bisbal Tanti*<sup>181</sup>, while the allegation pertained to rape of a 10-year-old girl, the accused was charged under Section 8 (sexual assault). In *State v. Md. Rabul Hussain Laskar*<sup>182</sup>, the accused was a cousin, but the charge applied was Section 4 and not Section 6. In *State v. SubhasNayek*<sup>183</sup>, the Special Court convicted under Section 4, POCSO Act, instead of the section the accused was

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<sup>181</sup>Spl. (POCSO) Case No: 07/2015 decided on 16.03.2016.

<sup>182</sup>Spl. (POCSO) Case No: 12/2015 decided on 31.03.2016.

<sup>183</sup>Spl. (POCSO) Case No. 14/15 decided on 23.11.2015.

charged under i.e., Section 6, POCSO Act, because the prosecution had failed to establish that he had authority over the 3 year child he had allegedly penetrated. The Special Court failed to consider Section 5(m), as per which penetrative sexual assault on a child below 12 years constitutes aggravated penetrative sexual assault. In *State v. Sukur Ahmad*<sup>184</sup>, the accused was the Imam of a mosque, but the charges levied were under Section 8, POCSO Act, instead of Sections 9(f) or 9(p).

#### 4.7. Support Gap

There is an evident support gap apparent from interviews with respondents from the Child Protection system and the judiciary in Kamrup (Metro) and Dibrugarh. There is reason to believe that this is true for the remaining districts as well. The crucial role of the Support Person in the POCSO Rules is not sufficiently appreciated.

**There is an urgent need to create a pool of persons who can be trained on law, legal procedures, and communicating with children so that they can offer the much needed support to child victims and their families during the investigation and trial.**

One respondent from the police, for instance, drew a complete blank when asked what information is provided to the victim after the FIR is lodged. It appeared that the obligation under the POCSO Rules to provide information to the victim under Rules 4(2) and 4(12) was not being adhered to. The Support Person could plug gaps in information and understanding that can often result in cases not being pursued or compromises.

The Child Welfare Committees should also proactively determine whether a Support Person should be appointed. The State Government also needs to take steps to create a pool of Support Persons who can be imparted training on the legal procedures involved.

#### 4.8. Failure to prepare a child for trial

Public Prosecutors need to appreciate the distinction between preparing a child for examination-in-chief and tutoring. They need to acknowledge that a child victim cannot be treated like an adult victim. She will have to be guided through the legal process, as she may not fully understand the implications of her statement on the outcome of the case. Her memory may also need to be refreshed if the gap between the incident and the recording of the testimony is long.<sup>185</sup>

#### 4.9. Hostile victims

As explained in Chapter 3, 32% of victims in Assam turned hostile while testifying before the Special Court and in 44.44% of these cases in which the victim turned hostile, the process for recording the testimony began well over a year after the incident took place or was reported. This is of concern, as it is probable that the accused may have applied pressure, threats, or influenced the victim and her family to retract their statement in court in the interim, or they may have compromised the matter by offering to marry the victim. Several respondents were of

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<sup>184</sup> Special (POCSO) Case No. 1/2015 decided on 21.12.2015.

<sup>185</sup> Ministry of Women and Child Development, Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act, 2012 (September 2013), p.68.

the view that the delay in completion of trial contributed to this as well and stressed on speedy trials. A respondent from the child protection system shared cases in which the victim testified against the accused, but the family members turned hostile because the accused was a relative. One respondent from the police felt that “if the fact is true then the victim will never change her statement.” This belief belies the complexities of testifying against a relative or a person known to the victim’s family. The analysis of the judgments confirmed this.

#### 4.10. Challenges posed by romantic relationships

The different approaches taken by Special Courts in “romantic cases” as detailed in Section 3.12. illustrate complexities of autonomy versus protection and reveal that most cases end in acquittal. Factors such as grooming, age gap between the victim and the accused, age of the victim, or an offer of marriage to evade punishment are rarely considered while acquitting the accused. In *State v. Thumybangbrim Hmar*<sup>186</sup>, for instance, the Special Court failed to consider that the victim may have been “groomed” by her uncle, who stepped in to care for her family when her father passed away. The grave abuse of authority and trust by the accused surfaced from the victim’s statement, that she used to sleep with the accused in his bed from childhood, which was overlooked by the Special Court. The quality of her consent, which the Special Court easily accepts, is questionable given that the uncle used classic ‘grooming’ techniques<sup>187</sup> by obtaining her trust, isolating her from her mother, sexualizing the relationship, and retaining control over her. The defence even argued that that “as per tribal custom prevalent in the society of the accused, there is no bar for marriage between near relatives.”

Several respondents shared their concerns about elopement cases and the difficulties that arise when applying the criminal law. From the prosecutorial point of view, establishing the offence is hard because the victim in such cases refuses to undergo medical examination and mostly turns hostile. The police also feel helpless in these cases as they do not have any discretion and have to make an arrest. One respondent from the police shared a case in which the boy was arrested and the girl was handed over to her parents. When he came out on bail, the girl went to his house. Her parents approached the police again. When the police reached his house, they found a sizeable number of villagers who surrounded them and said that the girl came on her own; and if either of them were to be taken away, there would be a law and order situation. The mother of the boy lay on the road and threatened to kill herself. The police avoided the situation by asking them to come to the police station. They did not turn up and neither did the police follow up on it.

Several respondents mentioned the disproportionate impact that cases like these have on the men involved. According to one respondent, the couple in these cases “shouldn’t be treated as offenders of victims. Career prospects are affected when the boy is arrested.” One respondent working within the child protection system and a defence lawyer, was of the view that the Special Court should be lenient in such cases.

One respondent working closely with the tea garden community stated, “A 17-year-old girl can decide her partner. We cannot see her as victim and the boy as accused. But if the guy is older, then it is an offence.”

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<sup>186</sup> Spl POCSO 4 of 2015 decided on 04.07.2015.

<sup>187</sup> National Center for Victims of Crime, “Grooming Dynamic”, <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/grooming-dynamic-of-csa>

While some felt that the law should change, others were of the view that consensual sex among persons below 18 years should not be decriminalized as it would be contrary to the values of the society.

