# Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi

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

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# Study on Special Courts in Delhi

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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, lobbying 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* (2nd ed, January 2015). The team recently 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.

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[1]List of participants: Charu Makkar, Former CWC chairperson; Ms. Nidhi- Legal Consultant, National Commission for Protection of Child Rights; Ms. Udita - Legal Consultant, National Commission for Protection of Child Rights; Ms.Tannishta Datta- UNICEF; Ms.Alpa Vora- UNICEF; Ms.Komal Ganotra, Mr.Shubendu, Ms. Jaya Singh – Child Rights and You, Ms.Deeksha Gulat, Ms.Madhu Mehra- PLD, Ms.Smriti Minocha – Human Rights Law Network.

**About the Study**

## *Normative Framework*

Under 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."[2] 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.[3] "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."[4]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.

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[2] 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

[3]Guideline 9(b).

[4]Guideline 9(d).

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*[5] 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 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.

### *Scope*

The Study on Special Courts established under the POCSO Act under in Delhi was initiated by the Centre for Child and the Law, National Law School of India University in January 2015 to understand if these Courts were facilitating "child-friendly justice" and to identify critical issues of concern related to the 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 trends that are emerging.The functioning of the police, doctors, investigating authorities while performing their roles under this Act is not within the scope of this study, although it is equally important.

### *Objectives*

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 (UNCRC) by all actors in contact with child victims during the trial in an age and developmentally appropriate manner.
- Adherence to the procedures stipulated in the POCSO Act and the Criminal Law (Amendment) Act, 2013 during the trial.

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[5] 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

- 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.

**The objectives of the study are to**

1. Examine the extent to which Special Courts in Delhi 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.

### *Parameters of Analysis*

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

**A. Assessment of Structural Compliance**

1. Have Special Courts been constituted?
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?

**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 coordination between the Child Welfare Committees and the Special Court on the point of compensation or custody of the child?
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
- Disposal rate

- 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:

- Structured interviews with prosecutors, lawyers, Support Persons, police officers, doctors, NGOs, 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.

Field interviews were carried out in February 2015 and May 2015 by SwagataRaha and ShruthiRamakrishnan, Legal Researchers. Structured interviews were carried out with:

- Director, Department of Public Prosecution
- Member Secretary, Delhi Legal Services Authority
- Chairperson, Delhi Judicial Academy
- Chairperson and Member, Delhi Commission for Protection of Child Rights
- Two Additional Public Prosecutors
- Two child survivors who had testified before the Special Court
- One Legal Aid Lawyer, Delhi Legal Services Authority
- Two Legal Aid Lawyers representing the accused in POCSO cases
- Two private advocates representing children in Special Courts
- One Chairperson, CWC
- Advocate, Delhi Commission for Women
- One court staff

- One Support Person appointed by CWC
- Principal Magistrate, Juvenile Justice Board
- Deputy Commissioner of Police (Crime)
- Officer-in-charge Anti Human Trafficking Unit (AHTU) (Crime Branch)
- Representatives from two NGOs providing legal and psycho-social assistance to child victims.

Interviews were also carried out with members of the legal fraternity and the child protection system on conditions of anonymity.

A census approach was adopted with respect to the analysis of judgments of the Special Courts. The team studied 667 judgments passed by 20 judges from 1 January 2013 till 30 September 2015. All judgments were downloaded from the website of the Delhi District Courts (http://delhicourts.nic.in).

### *Limitations*

However, 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. Although an attempt was made to ascertain the manner in which Juvenile Justice Boards deal with cases under the POCSO Act, the data gathered was not sufficient.
- The analysis of the proceedings in the case have largely been dependent on the text of the judgment, as the researchers were unable to witness actual court proceedings which are held *in camera*.
- Only judgments uploaded on the official website of the Delhi District Courts 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 POCSO judgment during this period was excluded from the analysis. Any errors or gaps in the data collected are therefore inadvertent and unintentional.
- Though a request was made for permission to interview judges of the Special Courts, this was not granted by the Delhi High Court. Formal interviews with judges of Special Courts therefore could not be carried out.
- While 112 cases ended in conviction, sentencing orders could be found in only 90 cases.

# Summary of Findings

**I. Structural Compliance**

The table below captures the status of structural compliance of Special Courts in the six court complexes in Delhi 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.

| Parameters of Analysis | Yes | No |
|---|---|---|
| **Special Court designated in all districts** | √ | |
| *Special Courts exclusively try offences under the POCSO Act, 2012* | | √ |
| **Special Public Prosecutors appointed** | | √ |
| **Special Public Prosecutors exclusively try offences under the POCSO Act, 2012** | | √ |
| *Separate entrance for children into the courtroom* | 2/6* | 4/6 |
| *Waiting room for children and families* | 2/6* | 4/6 |
| *Toilet located in the vicinity of the courtroom* | 2/6* | 4/6 |
| *Audio-visual facilities to record evidence of the child available* | 2/6* | 4/6 |
| **Means available to prevent exposure of the child to the accused *in* the courtroom** | √ | |
| *Separate room for recording the evidence of child witness* | 2/6* | 4/6 |

* The court rooms in Saket and Karkardooma have a separate entrance for children, a waiting room, audio-visual facilities, a separate room to record evidence, and toilets within the vicinity of the courtrooms. These facilities are not yet available in Tis Hazari, Patiala House, Dwarka and Rohini.

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 96 of the 667 judgments studied (i.e 14.39%), the case was committed to the Special Court by the Magistrates Court. Only two instances of committal took place in 2015. This can be attributed to the lack of awareness about the dispensation of the requirement for committal in POCSO cases.
- **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. Except Saket & Karkardooma, as a rule APPs and defence lawyers in most other Special Courts pose questions to the child directly. Routing of questions through the judge is therefore an exception. In Saket & Karkardooma, the questions are routed through a Legal Aid Lawyer (LAL)who serves as an intermediary between the court and the child. Under Section 33(6), POCSO Act, the Special Court should not allow aggressive questioning or character assassination of the child and should ensure that the dignity of the child is maintained at all times during the trial. This is largely complied with. However, questions put to the child are not always age and developmentally appropriate. For instance, questions like how much time did it take for the abuse to be perpetrated? Was the door open or closed? How did you reach from point A to B – are questions that can be very confusing for a young child particularly when the concepts of time and distance are not well formed.
- **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. This is mostly complied with. However, the developmental needs of the child are not considered while scheduling testimony. For instance, school timings, holidays, nap time, meal time, etc., are rarely considered before fixing the testimony. Special Courts should ensure that children are not called repeatedly to testify in the court under Section 33(5), POCSO Act. Matters are routinely adjourned if the defence lawyer/APP is not available or the judge is on leave. No prior intimation is given to the child and the family as a result of which they end up making multiple visits to the courtroom. With increasingly high dockets and the pressure of dealing with all special laws, the trial in POCSO cases is rarely speedy.
- **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. This is mostly

complied with. Some judges seat the child next to them on the dais and record evidence. However, courtroom procedures are rarely explained to the child by the APP or the judge.

- **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. According to several respondents, the identity of the child victim is poorly protected. The POCSO court hall is known to all, and names are called out loudly by the court staff while calling for cases. Besides, all details of victim are in the FIR and this is not hard to secure.
- **Award of compensation:** Section 33(8), POCSO Act empowers the Special Court to direct payment of compensation for any physical or mental trauma caused or for immediate rehabilitation of the child. Rule 7, POCSO Rules, lays down the procedure and factors that must be considered before compensation is ordered. A conviction did not automatically result in an award of compensation, which was awarded in only 36out of 667 cases. The quantum was determined by the Special Court in all cases except one. There is no mention of an award of interim compensation in any of the judgments. Unfortunately, none of the judges required the filing of a compliance report by the DLSA or any other authority.
- **Prompt recording of evidence and disposal of 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, if any, should also be recorded by the Special Court. None of the judgments studied indicate a reason for the delay in recording of evidence. In two cases, examination of the victim was conducted on two different dates.[6] While the prosecutrix testified in favour of the prosecution on the first date, she turned hostile on the subsequent date. In *State v. Mohd. Azeem Khan*[7] there was almost a one month gap between the two dates.
  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. In 461 cases,(i.e 69% of the cases), the trial was completed within a year, while in 187 cases (i.e 28% of the cases) it took over a year. In 19 cases(i.e 3% of the caes), the time taken to complete the trial was over two years. All trials were completed in less than three years. Of the 461 cases that were completed within one year, convictions resulted in 55 cases i.e., 11.93% cases. 187 cases were disposed between 1-2 years of which convictions were recorded in 50 cases i.e., 26.73% cases. Of the 19 cases, in which disposal took more than two years, conviction took place in 7 cases i.e., 36.84%.
- **Avoiding exposure to accused:** While Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused while testifying, a confrontation nearly always takes place when the child is waiting outside the courtroom, in complexes other than Saket and Karkardooma.
- ***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

[6] *State v. Subhash,* SC No. 110/13 decided on 31.05.2014; *State v. Mohd. Azeem Khan,* SC No. 49/14 decided on 25.08.14.
[7] SC No. 49/14 decided on 25.08.14.

than the courtroom if the Special Court deems it fit.[8]The courtrooms are cleared when the victim or material witnesses like family members and eye-witnesses testify in POCSO cases.

- **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. Interviews with stakeholders revealed that a list of qualified experts is not available with most Courts. In one case, the accused doubled up as a translator and stood right behind the child as she testified in court.
- **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. Some private lawyers also move applications for compensation before the Special Court. The DLSA has also instructed the LALs to file compensation applications on behalf of the child before the Special Court. The reaction of the APPs towards private lawyers has been mixed. While some are not receptive, other have accepted written arguments made by the private lawyers and even taken their assistance to respond to bail applications.
- **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. There are multiple actors providing varying degrees of support in Delhi. The LAL-Support Person serves as an intermediary in Saket and Karkardooma and has a very limited role to play. The Delhi Commission for Women (DCW) –Advocate also offers additional support on the day of the evidence. Support Persons appointed by the CWC do not have a prescribed role and often provide a range of services depending on the nature of the case. NGOs also provide psycho-social and legal services and orient the child and his/her family to the legal processes and the courtroom. Both child survivors interviewed for the study were highly appreciative of the services provided to them by a support person, as they derived strength from the presence of this support person in the courtroom and that helped them testify confidently.