#### **4.11. Structural Gaps and Challenges posed by jurisdiction of the Special Court**

As explained in Chapter 1, Special Public Prosecutors and Special Courts are not exclusively dealing with POCSO cases. Majority of the respondents in Kamrup (Metro) and Dibrugarh were of the view that the Special Courts should be exclusively trying POCSO cases. According to one Public Prosecutor, “There should be exclusive courts to deal with POCSO cases. The children should not get the feeling of normal court atmosphere. It should be like they should be coming to a sport’s arena.” A respondent from the judiciary agreed that the Special Courts should exclusively deal with POCSO matters, as dividing time between all the other matters was proving to be a challenge.

One respondent was of the view that designated courts will not suffice. Special Courts have to be dedicated to ensure that trials are speedy and the timelines mentioned in the POCSO Act can be achieved. This was also echoed by another respondent who stated, “manipulations happen because of the delays in trial and that can be curbed” if the Special Court exclusively deal with POCSO cases.

Several respondents offered their suggestions. One respondent from the police was of the view that the Special Court should be able to take up other matters as well, if the number of POCSO cases are not very high. An advocate attached to an NGO suggested that a specific day should be set aside for POCSO cases, and on that day, the Special Court should conduct its proceedings in a different premise, away from the regular court complex. According to the advocate, “Dealing with NDPS and then to switch off will be difficult. Once a week, on a specific day, the Special Court should deal only with POCSO cases. Then the mindset will also be child-friendly.” The Chairperson of the Assam State Commission for Protection of Child Rights was of the firm view that Special Judges should be deputed to exclusively try POCSO Cases. According to Gogoi, “the judge who deals with various other cases cannot switch his temperament from dealing with the adult cases to children’s case quickly,” and there should be “at least one ... exclusive Special Court in each zone, to start with.”

In the absence of a waiting room and separate entrance for children, most child victims encounter the accused in their own case and also the accused in other cases, while waiting to testify. This was reported as being a very intimidating experience.

#### **4.12. Procedural Gaps**

As detailed in Chapter 2, there are several gaps in compliance with the child-friendly procedures under the POCSO Act. Committals took place in 54.65% cases, even though the POCSO Act requires Special Courts to take direct cognizance. Questions are posed by the defence lawyer and the PP directly to the child in most cases. No formal orientation is given to children or their families about the procedures, and their queries are not addressed. Support Persons are rarely assigned to children and there is little awareness of the vital service that they can provide to victims. There is no reference to interim compensation except in one case. Identity of the victim



is poorly protected (77.32% of victims were identified in the judgment). Evidence is rarely recorded within 30 days and the disposal time of one year was met in only 29% of the cases.

#### 4.13. Application of probation in cases of penetrative and aggravated penetrative sexual assault

Probation was ordered in one case of penetrative sexual assault and two cases of aggravated penetrative sexual assault, even though the POCSO Act prescribes a minimum sentence for both these offences. In *State v. Monojit Das*<sup>188</sup>, the Special Court convicted the accused under Section 4, POCSO Act, but declined to sentence him in accordance with the Act, because of the marriage proposal that had been made to him by the girl's family. The fact that the girl married another person after a few months of the incident and also the age of the accused, were both considered as mitigating factors. Based on these, the Special Court ordered to release him on receipt of a bond, entailing him to keep peace and good behavior for a period of three years under Section 4 of the Probation of Offenders Act, 1958 (PO Act). The accused was directed to pay compensation of Rs. 10,000/- to the victim, as per Section 5 of the PO Act.

In *State v. Subbas Nayek*<sup>189</sup>, the accused claimed juvenility, but could not produce any documentary proof. Although he was convicted for aggravated penetrative sexual assault, the Special Court released him on probation of good conduct, instead of sentencing him and stated that an ossification/medical test to determine age would cause further delay, which would result in the accused staying in jail with other criminals. The procedure under Section 34, POCSO Act, has also not been adhered to. The age determination process could not have been bypassed by the Court and the accused should not have been tried by the Special Court, without determining his age.

In *State v. Gour Nayek*<sup>190</sup>, the accused committed aggravated penetrative sexual assault on a 12 year old girl, as a result of which she was impregnated. The family waited for five months in the hope of an amicable settlement, but, since, the accused refused to marry her, they filed the FIR. However, in the course of the trial, he agreed to marry her and the family filed a compromise petition. The Special Court, however, convicted him and considered the future of the baby girl, released him on probation of good conduct for a period of three years.

#### 4.14. Overreliance of the community on non-formal systems

Approaching the *gaonbura* (village head), Tea estate manager, and calling for a *bichar* (meeting) emerged as a common practice in POCSO cases in certain districts. FIRs are usually lodged only if the settlement is not amicable and the accused refuses to accept responsibility.

In *State v. Hari Nath and Ors.*,<sup>191</sup> the accused had allegedly committed penetrative sexual assault against a 14-year-old girl in her house when she was alone. Her mother came home and witnessed the offence. The accused escaped after assaulting the mother. The father called a village meeting in which he was advised by the villagers not to inform the police and instead, a resolution was passed, that the accused would pay Rs. 30,000/- to the victim. Tragically, on the following day, the victim committed suicide. The FIR was lodged thereafter against the accused

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<sup>188</sup>Spl. POCSO Case No. 11 of 2015 decided on 07.06.2016.

<sup>189</sup>Spl. (POCSO) Case No. 14/15.decided on 23.11.2015

<sup>190</sup>Spl (POCSO) Case No. 14/2014 decided on 30.4.2015.

<sup>191</sup> Sessions Case No.- 159 of 2015 decided on 07.01.2016.

as well as the other villagers. The accused was convicted based on the cogent testimony of the parents and the medical evidence. Presumption was also applied. The other villagers were acquitted because the charge of abetment of suicide was not established. Whether or not the suicide was prompted by the settlement will not be known. However, such attempted compromises do little to foster healing or justice for the victim in the case in question, and faith in the system by the wider society.

In *State v. Gour Nayek*<sup>192</sup>, the accused, a tea garden labourer, was a widower with a married son. The victim, a 12-year-old-girl used to work in his house. He was accused of aggravated penetrative sexual assault, as a result of which she became pregnant. Her family placed the matter before the '*Bagan Pachayat*' for '*bichar*'. The accused refused to marry her. The family waited for five months in the hope of an amicable settlement after which they filed the FIR. The girl was 25 weeks pregnant at that time. In the course of the trial, he agreed to marry her. The family also agreed and filed a compromise petition. The Special Court, however, convicted him and considering the future of the baby girl released him on probation of good conduct for a period of three years. He was directed to pay compensation of Rs. 10,000/- for loss and injury caused to the victim and the Special Court recommended further compensation to be determined by the DLSA.

While the above case ended in conviction despite the compromise, this was not the outcome in two other cases in which the compromise was expressly mentioned to the Special Court. (See Section 3.6.6 (c).

According to one respondent who works in the area of awareness raising on child protection in the tea gardens, the pressure on the families to compromise is also very high, as members of the community tell them that the boy will be sent to jail and the girl will be stigmatized. In cases in which the girl is pregnant, the families inevitably compromise and get them married to the perpetrator.

One respondent explained that the rate of elopement is much higher in tea garden communities, because of the prevalence of domestic violence at home – “The girl is scared and feels it is better if she marries and escapes the violence at home.” These cases are usually handled by the community. The Child Protection Committees established by the tea associations sometimes brings both sets of parents and the couple together, counsels them and makes them agree that they will be married to each other after they attain majority. One respondent from the judiciary stated that one may not want to go through the hassle of going to the police and the court processes in case of minor offences, but informal processes should be avoided in case of serious offences like those under the POCSO Act.

**While the community is undoubtedly a source of strength in most parts of Assam and for most reasons, in cases of sexual violence, there is a definite need to build awareness about the law, restorative justice principles, and the criminal justice system. Restorative justice processes are aimed at repairing the harm done to the victim and community and acceptance of accountability by the offender. The victim, community, and the offender are at the centre of the restorative justice process. Unlike the criminal justice system, a victim has a stronger voice in restorative processes. A structure of community-based dispute resolution mechanisms appears to exist in several parts of Assam. In the absence of a human rights or restorative justice framework, however, the victim’s interest is likely to be subordinated and the offender is likely to be let off without taking responsibility for his actions.**

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<sup>192</sup> Spl (POCSO) Case No. 14/2014 decided on 30.4.2015.

#### 4.15. Needs of child victims and victims with disabilities not addressed

The Special Court complexes in Kamrup (Metro) and Dibrugarh are not disabled-friendly. Further, little has been done to identify interpreters, translators, special educators and experts who could aid the Special Court and other authorities in communicating with children. Special Courts, Magistrates, police, CWCs, JJBs, and the State Government need to recognize that there is a definite need for the authorities to involve child development experts while communicating with younger children, as well as children with disabilities.

Interviewing children is a skill that is an art as well as a science. A lot depends on how the police interacts with the child, as the information that is extracted, is then contrasted against the statement of the child in court. While training on this aspect should necessarily be incorporated in the curriculum for the police, Magistrates, Special Courts, CWCs, and JJBs, the State Government through the District Child Protection Unit should also undertake the exercise of identifying experts.

#### 4.16. Gaps in understanding of the POCSO Act

The filing of incorrect charges detailed in Section 4.6, point to a gap in understanding of the offences under the POCSO Act. This also emerged from certain decisions of Special Courts, in which penetration was narrowly construed as being only peno-vaginal. In *State v. Adhan Das @ Jenibba*<sup>193</sup>, a 3-4 year old girl alleged that the accused who used to work in their house as a daily wage earner called her from her friend's house, offered her something, gagged her mouth and took her to his house and inserted his penis in her "backside". Her testimony was corroborated by other witnesses such as her mother, grandmother, and neighbours. Her testimony was consistent with her statement to the Magistrate. The medical report, however, stated that "no sign of rape found" and "Evidence of injury or violence not detected on her person and private part." This was relied upon to conclude that rape had not occurred, but sexual assault had indeed occurred. The mother of the victim stated that when she removed her daughter's panty, she noticed that she had passed stools. She would have surely been washed after this, but this was not considered. The Special Court relied on the old definition of rape, even though the Criminal Law (Amendment) Act, 2013, had come into force, and Section 3, POCSO Act, which includes anal penetration, and concluded that "rape" had not occurred. It convicted the accused under Section 7 and sentenced him under Section 8, POCSO Act.

#### 4.17. Problems with medical reports and their appreciation by the Special Court

While in most cases, the medical report revealed a range of two years, in 18 cases, the medical report simply stated that the victim was above or below a particular age, without specifying the range. This data showed the varying quality of medical examinations conducted by government hospitals in Assam.

In *State of Assam v. Dilip Kakoty*,<sup>194</sup> the medical report indicated that "No sign of rape found" when as per Ministry of Health and Family Welfare Guidelines<sup>195</sup> a doctor cannot determine

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<sup>193</sup> G.R. Case No. 2840 of 2013 decided on 22.07.2016.

<sup>194</sup> G.R. Case No. 49/2014 decided on 09.06.2016.

whether rape occurred or not, as it is for the court to ascertain that. Similar findings were recorded in *State v. Adhan Das*<sup>196</sup> and *State v. Gobinda Bharali*<sup>197</sup>.

Reference to the two-finger test was found in only one case - *State v Dwipen Dutta*.<sup>198</sup>

In *State v Haridas Biswas*<sup>199</sup>, the victim,(15- 16 years), was raped by her neighbor on two to three occasions and she became pregnant. Though the child and the prosecution witness testified against the accused, the court acquitted him, because there was no eye-witness; the victim had not reported it to anyone; and also the possibility of a false case could not be ruled out because of prior altercations. The matter was brought to light by the accused person's wife. Further, the Special Court was of the view that the medical evidence did not suggest "recent" sexual intercourse, and failed to recognize that the incident had occurred at least six months before the FIR was lodged and the medical examination conducted.