## III. Findings based on Judgment Analysis

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

### Sex and age profile of the victims

- 95% of cases involved a female victim, whereas only 5% of the cases involved a male victim.
- Among the 83.65% of cases where the age was specified, 69% of cases involved victims between the age group of 12 to 18 years.

[8] Proviso to Section 37, POCSO Act.

- Amongst the total number of victims, the 12 to 15 age group formed the largest group consisting of 30% of the cases (197 cases), while the 16 to 18 age group formed the second largest group consisting of 28% of the cases (186 cases). Children below 5 years constituted only 7% of the total victims.
- In approximately one in every six cases, the age of the victim was contested, i.e., it was alleged that the victim was over the age of 18 years.
- Minority was contested in about 30% of all cases where the child was stated to be between the 16 and 18 years, while only about 17% of cases where the child was alleged to be between the ages of 12 to 15 years were contested. Within this group of contested cases, it is notable that the victim herself claims to be above 18 years in several cases.

**Conviction rate and factors affecting conviction**

- Conviction was awarded in 112 cases under the POCSO Act and the large majority (i.e. 555 cases) ended in acquittal. This pegs the rate of conviction at a measly 16.8%. Thus, approximately only one in every six cases results in a conviction.
- Majority of convictions were recorded in cases in which the judges found the testimony of the victim/prosecutrix or eye-witnesses consistent and reliable.
- In 46 cases the accused was convicted under the IPC, but acquitted under the POCSO Act. The two principal reasons for this were the failure of the prosecution to prove the ingredients of the offence or establish that the victim was a minor. For instance, the accused was acquitted in a case in which the sexual nature of the assault could not be proven.
- The prosecutrix/victim turned hostile in a staggering 67.5% of the cases (450 cases) and testified against the accused in only 178 cases i.e., 26.7% cases.
- In 30 cases, the prosecutrix/victim did not appear or testify in court. The breakdown is as follows - the prosecutrix/victim did not testify in 3 cases, was untraceable in 16 cases, dead in 3 cases, deemed incompetent to testify due to tender years in 7 cases and due to disability in 1 case.
- Of the 178 children who testified against the accused, the testimony of 58 children was found unreliable i.e., 33% while that of 120 i.e., 67% was found reliable.
- In some cases, the accused was acquitted even though the testimony of the prosecutrix was reliable. This was because the Special Court was of the view that the ingredients of the alleged offence had not been established by the prosecution. For instance, if sexual nature of the assault could not be established the Special Court acquitted the accused.

**Charges**

The following charges were framed under the POCSO Act, 2012

- Penetrative sexual assault in 215 cases (32.23%) aggravated penetrative sexual assault in 174 cases (26.08%), sexual assault in 170 cases (25.48%), aggravated sexual assault in 101 cases (15.14%), and sexual harassment in 148 cases (22.18%).

- Charges were also framed under Sections 14, 17, 18, 21, 21 (2) of POCSO Act related to aiding, abetting, ____________. In 195 out of 667 cases (29.23%) charges were framed under kidnapping under sections _____ of the IPC.
- In 630 cases charges were framed under POCSO and IPC, of which rape charges were framed in 335 cases (53.1%), sexual harassment charges in 222 cases (35.23%) and kidnapping charges in 195 cases (30.95%). In 101 cases, multiple charges under POCSO were framed.
- 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.
- No case of failure to report under section 19 was decided by the Special Court during this period.

**Sentencing Pattern**

The findings from the examination of 90 sentencing orders were as follows:

- The mitigating factors that influenced the quantum of punishment were age of the accused, first offence, family responsibilities, and the socio-economic background of the accused. An aggravating factor was the relationship between the convict and the victim.
- The maximum prescribed sentence was awarded in seven cases. These were four cases of aggravated penetrative sexual assault, 1 case of aggravated sexual assault, one case of sexual assault, and one case of sexual harassment.
- In 50 cases, the minimum mandatory sentence under the POCSO Act was imposed. Judges struck a balance between the mitigating and aggravating factors while awarding the minimum sentence in these cases.
- In nine cases, Special Courts prescribed less than the minimum sentence. This included seven cases in which probation was ordered, one case of aggravated penetrative sexual assault in which the person was sentenced to the period already undergone during pendency of the trial and one case of sexual assault and aggravated sexual assault, in which an amalgam of the deterrent and reformative approach was applied to impose fine and rigorous imprisonment of 1 year each under Sections 8 and 10, POCSO Act, followed by probation of two years.
- Probation was ordered in 4 cases of aggravated sexual assault and 3 cases of sexual assault. Probation was awarded in 17 cases of which 10 cases were that of sexual harassment. Probation is neither prescribed nor expressly excluded in the sentencing section in POCSO Act.
- The convicted person was sentenced to the period already undergone during pendency of the trial in seven cases.
- Two distinct views emerged on probation. While some Special Courts held that the POCSO Act did not prohibit the application of probation, others were of the view that probation could not be applied if a minimum sentence was prescribed under the Act.

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

- All accused persons in the cases under study were male.
- The accused was known to the victim in 80% cases, was a stranger in 17% cases, and his profile not specified in 3% cases.

- The breakdown of the profile of the accused persons who were known to the victim reveals that neighbours constituted the largest group (29%), followed by those related to the child by blood or through the mother – like step-father or mother's boyfriend (20%). Acquaintances also form a significant proportion of accused known to the victim (15%). Acquaintances included brother's friend, shopkeeper, van driver, doctor, employer, former tenant, moneylender, domestic help, watchman, religious leader, and fiancé of sister. The accused was allegedly married to the victim in 19% cases and was in a romantic relationship with the victim in 10% cases.
- The rate of conviction was lowest in cases in which the accused was married to the victim (1%), and only 2.8% in cases which they were friends, and 3.9% in romantic relationships. Conviction was the highest in cases in which the accused was a stranger (31.3%) followed by neighbor (27.3%), acquaintance (16.6%), relative (15.1%) and father (15%).
- The highest percentage of cases in which the victim turned hostile were those in which she was married to the accused (99%), followed by cases in which she was in a romantic relationship with the accused (96.07%), his step-daughter (76.47%), and daughter (76.34%). In 73.58% cases in which the victim was related to the accused, the child turned hostile.
- The highest percentage of cases in which the victim testified against the accused was cases in which the accused was a stranger (41.73%), followed by neighbor (41.05%), acquaintance (35.71%), and friend (22.22%).
- The percentage of victims who testified against the accused was least in cases in which they were married (1%) and in a relationship (1.96%). It was also low in cases in which the accused was a father (18.27%) or related to the child (18.86%).
- Regression analysis revealed that as age increases, the probability of becoming hostile also increases. The possibility of becoming hostile when the person is in a romantic relationship is no different from when the perpetrator is a family member. The possibility of becoming hostile when the alleged perpetrator is known to the victim, is no different from that of own family members. Where the alleged perpetrator is a neighbour, the possibility of becoming hostile is lower as compared to when it is a family member. Where the alleged perpetrator is a stranger, the possibility of becoming hostile decreases, as compared to when it is a family member. The possibility of becoming hostile is much lesser in case of strangers than neighbours.

**Grounds on which victims turned hostile**

- In 149 cases the child victims denied that a sexual offence had taken place. In 71 cases they turned hostile on the point of age. In 59 cases, they stated that the accused was not the person who had committed the offence. In 177 cases, they turned hostile on other grounds and appeared ignorant about the complaint and stated that the police made them sign on a blank sheet of paper or an NGO person asked them to file a false complaint. In few cases, the child stated that a false complaint was filed out of anger or under pressure.
- In most cases where victims turned hostile and where documentary proof of age existed, the prosecutrix and/her family members claimed that a false date of birth was supplied to the school in order to secure admission. Material witnesses turned hostile on this point, in cases of elopement.

- A common plea taken in incest cases was that the complaint was lodged due to a quarrel or at the instance of the police or an NGO.

**Application of Presumption, investigation lapses, lack of consideration of medical evidence**

- Presumption was applied and mentioned in 83 cases by 13 out of the 20 judges.
- There were several cases that resulted in conviction without the application of the presumption.
- In *State v. Avinash Gupta*[9], a 14-and-a-half-year old girl was sexually assaulted by her step-father. The Special Court held that though presumption is in favour of the prosecution, it can be rebutted by referring to prosecution evidence and there is no requirement for the accused to present any independent evidence to rebut presumption.
- In *State v Amar*[10], the Special Court held that the prosecution has to lead the evidence and establish the ingredients of the offence under the POCSO Act as well as the IPC beyond reasonable doubt.

**Outcomes in 'romantic cases'**

In large number of cases of romantic relationships, a missing complaint was filed by the family after which the prosecutrix and the accused were traced and found to have married each other. In most cases, the ceremonies of marriage were not performed, but this aspect was not scrutinized by the court. In few cases, the complaint was filed by the prosecutrix, because of a breach of the promise to marry.

In none of the cases in which the prosecutrix admitted to a romantic relationship was the voluntary nature of the relationship or the age gap between them scrutinized by the court.

The outcomes in these cases have been as follows:

(a) Acquittal because the prosecutrix turned hostile;
(b) Acquittal justified on the basis of interpretation of provisions of the Act. One judge relied upon the definition of assault in the IPC to arrive at the position that in cases involving children between 16 and 18 years, the term assault will be interpreted as implying coercion, intimidation, fear or exploitation. The accused was acquitted because the victim willingly had sexual intercourse with him without any coercion or intimidation. Another judge took the view that the prosecution had to establish that the accused knew that the victim was a child in order to show *mens rea*. Failure to do so resulted in acquittal;
(c) Acquittal because of the victim and accused were already married;
(d) Conviction, but no sentence;
(e) Conviction and sentence;
(f) Convicted for kidnapping under the IPC, but acquitted under the POCSO Act.

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[9] SC No. 135/13 decided on 30.9.2015.
[10] SC No. 57/13 decided on 20.03.2014.

**Special Courts response to investigation lapses and delay in filing FIR**

- Judges have taken serious note of the discrepancies in most of the cases and have criticized the police and the investigation agency for shoddy investigation.
- In two cases, directions to initiate departmental inquiry against the errant officers were issued.
- In several cases, the Special Court criticized the police for their failure to bring on record relevant documents and record the statement of public witnesses. Inconsistencies between the version of the police and the victim, especially with respect to the location at which their statement was recorded, was noted in several cases.
- In the case of *State v. SurajTiwari*[11] a 3 day delay in filing of the FIR went against the victim in a case of incest by the father. The delay in filing the FIR and recording the statement became fatal in the case of *State v Shiv Ram,*[12]as there was no corroborative evidence or medical evidence to support the prosecution case and testimony of victim. The explanation given was found unconvincing to justify the delay. However, in *State v. Tej Kumar,*[13]the court did not discard the prosecution case on account of delays in filing the FIR, in recording the 164 CrPC statement, or for not conducting the investigation fairly and diligently by the IO. In this case, the IO sent the victim and accused for medical examination and only when they returned from the hospital the FIR was filed. In *State v Pappu*[14]*,* the Special Court looked into the circumstances on the day of the incident, where the child, after being subjected to aggravated sexual assault, was in a state of shock and mentioned about the incident to her mother only the next day. The court considered the typical orthodox Indian scenario, taboo surrounding exposure of one's daughter to the police about sexual assault and the trauma a mother faces.

**Consideration of Medical Evidence**

- Medical evidence has not comprised an important component of the criminal trial under the POCSO Act. Where the victims turn hostile, medical evidence is rarely looked into and the case is disposed.
- In several of the cases, either the victim herself or the parents of the victim refused internal gynecological examination. In few cases, judges drew an adverse reference because of the refusal to consent to medical examination (*State v. Md. Afroz*[15]). However, this was not the dominant trend.
- In the case of *State v Kapil Tyagi*[16], a child aged 9 years was sexually assaulted by the accused who had pulled her inside a room and touched her mouth with his mouth. Rejecting the plea of the accused that no medical evidence was available, the Special Court

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[11]SC No. 97/13, Decided on 14.09.2015, hi.
[12] SC No. 167/13, Decided on 22.05.2014, i.
[13] SC No.53/13, Decided on 08.10.2013i.
[14] SC No. 100/2014, Decided on 06.02.2015.
[15] S.C. No. 159/13 decided on 10.03.2014.
[16] http://indiankanoon.org/doc/74636257

observed, "It is difficult to comprehend that what kind of medical evidence could have been brought by the prosecution to corroborate this act."

- It is seen that in several cases, as a routine, a medical examination and potency test of the accused is conducted even when potency is completely unrelated to the charges pressed such as in cases pertaining to sexual harassment.

## IV. Challenges and Issues

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

**Inconsistent approach of Special Courts with respect to age-determination:**
The ambiguity with regard to the age of the child is sometimes so stark, that during the course of the case, the allegations regarding the age of the child vary anywhere from 11-12 years and sometimes extends till even 27 or 28 years. This in turn has resulted in ad hoc age determination processes especially in borderline cases where the application of the POCSO Act hinges on the minority of the victim.

In *Jarnail Singh v. State of Haryana,*[17] the Supreme Court held "though Rule 12 [of the Juvenile Justice Model Rules] is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime."[18] No reliance was, however, placed on this provision or on *Jarnail Singh* in majority of the judgments under the study. In the case of *Ashwani Kumar Saxena v. State of Madhya Pradesh,*[19], the Supreme Court categorically stated that courts cannot look into the correctness of the documents adduced, but must accept them at face value. Despite this ruling Special Court have not accorded face value to the documents and have relied on the testimony of the victim in which it is claimed that a false date of birth was given to secure school admission.

There has been no uniformity in the determination of whether a victim needs to be sent for ossification test or age determination by a Medical Board. A perusal of the cases in Delhi suggests that these decisions largely depend upon the Investigating Officer in charge. Although the Delhi Juvenile Justice Rules, 2009 clearly require that victims be sent before a Medical Board for age determination in cases where no documentary evidence in available, this is not carried out in all cases. In fact this procedure was followed in some cases where documentary evidence did exist.

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[17] *Jarnail Singh v. State of Haryana,* Criminal Appeal No. 1209 of 2010, available at http://indiankanoon.org/doc/70565223/. The ruling in this case was upheld in the case of *Mahadeo S/o KerbaMaske Vs. State of Maharashtra and Anr.*, (2013) 14 SCC 637

[18] *Id.* at para 20

[19] *Ashwani Kumar Saxena v. State of Madhya Pradesh,* AIR 2013 SC 553, available at http://indiankanoon.org/doc/57506863/

Where there is an ambiguity with regard to whether a child is a minor or not, there has been no uniformity in deciding who gets the benefit of doubt. Different judges have accorded the benefit differently. For instance, in *State v.Varun,*[20]it was held that "in view of the objectives of the Protection of Children from Sexual Offences Act, 2012 if there is any doubt about the age of the girl child, we must lean towards the juvenility of the victim." However, in the case of *State v. Ranjay Patel,*[21]benefit of doubt was instead given to the accused, where it could not be proved that the victim was less than 18 years.

**Inappropriate appreciation of testimony of victim**

In the case of *State v. Avinash Gupta*[22]*,* the fact that the victim proceeded to attend class at a beauty parlour course she was pursuing, immediately after the incident was held against her and the accused was acquitted. In another case[23] the Special Court failed to appreciate that a child aged 8 years would have to be prepared for court and concluded that her mother's statement to her that she must say what happened to the court, amounted to tutoring, which made her the child's testimony 'unreliable'.

**Hostile Witnesses**

Several of the respondents expressed frustration over the huge proportion of cases in which victims turned hostile. Many were of the view that children need to be separated from the family in cases in which the alleged perpetrator is a family member. A solution suggested by one respondent was – 'a good shelter home where children can be kept till the trial is over'. However, this was not supported by some others who felt that detention of a child victim because the IO requests for it would constitute unlawful detention. The recording of evidence could be delayed by three to four months and the child cannot be detained until then. Such a decision should be taken on a case-to-case basis, keeping in mind the principle of best interest. Besides, considering the pathetic condition of the Children's Homes under the Juvenile Justice (Care and Protection of Children) Act 2000, children would prefer to return to their homes than remain in this setting.

Although the Supreme Court, in *Gura Singh v. State of Rajasthan,*[24] held that the evidence given by a witness who later turns hostile cannot be discarded, this was not relied upon in most cases. All cases in which the victim turned hostile resulted in an acquittal, except two.

**Need for clarity on the applicability of probation to cases in which a minimum sentence has been prescribed**

In *State v. Mohan Dass*[25]*,* it was held that no provision in the POCSO Act bars or restricts the application of the Probation of Offenders Act and that before convicting the offender, one has to look at the social milieu and personal circumstances. The Special Court concluded that

[20] SC No. 108/13 decided on 29.10.13.
[21] SC No. 211/13 decided on 04.07.14.
[22] SC No. 135/13 decided on 30.9.2015.
[23]State v Suraj TiwariSC No. 97/13 decided on 14.09.2015
[24](2001) 2 SCC 205
[25] SC No. 73/13 decided on 25.01.2014

that the Probation of Offenders Act would apply and sentenced the accused to two years rigorous imprisonment followed by two years of probation, for having committed aggravated sexual assault. However, some judges have rejected the plea for probation. In *State* v *Bhagwat Singh*[26], reliance was placed on Supreme Court decisions in which it has been held that probation cannot be applied where minimum sentence has been stipulated in the Act. In *State* v.*Manish,*[27] the Special Court noted that if probation is allowed, the object of the legislature in providing minimum sentence will be defeated. There is a need for clarity on this point.

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

The judgment analysis reveals the variety of approaches adopted by Special Courts to sidestep the challenges posed by the age of consent and absolute prohibition of any form of sexual activity involving a child under the age of 18 years under the POCSO Act. While majority of these cases have resulted in acquittals, the reasoning adopted by some Special Courts is a cause of concern. For instance, what would the implications be of applying the IPC notion of 'assault' to the POCSO Act? Would there be a danger of its extension in cases other than romantic relationships? Is knowledge that the victim was a child an ingredient of the offences under the POCSO Act? Will the prosecution have to establish this without reasonable doubt for the case to succeed?

These cases also highlight the dangerous trend of parties resorting to marriage in order to evade punishment. The unintended consequence of the criminalization of all forms of sexual contact with a child under POCSO Act appears to be a spike in the number of child marriages. This is itself is a violation of the Prohibition of Child Marriage Act, 2006.

**Gaps in the award of compensation**

Special Courts have linked compensation to testimony and mostly consider an application only after the victim has testified. During the course of the study, it was evident that award and receipt of compensation is plagued with confusion. This is partly due to the pre-existing model, as per which the State and District Legal Services Authority are vested with the responsibility of determining the quantum of compensation. After the enactment of the POCSO Act, judges of the Special Court have been expressly empowered to determine and direct the payment of compensation to the child under Section 33(8), POCSO Act. The State Government must pay the compensation to the victim within 30 days from the date of the order of the Special Court. A Special Court is not bound by the limits placed under the Victim Compensation Scheme and can order any amount it deems fit.

Interviews with some actors within the criminal justice system revealed the dangerous misconception that cases are filed by families under the POCSO Act to avail compensation. This is despite the fact that compensation is rarely awarded by Special Courts.