#### **4.18. Procedural and Structural Gaps within the JJBs**

Section 34(1), POCSO Act, recognizes that JJBs will have the jurisdiction to deal with matters in which a sexual offence has allegedly been committed by a child in accordance with the JJ Act, 2000, (which has now been repealed and re-enacted as the JJ Act, 2015). Interviews and observations revealed that there is no separate entrance or waiting room for child victims attending JJB proceedings and there are no means available to prevent confrontation between the child victim and the child in need of care and protection. In the spirit of the POCSO Act, the JJB should apply certain child-friendly procedures such as ensuring that the child victim is not exposed to the child in conflict with the law and questions are not posed by the defence lawyer.

#### **4.19. Challenges faced by CWCs**

As per section 30(iii), JJ Act 2015, the CWC can direct the Child Welfare Officers, Probation Officers or DCPU or NGOs to conduct a Social Investigation Report (SIR). A CWC member stated they have one social worker and it was difficult to conduct an SIR in remote places and in tea gardens as they are isolated and do not have bus connectivity. On certain occasions, the social worker has faced hostility from the community. This is another issue, where it is difficult to identify NGOs working in the area of child protection in small districts.

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<sup>195</sup> Guidelines and Protocols :Medico-legal care for victims/victims of sexual violence, 19 March 2014, p.41, available at <http://www.mohfv.nic.in/showfile.php?lid=2737>

<sup>196</sup> SC No. 61/2015 decided on 22.07.2016.

<sup>197</sup> SC No. 1/2014 decided on 31.05.2016.

<sup>198</sup>SPL. (P) CASE NO : 5/2014 decided on 15.12.2015.

<sup>199</sup>Spl. (P) Case No.16 of 2014 decided on 31.03.2016.

## Chapter V. Recommendations

The foregoing chapters underline the need for intensification of efforts to improve the structural and procedural compliance of Special Courts with the POCSO Act. While courtroom design can alleviate the anxieties and fears of a child, the manner in which the functionaries interact with a child can make a positive difference to the outcome provided they are sensitive, capable of recognizing special needs of children, and communicating with children in a developmentally and age-appropriate manner. Compulsory elements of capacity building programs for judges, lawyers, prosecutors, support persons, police, and Magistrate should be child development, techniques for interviewing children, and unique features of child sexual abuse and the POCSO Act that distinguish it from other offences and sexual offences under the IPC. An action plan is required to provide a robust support system for victims staffed by qualified and trained persons to enable children and their families to navigate through the criminal justice system with ease.

The Hon'ble Gauhati High Court and the State Government have an important role to play to ensure the effective implementation and application of the POCSO Act. Members of civil society have an equally important role to play in the development of training and literacy materials and in also providing support services to victims of child sexual abuse and their families. These recommendations have been arrived at in the course of the Study on Special Courts in Assam as well as the studies in Delhi and Karnataka. It has also drawn from interactions with judges, CWCs, and other stakeholders in the course of training programs conducted by CCL-NLSIU in different States.

### 5.1. Recommendations for the Hon'ble Gauhati High Court

It is recommended that the Hon'ble Gauhati High Court, in consultation with the Assam Government, consider:

1. **Establishment of dedicated Special Courts** to exclusively deal with cases under the POCSO Act, in districts where pendency is high.
2. **Construction of waiting rooms** in all court complexes specifically for child victims of sexual abuse and their families, in a manner that they are not exposed to the accused or to other adult accused persons and the police. The waiting rooms should also **be accessible to persons with disabilities** in accordance with the Rights of Persons with Disabilities Act, 2016. The funds made available under the National Mission for Justice Delivery and Legal Reforms for improvement of courtroom infrastructure should be considered to ensure that the ambience of the court complex is child-friendly.
3. Authorize Special Courts to conduct **their sittings in a place other than the court complex**, when the testimony of the child and her/his family members needs to be recorded.
4. **Allocation of funds** to:
  - enable **prior courtroom orientation** for children and their families by support persons;
  - enable the creation of an **accessible and child-friendly court-complex and pictorial brochures** explaining the courtroom structure, people present in the courtroom, sequence of events and the procedures that will be followed during deposition;
  - ensure that the **JJBs and Special Courts have means available to prevent the exposure of the child victim to the accused, clean toilets, and drinking water facilities**;
  - invest in an **electronic intimation mechanism**, that will alert victims and their families at least 24 hours in advance if the hearing is being rescheduled.

5. Creation of a **cadre of trained para-legal volunteers** to support child victims during the entire course of the investigation and trial that the CWCs could draw from for the appointment of **Support Persons**.

6. The Hon'ble Gauhati High Court should consider issuing the following **guidance notes**:

- To Special Courts, on the award of **interim and final compensation** in cases under the POCSO Act, clarifying the respective roles of Special Court in awarding and the DLSAs in disbursement of compensation amounts.
- To **Magistrates, on the applicability of *Wajed Ali v. State of Assam*,<sup>200</sup>** in the light of the POCSO Act and the Hon'ble Supreme Court's order in *State of Karnataka v. Shivanna*,<sup>201</sup> as per which a victim's statement under Section 164, CrPC should be recorded within 24 hours, in cases of sexual offences.
- To Special Courts, on the **procedures** that should be followed while **determining the age** of the victim.
- To Special Courts, on **core minimum measures** that should be taken to ensure compliance with the **child-friendly procedures** under the POCSO Act. For instance, children should not be made to wait, when they attend the court for recording of their testimony. Exposure of the child to the accused should be avoided even while the child is waiting to testify. The identity of the victim as well as the victim's family members should be suppressed in the text of the judgment, so as to ensure compliance with Section 33(7), POCSO Act.
- To Magistrates and Special Courts, on Section 33(1), POCSO Act, which authorizes Special Courts to take **cognizance without committal**.
- **To Magistrates, on core minimum measures** that should be taken to ensure compliance with the child-friendly procedures under the POCSO Act.

7. **Training** of judges and Magistrates **on age and developmentally appropriate techniques of interviewing children and appreciating their statement**. The training should also address preparation of a child victim and how it can be distinguished from tutoring.