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[26] SC No.109/2013, Decided on 21.08.2015

[27] SC No. 60/13, Decided on 05.06.2014

Prosecutors also largely steer clear of filing compensation applications on behalf of victims. They feel it is the duty of the IO to apply for compensation to the DLSA. Private lawyers attempting to file compensation applications have also met with resistance. Some Special Courts refuse to entertain interim compensation applications until after the evidence has been recorded, to ascertain if the child supports the case of the prosecution or turns hostile.

**Support Gap**

There is a huge support gap in the services rendered to child victims and their families, as it was found to be sporadic and intermittent. Support services were, in most cases, not available to the child throughout the legal process, except in some rare cases in which a support person had been appointed by the CWC. NGOs in Delhi providing support services shared the positive impact of support on the child and the family. However, there is very little clarity on the role of the 'Support Person' and the nature/extent of the support they are required to provide. This emerged as a major area of concern, given the significant proportion of cases in which the victims turned hostile. The two children interviewed for the study shared that the assistance they received from the Support Person helped them testify in court and navigate the court processes. There is an urgent need for guidelines on the role of a support person and an action plan to ensure the availability of Support Persons in the State of Delhi.

**Challenges related to the structure and jurisdiction of the Special Court**

Judges assigned to these 'special' courts are expected to maintain a child friendly atmosphere within court rooms and simultaneously deal with hardened criminals charged under draconian anti-terror laws and the like. Practically, judges find it extremely difficult to switch from one mindset to another. Besides, this also affects the speedy disposal of cases. The absence of a separate court also results in child victims being exposed to police officers, accused persons in handcuffs, etc., which creates an intimidating court atmosphere for children and their families.

**Lack of sufficient training**

Despite the Act being new and the first of its kind, several stakeholders stated that they had never been trained on the POCSO Act prior to taking up a post or even after. Several of them also felt that training is needed not just on the POCSO Act but on several related aspects such as child psychology, child sexual abuse in general, etc. The insensitive manner in which questions are posed to children and the developmentally inappropriate nature of questions themselves were highlighted by some respondents. Emphasis was placed on the need to develop protocols and guidelines for questioning children.

**Gaps in Law**

In cases in which the accused persons include a juvenile as well as an adult, the child victim will have to testify twice as per the current legal framework. Most respondents agreed that this was not desirable, but agreed that this was unavoidable because of the existing statutory framework. Similarly, children have to repeat the statement made to the Magistrate under Section 164, CrPC before the Special Court as

the CrPC does not allow the earlier statement to be admitted as examination-in-chief, unless the child is disabled. Some within the legal fraternity were of the view that minimum sentences under the POCSO Act are very high. One respondent also felt that the Act should provide sentencing discretion to judges. Most respondents drew attention to the problematic aspects of a uniform age of consent that resulted in the criminalization of even consensual sexual exploration among teenagers, considered as normal developmentally appropriate human behaviour.

**Other issues**

Other issues include the routine production of children before CWCs; directions by the CWC to the police urging them to facilitate the recording of a second statement under Section 164, CrPC; lack of clarity as to when a child should be restored to the family by the CWC and non-reliance on reports of the CWC by the Special Court.

## V. Recommendations

The Hon'ble Delhi High Court and the Delhi 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 from the course of the Study as well as interactions with judges, CWCs, and other stakeholders during the course of training programs conducted by the team in different States as well as their participation in meetings, workshop on the issue.

### A. Recommendations for the Hon'ble Delhi High Court

Based on the foregoing chapters, it is recommended that the Hon'ble Delhi High Court, in consultation with the Delhi Government consider the following measures:

1. Designation of additional Special Courts to deal with cases under the POCSO Act, 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 criminals, the police and other such persons. Toilets should also be located in the vicinity of the courtroom. 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. Issuance of a guidance note to Special Courts on the award of interim and final compensation in cases under the POCSO Act clarifying the role of various authorities in the awarding and disbursement of compensation amount.
4. Issuance of a guidance note to Special Courts on core minimum measures that should be taken to ensure compliance with the child-friendly procedures under the POCSO Act.

5. 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.
6. Instruction to the Delhi 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.
7. Instruction to the Delhi Judicial Academy to include components of age determination, dealing with hostile witnesses, and medical evidence in the training modules for judges and prosecutors.
8. Allocation of funds to enable prior courtroom orientation for children and their families. The funds should also enable the creation of a court-complex and specific pictorial brochures explaining the courtroom structure, people present in the courtroom, sequence of events and the procedures that will be followed during deposition.
9. 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.
10. Reconsideration of the appointment of Legal Aid Lawyers as Support Persons to play the role of an intermediary in court. A cadre of trained para-legal volunteers could be created in their place to support child victims during the entire course of the investigation and trial and the CWCs could also draw from the pool for the appointment of Support Persons.
11. Investment in an intimation mechanism that will alert victims and their families at least 24 hours in advance if the hearing is postponed.
12. Urgently request the Delhi 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.
13. Consider the establishment of a mechanism to collect feedback from child victims sensitively and anonymously of their experience of testifying before the Special Court and suggestions for improvement.
14. Consider 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. Extend requisite support to the Delhi Commission for Protection of Child Rights to enable it to monitor the implementation of the POCSO Act as per Rule 6, POCSO Rules.

### B. Recommendations for the Delhi Government

Based on the foregoing chapters, it is recommended that the Delhi Government consider the following measures:

1. Appointment of Special Public Prosecutors (SPP) who will exclusively deal with the POCSO cases and other offences against children.

2. Periodic trainings of prosecutors and Legal Aid Lawyers on age and developmentally appropriate techniques of interviewing children and appreciating their testimony.
3. Joint trainings of police and prosecutors on age and developmentally appropriate techniques of interviewing children, lapses that should be avoided, and the manner of investigation and prosecution in sexual offences.
4. Periodic training of Chairperson and Members of Child Welfare Committees on their role under the POCSO Act and Rules.
5. Allocation of sufficient funds to facilitate the 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 criminals, the police personnel in uniform and other such persons. 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.
6. Development of an Action Plan to address the support gap and to facilitate greater coordination between support persons, lawyers, prosecutors, and 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 a FIR is lodged till the completion of trial.
7. Creation of a trained cadre of Support Persons with the assistance of Delhi Legal Services Authority and District Child Protection Units under the Juvenile Justice (Care and Protection of Children) Act, 2015.
8. Allocation of funds to enable Child Welfare Committees to provide remuneration and travel expenses to Support Persons appointed in POCSO cases.
9. Ensure that compensation ordered by the Special Court is paid within 24 hours.
10. Instruction to the Department of Public Prosecution to issue a guidance note for prosecutors to enable them to conduct the prosecution in a child-sensitive manner. The note should also address the need for cooperation between the prosecutor, lawyer of the victim, and the Support Person.
11. Direction to District Child Protection Unit 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.
12. 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.
13. Facilitating the establishment of community level support groups to create awareness about child sexual abuse, the legal framework, and support services available among all children, particularly children out of school, children with disabilities, children living on the street, and children living in residential institutions.
14. 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. To also use the media to promote positive attitudes towards children.
15. Developing safe, well-publicized, confidential and accessible support mechanisms for children to report sexual abuse with specific attention to reporting mechanisms within residential institutions.

16. Developing guidelines for reporting by professionals such as doctors and others in contact with child victims.
17. Ensuring regular inspections of Child Care Homes.
18. Commissioning research on evidence-based treatment programs for persons at risk of sexually abusing children and on root causes of sexual violence against children.
19. Organize periodic consultations with police, prosecutors, doctors, CWCs, JJBs, and support persons to understand the problems they face in the implementation or application of the POCSO Act, identify training needs, document good practices, and identify measures that should be taken to support them in the discharge of their obligations.

**C. Recommendations for Special Courts**

1. Take into account the developmental needs of the child 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 on the same day. Breaks should be allowed if necessary.
4. Do not allow the defence or the prosecution to question the child directly.
5. Admit the statement of a child with disability recorded under Section 164(5A)(a) as examination-in-chief.
6. Do not delay or deprives child victim in need of interim compensation by linking the decision to award to their testimony.
7. Proactively consider compensation application and not hesitate from exercising their *suo motu* powers in this regard.
8. Direct the DLSA to file a compliance report within 30 days of the award of compensation.
9. In the absence of a waiting room, allow the child to be seated in the judges' chamber.
10. Examine the child in the chamber or any other room in the court complex, if the courtroom intimidates the child.
11. Apply the rulings of the apex court in *Jarnail Singh v. State of Haryana* and *Ashwani Kumar* on the point of age determination.
12. Apply the techniques suggested in Annexure A of this report, while questioning children.

**Areas of further research**

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

- Compendium of case laws relevant to POCSO trials
- Experience of child victims in the police station
- Experience of child victims in the courtroom
- Quality and nature of support available to child victims of sexual abuse
- Rehabilitation needs of child victims of sexual abuse
- Restorative Justice Processes in cases of child sexual abuse.

- Research on evidence-based treatment programs for persons at risk of sexually abusing children.
- Research on criminal liability of children in consensual sexual relationships

# Chapter 1. Structural Compliance

## 1.1 Establishment of Special Courts

According to Section 28(1) of the 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.[28]

In Delhi, by a notification dated 16 March 2013, the Delhi High Court designated the Courts of Additional Session Judge -01 in 11 districts as Special Courts under Section 28 of the POCSO Act. These courtrooms are located in six court complexes – Patiala House, Dwaraka, Rohini, Karkardooma, Saket, and Tis Hazari. The POCSO Act does not expressly require Special Courts to exclusively deal with the POCSO Act or offences against children. The designated Special Courts in Delhi thus deal with offences under several other special laws like the Narcotics Drugs and Psychotropic Substances Act, , 1985, Terrorist and Disruptive Activities (Prevention) Act, 1985(TADA), Prevention of Terrorism Act, 2002 (POTA), Maharashtra Control of Organised Crimes Act, 1999 (MCOCA), etc. Most courts hear POCSO cases on a daily basis. Some judges hear POCSO cases on specific days so as to prevent the exposure of the child to other accused persons and to also devote the time required to examine a child witness.

## 1.2 Appointment of Special Public Prosecutors

All cases before the Special Court have to be prosecuted b*y* 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." The language of the provision clearly suggests that the SPPs must exclusively handle only POCSO cases. However, this is not the case in Delhi. The Directorate of Public Prosecutions, Delhi has assigned an Additional Public Prosecutor for each of the 11 Special Courts.[29] They are not "Special Public Prosecutors, but are senior persons with experience"[30] and are dealing with other criminal cases in addition to the cases under the POCSO Act. Like the judges, the prosecutors are also handling all criminal cases.

## 1.3 Design of the courtroom

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[28] Section 28(2), POCSO Act, 2012.

[29] Interview with Ms. ReetaDutta, Director of Public Prosecution, Delhi on 16.02.15 (on file).

[30] Interview with Ms. ReetaDutta, Director of Public Prosecution, Delhi on 16.02.15 (on file).

According to Section 33(4) of the 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.

The physical dimension has been addressed by the Delhi High Court which took the initiative to create a 'Vulnerable Witness Deposition Court' even before the enactment of the POCSO Act. It was inaugurated on 10 February 2012 in the Karkardooma Complex. The second Vulnerable Witness Deposition Complex (VWDC) was inaugurated in Saket on 17 September 2014.[31]

A set of "Guidelines for recording evidence of vulnerable witnesses in criminal court"[32] (Delhi Guidelines) were developed under the guidance of Justice Ms. Gita Mittal. Though these guidelines have not been formally notified by the High Court, they serve as a guide for criminal courts in Delhi. Clause 3(a) of the Delhi Guidelines defines "vulnerable witness" to mean "a child who has not completed 18 years of age." The Delhi Guidelines require the judges of criminal courts to "ensure that the developmental needs of vulnerable witnesses are recognized and accommodated in the arrangement of the courtroom" and "separate and safe waiting areas and passage thereto" are provided.[33]

The VWDCs in Karkardooma and Saket have waiting rooms for children and their families. These rooms are stocked with toys, games, carom board, colouring books, and a computer. Construction of a similar waiting room has been undertaken in the Patiala House Court Complex in a separate space. The Saket and Karkardooma court complexes have a toilet in the vicinity of the room in which the child's testimony is to be recorded, so as to enable easy access to this facility for the child.. However, this is not the case in Tis Hazari, Rohini, Dwarka and Patiala House.

In Karkardooma and Saket, the victim's entrance is different from that of the accused. In Karkardooma, for instance, the child will approach the building through the judge's entrance thus avoiding the crowd that throngs the court complex. These two court complexes also have audio-visual facilities that make it possible for the child to testify from a different room. The child will not have to appear in the courtroom or be confronted by the accused, the prosecutor or the defence lawyer. The child will be accompanied into the Witness Room by a Legal Aid Lawyer appointed by the Delhi Legal Services Authority to serve as a support person in the case. The accused is placed in a separate room from which he/she can view the video link but cannot be seen by the child.

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[31]Nirnimesh Kumar, Complex for vulnerable witnesses inaugurated in Delhi, *The Hindu,* 18 September 2014, http://www.thehindu.com/news/cities/Delhi/complex-for-vulnerable-witnesses-inaugurated-in-delhi/article6421870.ece

[32] Available at http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf

[33]Clause 28(ii) and (iii), Guidelines for recording evidence of vulnerable witnesses in criminal matters.

In all the remaining complexes, the child is brought into the courtroom through the regular entrance for the purpose of recording evidence. There are no waiting rooms and the child is often waiting outside the courtroom where the exposure to the accused and other accused persons is inevitable. An advocate appointed by DCW to provide legal services to POCSO victims[34] in Tis Hazari explains the implications of a regular entrance and lack of a waiting room on the privacy of the child: "both accused and victim enter and exit from the same place. Everybody knows she is a victim as everybody knows this court hall is for POSCO/fast-track. There is no protection of identity. They call names out loudly while calling for cases. There are three four-five court halls nearby and they are all waiting together. [There is] no secrecy at all."

> "You have child witnesses and suddenly you have Abu Salem coming in with three -four guards to the court."
>
> - Former judge of a Special Court

The absence of such facilities does not, however, prevent judges from taking steps to make the deposition experience from child-friendly. The proviso to Section 37 enables the Special Court to examine the child in a place "other than the court" if it is of the opinion that the child needs it. For instance, in *State v. Badku*[35], the testimony of an eight-year-old girl was recorded in a chamber annexed to the court room while ensuring that the accused could hear her testify. However, this is an exception and the general norm is to record the testimony of the child inside the courtroom.

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

Section 36 of the 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, curtains or any other such device. However, such arrangements have not always been made in courts. One respondent shared that before the VWDC was established in Saket, the court did not deploy even screens to prevent exposure of the child to the accused. It was only after this was brought to the attention of the DLSA that screens were provided to all courts and they were instructed to use them.

The researchers visited four courtrooms – Patiala House, Saket, Tis Hazari and Karkardooma – and observed that each courtroom had a different device to prevent exposure. A single visibility mirror is placed at the back of the courtroom in Patiala House. The accused is mostly called into the courtroom after the victim/survivor is seated. The victim cannot see the accused entering unless she/he turns around. In Tis Hazari, a screen is always kept in the courtroom and is brought out when the evidence of a child has to be recorded. In Saket and Karkardooma, the child and the accused are seated in separate rooms. While the accused can see the child through video-link, the child cannot see the accused or any of the lawyers in court.

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[34]Interviewed on 16.02.15. (On file).

[35] SC No. 173/13 decided on 06.01.2014.

Other than Saket and Karkardooma, in all the other courtrooms, the child and the accused occupy the same physical space and are usually separated by a curtain or a one-way mirror. The accused is asked to step outside the barrier so that the child can identify him/her in court. In Saket and Karkardooma, the accused is shown to the child through the AV monitor.

An Advocate on the panel of DLSA who serves as a support person for children on the day of their evidence in POCSO cases felt: "The Special Court in Saket is child-friendly as the child can't hear the communication in court between the lawyers. When two lawyers fight over the questions being asked – there is an impact on the witness- mature witness also gets intimidated. Here the child doesn't come in contact with the lawyers."

**Table No. 1: Status of structural compliance of Special Courts under the POCSO Act, 2012 in Delhi**

The table below captures the status of structural compliance of Special Courts in the six court complexes in Delhi 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.

| PARAMETERS OF ANALYSIS | Yes | No |
|---|---|---|
| **Special Court designated in all districts** | √ | |
| *Special Courts exclusively try offences under the POCSO Act, 2012* | | √ |
| **Special Public Prosecutors appointed** | | √ |
| **Special Public Prosecutors exclusively try offences under the POCSO Act, 2012** | | √ |
| *Separate entrance for children into the courtroom* | 2/6* | 4/6 |
| *Waiting room for children and families* | 2/6* | 4/6 |
| *Toilet located in the vicinity of the courtroom* | 2/6* | 4/6 |
| *Audio-visual facilities to record evidence of the child available* | 2/6* | 4/6 |
| **Means available to prevent exposure of the child to the accused *in* the courtroom** | √ | |
| *Separate room for recording the evidence of child witness* | 2/6* | 4/6 |

* The court rooms in Saket and Karkardooma have a separate entrance for children, a waiting room, audio-visual facilities, a separate room to record evidence, and toilets within the vicinity of the courtrooms. These facilities are not yet available in Tis Hazari, Patiala House, Dwarka and Rohini.

> "You may have swanky and colorful rooms but hostile behaviour will not make a difference… [we should] go for a child-friendly judge and an ordinary room."
>
> - Private Advocate representing children before Special Courts

# 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

## 2.1. Direct cognizance by Special Court

While generally cases cannot lie directly before the Sessions Court and require a Magistrate to commit the case to the Sessions Court, no committal proceedings are required under the POCSO Act. 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. 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 96 of the 667 judgments studied *i.e* 14.39%, the case was committed to the Special Court by the Magistrates Court. Committals mostly took place in 2013 and 2014. Only two instances of committal took place in 2015This can be attributed to the lack of awareness about the dispensation of the requirement for committal in POCSO cases.

## 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 ensure that dignity of the child is maintained at all times during the trial.

Except Saket&Karkardooma, as a rule APPs and defence lawyers in most other Special Courts pose questions to the child directly. Routing of questions through the judge is an exception. In these courtrooms, the questions are routed through a Legal Aid Lawyer (LAL) –Support Person who serves as an intermediary between the court and the child. Several advocates who were interviewed shared that some judges allowed the APPs and defence lawyers to question children directly. Judges invariably face resistance from the defence counsels and insist on questioning the children directly. The judgments have confirmed in some cases, the point at which the court took over the questioning of the child was mentioned and in others reference was made to the Support Person appointed by the DLSA.

Defence lawyers are invariably very aggressive in their questioning. One child survivor shared that the hardest part of the trial for her was when the defence lawyer questioned her. One private advocate shared that she encouraged the children to fight back and trust their instinct.

An advocate who represents victims before the Special Court was of the view that questions that confuse the child or are not child-friendly should be avoided. For instance, questions like these should be avoided –"how much time did it take for the abuse to be perpetrated? Was the door open or closed? How did you reach from point A to B? Was the door open/closed, how did you reach from point A to B? This can be very confusing for a young child particularly when the concepts of time and distance are not well formed."

He shared of an instance in which the judge got up from the dais and sat next to the child and recorded the statement as an example of a child-friendly deposition. Another respondent shared a case in which a 6-year-old child had been allegedly abused by her father and was not speaking at all. The lawyer on behalf of the child introduced a toy and the child pointed to the private parts to explain what had happened. The defence did not object and the judge also allowed the use of the toy.