8. Instructions to the **Assam Judicial Academy** to:

- Seek the **assistance of experts in child development, child psychology, and child psychiatry** to develop **training modules** for judges, prosecutors, advocates, support persons, and court staff on interviewing children and building rapport with them.
- Include **components and methods of age determination, dealing with hostile witnesses, and appreciation of medical evidence** in the training modules for judges and prosecutors.
- Include **aspects of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act 2015)** to ensure that a Special Court is equipped to deal with a case of a child in conflict of law transferred by the JJB as per Section 19, JJ Act 2015.

10. Introduction of **certificate courses for court staff** attached to Special Courts, to enable them to acquire the sensitivity and skills required to interact with traumatized children and their families.

11. Urgently request the Assam Government to ensure that a list of **qualified translators, interpreters, special educators and experts** who could assist in the recording of testimony of the child be made available to all Special Courts.

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<sup>200</sup> Anticipatory Bail Application No. 1962 of 2012 decided on 05.06.2012 by Gauhati High Court.

<sup>201</sup> SLP (Crl.) NO. 5073/2011. Dated 25.04.2014

13. Placing of a **suggestion box outside Special Courts**, for feedback from child victims and others of their experience of testifying before the Special Court and also seeking suggestions for improvement.

14. Seeking feedback from Special **Courts** on a regular basis on the challenges they face in trying cases under the POCSO Act, measures they have taken to make the courtroom experience child-sensitive, and to solicit suggestions for improvement. The good practices that emerge from the feedback should be collated, analyzed, and disseminated to all Special Courts.

15. Instruct Special Courts to **display data on disposal and pendency** in POCSO cases on their website on a regular basis.

## 5.2 Recommendations for the Assam Government

The Assam Government should consider:

1. **Appointment of Special Public Prosecutors (SPP)** as mandated under Section 32(1) to exclusively deal with the POCSO cases

2. Trainings:

- **Periodic trainings of prosecutors** on the POCSO Act as well as developmentally appropriate techniques of interviewing children and preparing them for trial and filing compensation applications.
- **Periodic trainings of police** on the POCSO Act, investigation methods, collection of samples, as well as developmentally appropriate techniques of interviewing children. The training should also address the protocol in cases in which the victim is pregnant.
- **Joint trainings of police and prosecutors** on the POCSO Act, lapses that should be avoided, and the manner of investigation and prosecution of sexual offences.
- **Periodic training of Chairperson and Members of Child Welfare Committees** on their role under the POCSO Act and Rules.
- **Periodic training of the Members of the Juvenile Justice Board and joint trainings** of the Principal Magistrates along with Members of the JJB, on the POCSO Act.
- **Periodic training of doctors of government hospitals** on conducting medical examination in accordance with the POCSO Act and on age determination process.

3. Development of an **Action Plan to address the support gap and to facilitate greater coordination between support persons, lawyers, prosecutors, as well as children and their families**. The Action Plan should indicate measures that will be taken to ensure the availability of competent and sensitive Support Persons immediately after an FIR is lodged, till the completion of trial. The Action Plan should also address the counselling and support services that will be extended to girls who become pregnant as a result of the alleged assault.

4. Creation of a **trained cadre of Support Persons with the assistance of Assam Legal Services Authority and District Child Protection Units** under the Juvenile Justice (Care and Protection of Children) Act, 2015.

5. Allocation of **funds to enable Child Welfare Committees to provide remuneration and travel expenses to Support Persons** appointed in POCSO cases.

6. Allocation of **dedicated funds and transport to the police** to enable them to escort child victims for medical examination and in order to present them before the CWC.

7. Allocation of **funds to JJBs**, to ensure that curtains or other means are available to ensure that the **child victim is not exposed** to the child alleged to be in conflict with the law.

8. Direction to **District Child Protection Units, to prepare a list of qualified translators, special educators, interpreters and other experts** to assist the police, Magistrate, and Special Court, with the recording of statement of the child.
9. **Collaborations with Child Protection Committees, tea associations, and Kishori Clubs** working within the tea garden communities to build awareness about the POCSO Act and its linkages with the JJ Act as well as about the available support structures.
10. Ensuring that **sex education** is included in the school curriculum. Parent Education Programmes should be launched to enable parents and other family members to talk to children about sex and sexuality at home, and to focus more on sensitizing boys to respect girls.
11. Facilitating the **establishment of community level support groups** to create awareness about child sexual abuse, the legal framework, and support services available to all children, particularly children out of school, children with disabilities, children living on the street, and children living in residential institutions.
12. **Collaborating with mass media** to devise and promote awareness about applicable laws and to challenge attitudes and harmful gender stereotypes that perpetuate the tolerance and condoning of violence against children in all its forms; and to also use the media to promote positive attitudes towards children.
13. Developing **safe, well-publicized, confidential and accessible support mechanisms within the community**, for children to report sexual abuse, with specific attention to reporting mechanisms within residential institutions.
14. Developing **guidelines for reporting by professionals** such as doctors and others working with children.
15. Ensuring **regular inspections of Child Care Institutions**, by Inspection Committees under the JJ Act 2015.
16. **Commissioning research** on evidence-based treatment programs for persons at risk of sexually abusing children and on root causes of sexual violence against children.
17. **Organizing quarterly meetings** with police, prosecutors, doctors, CWCs, JJBs, and support persons to understand the problems they face in the implementation or application of the POCSO Act.
18. **Identifying training needs, documenting good practices**, and identifying measures that should be taken to support stakeholders in the discharge of their functions.
18. Bridging the **gap between birth registration and birth certification** especially in the tea garden community by conducting birth certification camps and awareness programs.

### **5.3. Recommendations for Assam Legal Services Authority**

1. Ensure that **DLSA's disburse compensation** ordered by the Special Court **within 30 days** of the order passed by the Special Court.
2. **Designate Legal Aid Lawyers and para-legal volunteers to provide orientation about the legal procedure** and the courtroom to child victims and their families as well as children in conflict with the law who may have been transferred by the JJB to the Special Court for trial as an adult.
3. Assign **Legal Aid Lawyers** to provide assistance to child victims in filing an **interim compensation** application before the Special Court.



4. Assist the State Government in **creating awareness on birth certification and birth registration**, with the aid of law students and others.