### 2.3. 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. This is mostly complied with. However, courtroom procedures are rarely explained to the child by the APP or the judge. Judges have resorted to different techniques to make children comfortable in the courtroom. For instance, when the child is young, some judges seat the child next to them on the dais and ask them questions. However,

some took a cynical view as they felt that the child-friendly atmosphere did not make a difference to the testimony of the child as in many cases the parties enter into a compromise outside of the court.

Most respondents were of the opinion that there wasn't much difference between the trial conducted by the Special Court and that by a regular criminal court. One felt that the judges should not sit at a distance from the child or question them as though they were on trial.

> "It would be good if there would be a separate entry. Children get shocked as they have never been to a crowded place. Not just making the child comfortable, the parents also have to be made comfortable. The child feels scared if the parents are uncomfortable. The parents have never been to court – we need to take into consideration the family."
>
> - Support Person

The fact that the child cannot hear the exchange between the defence and the prosecution in the Saket court complex was regarded by one respondent as a vital child-friendly measure as a child will invariably get intimidated if she hears people talking in loud voices in a courtroom. Since the questions in Saket are routed through the DLSA Support Person, the child is spared the exposure to this.

In one case of sexual abuse of a nine-month old baby, a Support Person who was interviewed shared that she accompanied the mother of the child for her deposition. The judge told her that Support Persons are meant for children and not their parents, but upon her insistence allowed her to remain in the courtroom.

Among the APPs, there appears to be an anxiety that a prior conversation with the child could be labeled as an attempt to tutor her/him.

> "I meet the child first time she comes to depose. We don't prepare the child. I don't discuss questions with child. Because the examination of a child is very typical and if we talk with the child before the question, the defence may ask if child was tutored. I don't interact with child or family except in court."
>
> - Additional Public Prosecutor

Another APP was of the view that the CrPC did not allow her to meet the child in advance. She felt that the defence would invariably attack the prosecution if the child admitted to speaking to the prosecutor before the deposition. She also stated that she did not familiarize the child with the courtroom structure or process because she felt the child has "already seen a courtroom during a 164 statement. They know what a court looks like and why they have come. I try and make them comfortable and speak to them like I would speak to my child. On the day of evidence, I try and understand if they will support the case or not." She also felt that it was the duty of the Support Persons to prepare the child. The value of a prior courtroom orientation cannot be overlooked. For instance, both child survivors interviewed shared that they felt scared during their first court appearance because they had never seen a courtroom before and did not know what to

expect. Their fears were allayed by the lawyers and support person from the NGO - Counsel to Secure Justice. However, Support Persons or private lawyers are not appointed in every case and NGOs can offer their services to only a limited number of children.

In the absence of sufficient number of support persons, preparation of a child witness by prosecutors is necessary and would entail familiarizing the child with the courtroom structure; people present in the courtroom, where the parent or trusted person and accused may be seated, sequence of events, and the procedure that will be followed during deposition. Prior interaction with the child would also help the APP understand the vocabulary and cognitive skills of the child and could enable framing of questions that are age and developmentally appropriate.

**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 Courts should be located in a separate building away from the main court complex. The courtroom should be in the corner at the entrance of the complex and not in the centre of the complex so that the children don't have to navigate the crowds.
- Raised dais in courtrooms should be done away with.
- Minimal staff should be in the courtroom.
- Special rooms in which the child can be examined should be constructed in all court complexes.
- Prosecutors, defence counsel, and the police should not be in uniform.
- The room in which children testify should not give a court-like feeling. An across-the-table arrangement should be considered.
- While waiting for the testimony to be recorded, the children should be seated in a different room instead of the common waiting area. This will ensure that the victim is not exposed to the accused outside the courtroom.
- Room should be well-lit with bright walls and equipped with fire fighting devices and safety equipment.
- Toilet should be attached to the courtroom.

**Interaction with the child**

- The judge must initiate a round of introduction as this can boost the confidence of the child and make her/him comfortable.
- Judges should sit at the same level as the child while taking evidence.

- Judges should prohibit other people from entering the courtroom or walking around when the child is testifying.
- The entire process should be explained to the child and their family/support person in a language that they understand.
- The child's choice of support person should be ascertained. For instance, an adolescent child may not want to testify in the presence of her parents for cultural reasons or out of fear.

**Timeliness**

- Judges, PPs, and IOs should inform in advance if they are planning to take leave.
- If the children come to court they must be heard irrespective of who is on leave. Some children are moody and may not speak up the next time they come to court.
- Children should not be made to wait.

**Communicating with children**

- Judges should not speak in a tone of authority.
- Judges should be polite and speak in a language that the child understands.
- Language used should be age and developmentally appropriate.
- Judges can use examples to help the child understand the question.
- Drawings or figures can be used to communicate with younger children especially for establishing the fact related to the act of sexual assault.
- Questions should be short.
- Judges should listen patiently.
- Simple tenses and moods should be used.
- An accusatory or judgmental tone should be avoided.
- The child should be informed that she/he can interrupt the judge if the question is not clear or can say "I don't know." The child should be told that anything she/he can recall can be reported even something that may seem unimportant.
- Judges should not allow any kind of aggressive questions.
- Record the statement in the exact language of the child. Record gestures.

**Involve Experts**

- Assistance of Support Persons, social workers, child psychologists and child rights activists should be taken y the court.
- Translators, interpreters and special educators should be available.

**Refreshments**

- Water and refreshments should be available for the child.

**Training Components**

- Judges should be trained on how to question children
- Court staff should be trained on how to deal with children.
- Trainings should be conducted periodically.
- Police, prosecutors, and judges should be jointly trained in one forum.
- Child psychology, sociology and criminology should be included in the training curriculum.
- Support Persons should be trained on the law as well as on how to provide support to traumatized children.

## 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). At the same time, as per Section 33(3), frequent breaks should be allowed to the child during trial if if necessary.

With increasingly high dockets and the pressure of dealing with all special laws, the trial in POCSO cases is rarely speedy. An Advocate on the panel of DLSA lawyers meant to support children on the day of evidence shared that the Special Courts invariably hear bail matters in the morning and the child is kept waiting for a few hours on the day of evidence.

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.[36]

We asked some respondents whether judges take into account school timings, holidays, nap time, meal time, etc before scheduling the testimony of a child. The unanimous response received from respondents who have appeared before Special Courts was that none of these factors are considered. The testimony is scheduled based on the convenience of the Court. One advocate felt that children are more alert in the morning, but judges do not consider this and continue with the regular practice of scheduling evidence in the afternoon by which time young children are usually tired. One respondent shared an instance of a Special Court simultaneously recording the evidence of two children in two separate cases with the courtroom open to outsiders.

Another respondent shared that children have to be inevitably called again and again because of the huge backlog - "the POCSO courts are burdened with so many cases that invariably the victim has to be called again, sometimes 4 times (twice for examination-in-chief and twice for cross examination)." One respondent shared that in one of the cases she handled, the victim had to make 14 trips to the court and had to take the stand three times. An APP who was interviewed stated that the child has to appear again if the steno or defence lawyer is not available or the judge is on leave or is overburdened. For these reasons, the evidence of the child is rarely recorded within 30 days of the Special Court taking cognizance. One advocate attributed the failure to meet the timelines to poor time management, lack of infrastructure and innovation on the part of the courts –"Chargesheet has 40-50 witnesses – judge should ask defence and PP which are material and call only them. Evidence should be held on a day to day basis so that they know the facts and output is better. Dates are given four months later by which time they have forgotten the matter."

## 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.

According to several respondents, the identity of the child victim is poorly protected. The POCSO court hall is known to all. Names are called out loudly by the court staff while calling for cases. Besides, all details of victim are in the FIR and this is not hard to secure.

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[36] 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."

## 2.6 Award of Compensation

A conviction did not automatically result in an award of compensation. Compensation was awarded in only 36 cases out of 667 cases by Special Courts *i.e.,* a measly 5.39% of cases. The quantum was determined by the Special Court in all cases except one. In *State v. Dinesh Sharma*[37]*,* the defendant was found guilty of sexually assaulting his 14-year-old daughter. Recognizing that imprisonment of the breadwinner could stall the education of the girl, the judge recommended that a suitable compensation be paid u/s 357A, CrPC 'to enable her to complete her study and become financially independent.' He directed the Secretary, DLSA to determine the quantum of the compensation.

**Table No 2. Compensation awarded by Special Courts under the POCSO Act in Delhi**

| Penetrative Sexual Assault (in Rs) | Aggravated Penetrative Sexual Assault (in Rs) | Sexual Assault (in Rs) | Aggravated Sexual Assault (in Rs) | Sexual Harassment (in Rs) |
|---|---|---|---|---|
| 2,00,000 | 1 ,00,000 | 50,000 | 1,00,000 | 25,000 |
| 1,00,000 | 1,00,000 | 50,000 | 50,000 | 50,000 |
| 1,00,000 | 1,00,000 | 50,000 | 50,000 | 10,000 |
| 50,000 | 2,00,000 | 1,00,000 | 10,000 | 10,000 |
| 50,000 | 1,00,000 | 10,000 | 10,000 | 5,000 |
| | 1,00,000 | 10,000 | 50,000 | |
| | 1,00,000 | 50,000 | 50,000 | |
| | 1.5lakhs + Rs 15,000 from fine | 50,000 | 50,000 | |
| | | | 7,000 (from fine of Rs 10,000) | |
| | | | Compensation recommended. To be computed by DLSA | |

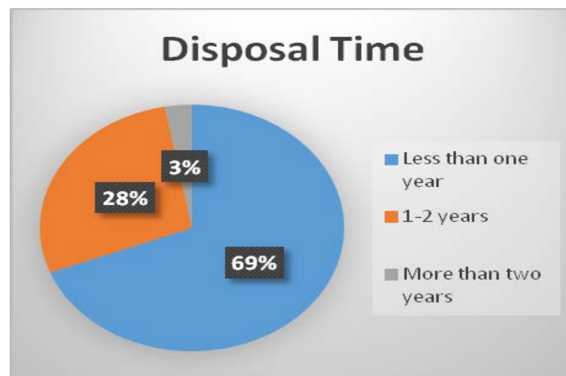
[37] SC No. 155/2013 decided on 03.02.2014.

There is no mention of an award of interim compensation in any of the judgments. None of the judges required the filing of a compliance report by the DLSA or any other authority.
Judges have used their discretion to compute the compensation amount resulting in a wide range for the same offence. For instance, the compensation amount for aggravated sexual assault has ranged from Rs 10,000 to Rs 1 lakh.

## 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 indicate a reason for the delay in recording of evidence. For instance, in two cases examination of the victim was conducted on two different dates.[38] While the prosecutrix testified in favour of the prosecution on the first date, she turned hostile on the subsequent date. In *State v. Mohd.Azeem Khan*[39] there was almost a one month gap between the two dates.

> "Memory of the child is short. Child should be examined within 2-3 months of the incident. Child is trying to forget but they will be asked to repeat 2-3 years later as to what happened. We are harming their psyche and delaying their recovery. The child may feel shy or may have forgotten the incident."
>
> \- Additional Public Prosecutor




According to Section 35(2), as far as possible, the trial should be completed within one year of the court taking cognizance of the offence. In 461 cases i.e. 69%, the trial was completed within a year, while in 187 cases i.e. 28%it took over a year. In 19 cases i.e. 3%, the time taken to complete the trial was over two years. All trials were completed in less than three years. Of the 461 cases that were completed within one year, convictions were recorded in 11.93% while that for cases which were disposed between 1-2 years was 26.73%. Cases that took more than two years for disposal had a conviction rate of 36.84%.

[38] *State v. Subhash,* SC No. 110/13 decided on 31.05.2014; *State v. Mohd. Azeem Khan,* SC No. 49/14 decided on 25.08.14.
[39] SC No. 49/14 decided on 25.08.14.

**Table No.3: Time taken to dispose cases and number of convictions**

| Disposal duration | No. of cases | Convictions |
|---|---|---|
| **Less than one year** | **461** | **55** |
| **1-2 years** | **187** | **50** |
| **More than 2 years** | **19** | **7** |

## 2.8 Avoiding exposure to the accused

While Section 36(1) requires the Special Court to ensure that the child is not exposed to the accused while testifying, a confrontation nearly always takes place when the child is waiting outside the courtroom. There ae no means to prevent exposure as the entrance used by the child and the accused are the same. Where Support Persons are appointed, they usually take the child to the canteen and bring her in just before the case is called out.

## 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.[40]The courtrooms are cleared when the victim or material witnesses like family members and eye-witnesses testify in POCSO cases. The trial is not held *in camera* when formal witnesses like doctors, investigating officers and others are examined. During *in camera* proceedings, the APP, parents, accused, defence lawyer, steno, and reader are usually present along with the judge and the child. Some courts also allow the police to remain in the courtroom.

[40] Proviso to Section 37, POCSO Act.

As stated in Section 1.5 above, the proviso to Section 37 appears to have been applied in *State v. Badku*[41] to record the evidence of an eight-year-old girl in a chamber annexed to the court room.

## 2.10 Assistance of interpreters, experts and special educators

Section 38 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. Interviews with stakeholders revealed that a list of qualified experts is not available with most Courts.

In one case, the court allowed the older sister of a 16-17 year-old girl with mental disability who understood her language and gestures to communicate the questions and her responses.[42]

In one case handled by Counsel to Secure Justice, the accused was made to stand right behind the victim because the court had failed to arrange for a translator. The victim/survivor and the accused spoke the same language that the defence lawyer, judge and prosecutor were unaware of. The accused was asked to translate the victim's testimony. It was the presence of the support person that gave the 14-year-old victim the courage she needed to get over her fear and to testify confidently. However, it gives rise to concern about such practices in courts and the damaging psychological effect it can have on child victims, especially those who have any support persons assigned to or accompanying them. A list of professional service-providers should be available with the courts. Efforts also need to be made to offer training on communication with children with disabilities so as to create a pool of experts.

## 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. Independent advocate and advocates attached to NGOs represent children and often work in a multi-disciplinary mode to provide legal and psycho-social services to them. For instance, the social worker attached with HAQ and CSJ provide basic counselling services that helps children with coping strategies and planning their future. The police and the CWC refer cases to NGOs and as a result their services usually begin after the FIR has been lodged, medical examination has been conducted, and the statement under Section 164, CrPC has been recorded. Their service extends till the conclusion of trial and continues even beyond it in some cases. Some private lawyers

[41] SC No. 173/13 decided on 06.01.2014.
[42] *State v. Manoj,* SC No.114/13 decided on 03.12.2014.

also move applications for compensation before the Special Court. The DLSA has also instructed the LALs to file compensation applications on behalf of the child before the Special Court.

The reaction of the APPs towards private lawyers has been mixed. While some are not receptive, other have accepted written arguments made by the private lawyers and even taken their assistance to respond to bail applications. Two of the APPs who were interviewed shared that they preferred not to rely on private lawyers and chose to work independently on their matters.[43] Private lawyers often brief the APP about the case and how the child responds to questions. Some judges have allowed them to conduct the examination-in-chief. Where the prosecutor is not supportive, the lawyers approach the court directly and request permission to make submissions. However, the criminal justice system has been largely slow in accepting the involvement of private lawyers on behalf of victims. For instance, while the availability of the defence counsel is considered while fixing hearing dates, that of private lawyers representing the victims is not.

## 2.12 Appointment of Support Persons

According to Rule 4(7), the CWC may provide a support person to provide assistance to the child throughout the process of investigation and trial. Attempts have been made to extend legal services and support to the child by the Delhi Commission for Women, Delhi Legal Services Authority, and the CWCs during trial. Several NGOs provide support services as well.

The various actors who offer support to children in POCSO cases are as follows:

### *(a) Support Person appointed by DLSA*

Legal Aid Lawyers (LAL) empanelled by the DLSA can be appointed as Support Persons by the Special Court pursuant to the *Guidelines on Vulnerable Witnesses.*[44] These Guidelines have not been formally adopted by the Delhi High Court, but are regarded as having persuasive value. Guideline 3(b) defines "support person" to mean and include "guardian ad litem, legal aid lawyer, facilitators, interpreters, translators and any other person appointed by court to provide support, accompany and assist the vulnerable witness to testify or attend judicial proceedings." While the Guidelines chalk out different roles for guardian ad litem, facilitator, and support person, the LALs refer to themselves as support persons. As per the Guidelines, the support person should accompany the child for a pre-trial court visit with a view to orient the child about the court procedures, persons who would be present in court, and the location of the accused.[45] According to

[43]Interviews with Ms. Neeta Gupta and Mr. R K Tanwar, APPs on 16.02.15 (on file).
[44] http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf
[45]Guideline 13, Guidelines on Vulnerable Witnesses.

Guideline 18(a), the court can allow a support person on its own or based on a verbal or written application. The child testifying in court should be entitled to have a person of her/his choice to offer support during the proceedings. Further, the court should "instruct the support persons not to prompt, sway, or influence the vulnerable witness during his testimony. The support person shall also be directed that he/she shall in no circumstances discuss the evidence to be given by the vulnerable witness."[46]

Mr. Surinder Rathi, Officer on Special Duty, DLSA[47], explained the function of the LALs appointed as Support Persons – "[t]heir role is to pick up the child on the day of evidence, bring him/her to court and tell the child how to state the evidence without getting intimidated. They cannot tell the child what to say. They cannot support the PP. They are meant to be neutral in their role as a support person and cannot participate in the trial." The LAL essentially plays the role of an intermediary by communicating the questions posed by the Judge, defence lawyer, and PP to the child and then relaying the child's responses to the court.

One respondent, a LAL explained how she prepares children for their testimony – "Personally, I speak to them in the evening before the evidence. I am not required to do this, but I do it on my own. On the day of the evidence, I go early in the morning, pick the child up, bring them to court and make them read the police file. I make them read their statements under sections 161 and 164 and tell them that their response should be within this frame and they should clearly say if they don't remember instead of making something up due to the pressure to respond." The DLSA has made a vehicle available in every district to enable the LALs to escort the children to court. However, this has not been well received by the child victims and their families because a LAL landing up in their house in a government vehicle draws the unwanted attention of their neighbours. The LAL shared, "When I go to pick up children, their families ask me not to come to the house – because they don't want to answer their neighbours." She also shared the logistical challenge of organizing the escort when more than one child has to be escorted for the hearing.

One respondent shared that most parents refuse the services of the LAL because they are a new entrant and someone they haven't met before.

The DLSA support person is not monitored by the DLSA. Instead, the Vulnerable Witnesses Committee headed by Justice Gita Mittal is responsible for monitoring and payments. The LAL is entitled to receive Rs 1500 per case.

At the time of the field visit, the LALs had not been imparted training on child development or child-friendly interviewing methods. Most organisations offering support services to children were of the view that the LAL-Support Person was as much a stranger for the child as any other person in court.

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[46]Guideline 18(c), Guidelines on Vulnerable Witnesses.
[47]Interviewed on 18.02.15 (on file).

### *(b) Lawyer provided by Delhi Commission for Women (DCW)*

In 2005, the DCW launched the 'Rape Crisis Cell' to provide legal services for rape victims.[48] Lawyers appointed by the DCW rape crisis cell are expected to "assist the prosecutor in the trial, oppose the bail application of the accused, facilitate recording of statement under section 164 of the Code of Criminal Procedure." An Advocate on the DCW panel of lawyers explained that the DCW lawyers "are there to help the victim at every step. We even oppose bail. We prepare victims on what to say and what not to say. We even help with getting compensation. If they are facing threats we file application for protection. We see all the documents – the statements under Sections 161 and 164 statement, chargesheet and FIR, etc. and we prepare the child based on that. We call them to our office or we prepare outside court itself on the day of the hearing."