#### 5.4 Recommendations for Special Courts

1. Take into account the needs of the child as per the child's **developmental stage before scheduling testimony**. Judges should verify if the child is hungry, sleepy, or needs to use the toilet before commencing with the testimony.
2. Care should be taken to ensure that the **child is not kept waiting on the day of the testimony**.
3. **Complete the examination-in-chief and cross-examination on the same day**. Breaks should be allowed, if necessary.
4. **Do not allow the defence or the prosecution to question the child directly** in accordance with the POCSO Act.
5. Admit the **statement of a child with disability** recorded under Section 164(5A)(a) Cr.P.C as examination-in-chief.
6. Proactively consider **awarding interim compensation** and indicate reasons as to why compensation is not being awarded.
7. Direct the **DLSA to file a compliance report within 30 days** of the award of compensation.
8. **Examine the child in the chamber or any other suitable room** in the court complex, if the courtroom is likely to intimidate the child.
9. While **determining age** of the child victim, apply the rulings of the apex court in *Jarnail Singh v. State of Haryana*<sup>202</sup> and *Ashwani Kumar Saxena*<sup>203</sup> on the point of age determination and Section 94, JJ Act 2015.
10. Apply the techniques suggested in Annexure A of this report, while questioning children.

#### 5.5. Recommendations for the Assam State Commission for Protection of Child Rights

1. Develop monitoring indicators to assess the State Government's compliance with the POCSO Act.
2. Conduct inspections of child care institutions to assess measures in place to protect children from sexual offences.
3. Review the care and protection arrangements available for victims under the POCSO Act in all districts.

#### 5.6. Areas of further research

The study has underlined the need for more empirical studies and research on the following areas:

- Challenges faced in the investigation and prosecution of cases under the POCSO Act;

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<sup>202</sup> (2013) 7 SCC 263.

<sup>203</sup> AIR 2013 SC 553.

- Non-formal systems of justice as a pathway for restorative justice processes in cases of sexual offences;
- Child marriage and the POCSO Act;
- Quality and nature of support provided by different functionaries available to child victims of sexual abuse;
- Empirical study on the implications of assignment of Support Persons in POCSO cases.
- Evidence-based treatment programs for persons at risk of sexually abusing children;
- Challenges faced by JJBs in dealing with cases under the POCSO Act;
- Empirical study on the treatment of children alleged to be in conflict with the law in “romantic” cases;
- Challenges faced by CWCs in dealing with cases under the POCSO Act;
- Children’s experience of the criminal justice system

### **Ingredients of a Child-friendly Special Court**

All respondents were asked their views on measures that can be taken to make the courtrooms more child-friendly. A collation of their responses is as follows:

#### **Structure**

- Special Court should be in a separate complex and not within the regular criminal courts complex.
- The child should not feel threatened inside the room.
- The room should not resemble a courtroom. For instance, a witness-box should not be present in the room.
- Special Judges should be deputed to exclusively try POCSO cases.
- At least one exclusive Special Court should be established in each zone.
- SPPs should be appointed.
- Drinking water should be readily available.
- Separate waiting room with a clean toilet should be available.
- The seating could be informal and the judge, child, advocate, and Support Persons could sit in the formation of a circle.
- The days on which POCSO cases will be heard should be decided beforehand and on those days, the Special Court should sit in a separate complex and not the regular court campus.
- Child Psychologists should be involved in the creation of a child-friendly space where testimony of the child can be recorded.

#### **Recording the child’s testimony**

- The judge should interact with the child before the evidence and make the child comfortable.
- Children should not be made to wait for long periods for the recording of their testimony.
- Children should not be exposed to the accused in their own case, or other accused persons in handcuffs. Measures should be taken to ensure that the child does not come face to face with the perpetrator.
- The child should be introduced to the people present in the room.
- Exposure to the accused should be avoided at all times and at all places in the court complex.

- The time for recording testimony should be specified.
- Testimony should be recorded in the judge's chamber.
- Children should be given an orientation of the POCSO Act and the courtroom procedures in a language and manner that they understand.
- The child should be made to sit and feel comfortable during the proceedings.
- The child should not be made to stand in the witness box.
- The child should not be taken alone in the judge's chamber and should be accompanied by a family member or person of trust.
- Statement should strictly be recorded *in-camera*.
- Support person should be present with the child during the recording of testimony.
- The police, advocates, and judges should not be in uniform.
- The judge should ensure that no derogatory questions are put to the child.

#### **Timeliness**

- Trial should be completed as soon as possible and should not be delayed.
- Cases should be disposed off within six months.
- Case should be sent directly to the Special Court for cognizance and not to the Sub-Divisional Judicial Magistrate for committal.

#### **Care and Protection**

- Decisions regarding the rehabilitation and custody of the child victim should be taken in deliberation with CWC or the matter should be referred to the CWC.

#### **Training Component**

- Judges should be aware of child psychology and take measures to minimize trauma.

## Annexure A

### Questioning a Child in Court – Suggested Do's and Don'ts for a Special Court Judge

Extracted from: Centre for Child and the Law, NLSIU, *Law on Child Sexual Abuse in India (2015)*, pp. 196-216

Author: Dr. Preeti Jacob, M.D. (Psychiatry), Post-Doctoral Fellowship (PDF) and D.M. (Child and Adolescent Psychiatry) and Assistant Professor, Department of Child and Adolescent Psychiatry, NIMHANS

The questioning of children for forensic purposes needs to follow a format so that the children can give accurate information to the best of their ability. Given below are some do's and don'ts for the interview procedure as well as questions that can be posed to child victims or witnesses. These have been adapted from a number of interview protocols including The Cornerhouse Forensic Interview Protocol (Anderson et al, 2010) , Forensic Interviewing Protocol (Governor's Task Force on Children's Justice and Department of Human Services, State of Michigan, 2003), National Institute of Child Health and Human Development Investigative Interview Protocol (Lamb et al, 2007) and the Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act (POCSO) 2012 Ministry of Women and Child Development, Government of India, 2013.

These would apply to interviews by the police in the course of investigation as well as examination and cross-examination during trial.

#### Do's and Don'ts

##### Atmosphere

- The atmosphere must be child friendly and relaxed. This can be done by having a specific room specially designed to interview children. The room should be away from traffic, noise and other potential distractions like phones, fax machines, computers, typewriters, etc. The room should be bright and well lit. It should have a toilet facility. It should have tables and chairs and a cupboard to keep materials out of view. The cupboard can have a few toys and drawing material (such as papers, crayons, colour pencils,) which can be used, if necessary. It should preferably have a one-way mirror and a video recording facility so that the interview can be recorded. The environment should be relaxed but not too distracting.
- Avoid having police personnel in uniform, the accused or any other person in the room when the interview is being conducted

##### Scheduling Interviews

- Interviews must be scheduled after the child has used the toilet and has had something to eat. It should not be scheduled during the child's nap time. It should be scheduled preferably in the morning. If the child is on medication, (for example, anti-seizure medication which can cause drowsiness), the interview should be scheduled for a time when the child is most alert.

##### Interview Guidelines

- The judge/police personnel conducting the interview must introduce themselves. Their tone must be relaxed and easy-going. Sometimes children think that they have done something wrong and are in trouble and therefore are being interviewed by the judge/police personnel. It is important to allay their fears. The following is a brief

example of how one can introduce one's self at the beginning of the interview. "Namaste, my name is Srinivas. I am a judge in this court. Part of my work here is to talk to children about events that have happened to them." Or, - "Hello, my name is Raju and I am a police officer here. I talk to a lot of children in Hoskote (example of name of place where police station is located) about things that have happened to them. We will talk for a while and then I will take you back to the other room where your mother is waiting for you. Okay?"

- If the interview is video-recorded, verbal consent of the child must be taken prior to the interview. A statement such as the following can be made. "I have a video recorder in this room. It will record what we say. It is there so that I can listen to you without having to write everything down. Is that okay?"
- The child's personal space must be respected. By this it is meant that there must be adequate space between the interviewer and the child. More often than not, these children are talking about difficult issues which they may or may not have confided in others, events that are painful, shameful, embarrassing and guilt inducing and thus it can be quite disconcerting to have someone, especially a person in authority staring/looking at them directly at all times. Sitting at an angle of 45 degrees is helpful, as the child can look in front and talk if they don't wish to look at the interviewer, but the interviewer can see the child at all times.
- As these children have been abused in some form or the other (physical, sexual) they often misinterpret touch. It is important therefore not to touch the child. Even if it is a small child, it is important not to tousle their hair, pinch their cheeks or demonstrate affection using touch.
- If the interviewer is unable to hear the child, he/she should not guess what the child might have said. This is important, because if the interviewer has misunderstood the child, in most cases the child is unlikely to correct the interviewer. It is therefore always better to ask the child again as to what he/she had said. For example, "Could you repeat what you just said?" or "I did not hear what you just said, so could you repeat it again please"
- If the child is talking very softly and the interviewer is unable to hear the child clearly, this should be communicated to the child. The interviewer could give the child an explanation such as -"I am unable to hear you, so it would help me if you can look at me and talk a little louder. Thanks" or, - "I have some difficulty hearing, so could you look at me and talk a little louder. Thank you"
- Do not volunteer information that the child has not yet revealed in the interview. For example, if the child has not told you that the father lay down on top of the child it is important not to introduce this information before the child has revealed it himself/herself. For example, "Did he have his pants off or on when he laid down on top of you?" If leading questions have to be asked then it is suggested that the following style be adopted - "Did he have his pants on or off?". Based on the child's answer, the follow up question can be- "Tell me what happened after he took off his pants?" or "Tell me what happened then?"

### **Language and Communication**

- It is important to talk to the child in a language well understood by the child. If the interviewer does not speak the child's preferred language or dialect a translator must be present.
- Do not use baby or childish language while talking to children. Use a normal adult tone and pronunciation. The words that the child uses to describe certain body parts or names of alleged perpetrators or others need to be used when referring to these body parts or

persons.

- Actively listen to the child using minimal encouragers, such as “Go on, I am listening,” or “Hmmm,” or “Then what happened?” or “Tell me more about what happened.”
- If the child uses a kinship term like “uncle” or “Grandpa” it is useful to clarify their name. For example, “Can you tell me this uncle’s name?” Or, the interviewer can ask- “Do you have one grandpa or more than one grandpa? Which grandpa was this?” Thereafter during the interview the alleged perpetrator’s name must be used. For example, if the child says “Rakesh Mama” or “Dada” then subsequent questions must contain his/her name.
- It is also important not to use the pronouns ‘he’ or ‘she’ as they can be quite ambiguous. For example, “What were you doing when he came home?” Instead the question can be framed as “What were you doing when Rakesh Mama came home?”
- Do not propose feelings by saying things such as- “I know that you probably hate your father”. Feelings that children have for the perpetrators can be rather ambivalent. Sometimes it can be quite confusing for the child. The perpetrator may otherwise be pretty affectionate and caring and the child may have difficulty reconciling the different experiences shared with the perpetrator, both positive and negative experiences including the sexual abuse itself. The above statement regarding whether the child hates her/his father need not be made at all, as it is irrelevant legally to whether sexual abuse has indeed occurred or not.
- Do not make promises such as- “I will lock him up in prison and you will never have to see him again”. This is not ethical, as one cannot predict what is likely to occur during the trial. Making false promises can therefore even result in secondary victimisation.
- Do not ask questions which convey judgements such as -“Why didn’t you tell your mother about it that very night?” It is essential to be non-judgmental, as in all probability, the child is feeling guilty about the same fact and this can make the child more guarded which may impede further evidence gathering by the interviewer.
- Do not use the words such as “abuse”, “rape” or “bad” etc., when asking about the experiences as these are adult interpretations.
- Do not display affection and bonhomie such as “I am like your father, you can tell me anything,” or “We are friends, aren’t we?”. This might be quite confusing for the child whose trust in adults and perhaps in close friends/relatives has been destroyed – which may therefore make him/her more wary and guarded.
- If the interviewer does not understand a particular word or phrase, she/he can ask the child to elaborate by showing it on an anatomical drawing and explaining the same. For example, if the child says “pee pee” for the male/female genitalia, then the interviewer must ask- “Can you tell me what a pee pee is?” or “On this diagram can you show me where the pee pee is? As explained earlier, it is also important that the child’s words be used subsequently in the interview, when referring to the genitalia
- If there is inconsistency, then the interviewer must ask the child for clarifications in a non-confrontational and non-accusatory manner. At no point should the questioning style suggest dis-belief in the story of the child. For example conversations questions with statements such as the following should be avoided- “You said that your father kissed you on your mouth yesterday and then you said that you had stayed at your uncle’s place yesterday. I am confused. Can you tell me again what happened”.

### **Questioning Children**

- Children are quite concrete in their thinking, and thus open ended questions must be asked. Questions such as “Did he touch you?” are not very good questions as they are unclear and misleading. Some children may answer negatively as in their experience, they

were kissed not touched. Children are often literal beings and may be extra careful while answering in an interview of such nature and thus may not equate touch and kiss.

- Questions which are ambiguous must not be asked, such as -“How were your clothes?” Instead, concrete questions such as- “What were you wearing when this happened?” must be asked.
- In the hierarchy of questions that can be asked during an interview of a child victim, open ended questions and prompts are most often preferred. Specific but non-leading questions can be asked for soliciting further details. Closed questions are used to confirm specific details through the use of a multiple choice question or a yes/no question. Leading questions can be asked after certain facts have already been established/revealed by the child.
- Examples for the above mentioned question types are given below.
  - Open-ended questions are as follows. “Tell me everything you can about it,” or “Tell me what you know about what happened”. Open-ended prompts are used in the following manner: If the child stated that the uncle hit her, an open-ended prompt would be- “You said your uncle hit you. Tell me what happened,” or “You said your uncle hit you. Tell me everything about that”.
  - Specific, non-leading questions are as follows. It focuses on details the child has already mentioned. Questions of this kind are as follows - “You said you were at home alone. Tell me what happened then?” or “You called this person Bittu. Who is Bittu?,” or “You said you were sleeping. Then what happened?”
  - An example of a closed question would be as follows “Where did this happen? In your room, the bathroom or another place?,” or, “Were you wearing your pajamas, or wearing something else?”
- Leading questions must not be asked or, if at all, should be used sparingly, as they assume facts or suggest an answer, which the child has not yet given. Questions such as - “He touched you, didn’t he?,” should not be asked. If a leading question is required to be asked, the question should be framed as follows, “Did Uncle Ravi touch you?,” then follow it up with an open-ended prompt such as - “Tell me everything about that.”
- Do not ask the child to “pretend or imagine”. For example, “Imagine what happened and tell me”. This is not a good practice, as it removes the child from the direct experience and can lead to incorrect or/and inaccurate answers.
- Most children do not understand the concept of time until they are 8-10 years of age. Even if they do understand the concept of reading time, they may or may not be able to relate it to events that have occurred. Children less than 4 years have difficulty with times of the day. Children less than 7 years also do not understand prepositions such as “before” and “after” clearly. It is essential to keep these facts about the developmental stages of children in mind while questioning children. Words such as ‘yesterday’, ‘day after tomorrow,’ etc., should also not be used. Clock times should not be included in questions. Instead, events should to be tied to meal times and other activities in the child’s day, (for example, to the time that he/she goes to school or comes back from school, attends singing class, etc.,) which can be used as reference points. For example, - “You came back from school and then what happened?,” or “You said you ate lunch. Then what happened?”.
- Young children also often have difficulty with numbers. Children should not be asked “Tell me how many times it happened?” Instead the question should be framed as “Did it happen once or more than once ?,” followed by questions such as “Can you tell me about the first/last time that this happened?”
- Multiple questions should not be asked at the same time. For example, “Where were you and what were you doing?” Instead, if the child stated previously that the event occurred

after the uncle came home, then the questions must be framed as follows- “Where were you when Rakesh Mama came home?” After the child has answered the first question, the next question can be -“What were you doing when Rakesh Mama came home?” If for instance, the child said he/she was doing his/her homework, then the follow up question thereafter can be -“Tell me what happened after Rakesh Mama came home and found you doing your homework?”

### **Making the Child Comfortable**

- Do not correct the child’s behaviour. For example, if the child rocks in his/her seat, or shakes his/her legs, as long as the interviewer can hear the child and it is not interfering with the interview procedure, it should be allowed, as these are often nervous or soothing behaviours. The child should, in no circumstance, be told to stop acting in these ways or any other such manner, as the range of such self-soothing behaviours may not always be all known. For example, some children may tap on the desk, hum, make noises with their mouth; rub their hands, sing, etc. An effort should be made to understand such behaviours, (however disturbing they may be to the interviewer), as possibly self-soothing behaviours, which in itself may actually contribute to a conducive and enabling environment for the child in making a clear testimony.
- It is also important to convey a non-judgmental attitude. Do not display shock, disbelief or disgust when the child says something. If a translator is present, try and confine your communication with the translator to understanding the child. Do not engage in conversation beyond this as it could distract and prevent the free flow of thought and recall of painful memories.
- Do not promise rewards or gifts by making statements such as- “I will give you a chocolate, if you tell me what happened?”
- Do not withhold basic needs as a form of reinforcement, by making statements such as- “I will allow you to go the bathroom/drink water if you tell me what happened?” Children are then not only compelled to concentrate more on holding in their bowel/bladder, rather than answering the interviewer’s questions, which is counterproductive, but also feel disrespected and unimportant.
- Uses of reinforcements as stated in the above two examples are viewed as improper interview techniques, as they tend to coerce and compel the child into stating events and making disclosures in an incorrect manner. This will undermine the quality of the interview and the accuracy of the facts collected which can have negative consequences for the case in court.
- Acknowledge the child’s feelings. For example, if the child is demonstrating a feeling of being upset, sad, embarrassed or scared, acknowledge these feelings. For example, “I talk to many children about these kinds of things, it’s okay to feel that way, don’t worry. Now, would you like to tell me what happened?”