### *(c) Legal Aid Lawyer appointed by DLSA*

To tide over the confusion related to the award of compensation, the DLSA has instructed Legal Aid Lawyers on its panel to file compensation applications on behalf of the victims before the Special Court. This is also because the Additional Public Prosecutors are overburdened and have no time to make such applications.[49] Some of the panel lawyers are also representing accused persons in POCSO cases before the Special Court as well as juveniles before the Juvenile Justice Board. The provision for appointing LALs for victims also exists and in such cases the LAL can assist the prosecution.

### *(d) Support Person appointed by the CWC*

As per Rule 4(7) of the 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. Not all CWCs have a panel of support persons and largely rely on NGOs known to them and the DCPU. A letter of appointment is issued to the Support Person, but no other terms of reference are issued. A copy of the letter is given to the SHO and the child's family. The Welfare Officer attached to some CWCs usually contact families and inform them about the availability of a support persons and counsellors. If the parents are found to be anxious, the Welfare Officer can visit them and explain to them the support services available.

A respondent who has been appointed as a Support Person by the CWC in several cases shared that she was unaware if the Courts are intimated about her appointment. She usually informs the court about her appointment as the Support Person. Judges have largely been cooperative and allowed her in court. As a Support Person, she has accompanied child victims to the hospital for medical examination and medical treatment, for counselling, to the Magistrate's Court for recording of the statement under Section 164, CrPC, to the CWC, and has

[48] Delhi Commission for Women, Rape Crisis Cell, http://www.delhi.gov.in/wps/wcm/connect/lib_dcw/DCW/Home/Rape+Crisis+Cell

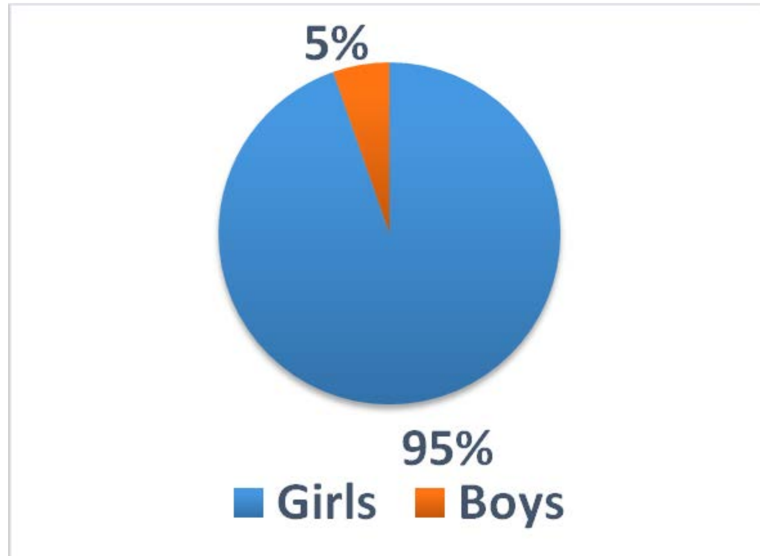
[49] Interview with Mr. Surinder Rathi, Officer on Special Duty, DLSA on 18.2.15 (on file).

attended hearings in court in which the child and/or the parents have to testify. She also gives the child and the family an orientation about the legal procedures and rights under the POCSO Act. In some cases, she has also been present during police interactions with the family. However, she has not received any instructions on what exactly her role is. There is also no clarity about the point till which the support should be extended. In one case she assisted the family in securing the compensation by urging the CWC to instruct the IO to file an application before the DLSA. She lamented about the lack of interaction with the APPs who are so overburdened that they have no time to meet the child or file a compensation application.

Both child survivors interviewed for the study were highly appreciative of the services provided to them by a support person. They derived strength from the presence of the support person in the courtroom and that helped them testify confidently.

# Chapter III. Findings based on Judgment Analysis

## 3.1 Sex profile of the Victims




95% of cases involved a female victim and only 5% cases involved a male victim. This does not reflect the findings of the 2007 *Study on Child Abuse* by the Ministry of Women and Child Development as per which 52.94% boys and 47.06% girls had reported having faced some form of sexual abuse.[50] The finding suggests that sexual abuse against boys remains underreported.

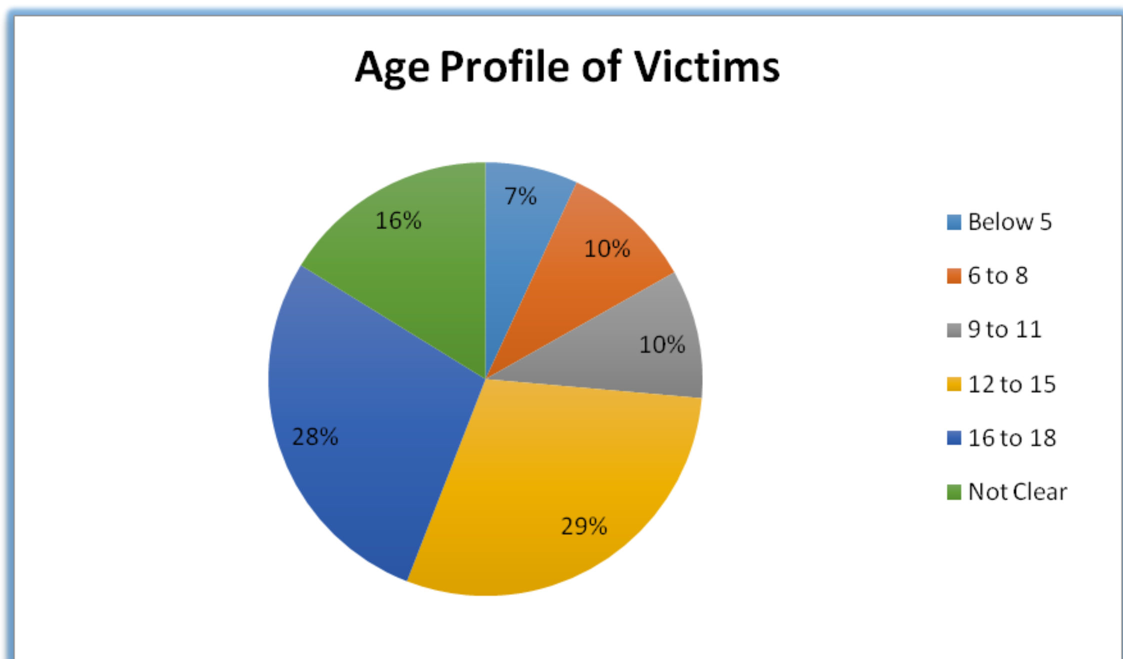
[50] Ministry of Women and Child Development, *Study on Child Abuse: India 2007,* p.74, available at http://wcd.nic.in/childabuse.pdf

## 3.2 Age profile of victims

The analysis of 667 cases of the Special Court in the state of Delhi reveals that amongst the 558 cases where the age claimed was specified, about 69% of the cases involved children between the age group of 12 to 18 (383 cases).

Amongst the total group of victims, the 12 to 15 age group formed the largest group consisting of 30% of the cases (197 cases), while the 16 to 18 age group formed the second largest group consisting of 28% of the cases (186 cases). Children below 5 years constituted only 7% of the total victims.

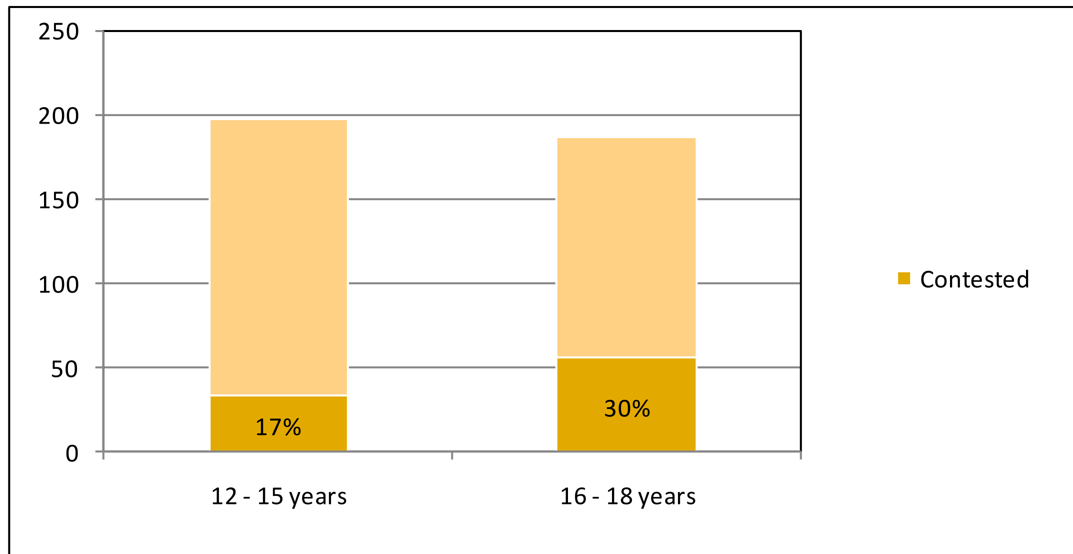
The age profile of the survivors is indicated in the graph below.




**Cases in which age was contested**

As the POCSO Act applies strictly only to child victims below the age of 18 years, the issue arose as a point of contestation in several of the cases especially in older victims around the ages of 15 to 17 years. It was seen that **in almost one in every six cases, the age of the victim was contested,** i.e., it was alleged that the victim was over the age of 18 years.

Data from the study reveals that about 30% of all cases where the child is alleged to be between the age of 16 to 18 are contested before the Special Court, while about 17% of cases where the child is alleged to be between the ages of 12 to 15 years are contested. Within this group of contested cases, it is notable that the victim herself claims to be above 18 years in several cases.




Another point at which age becomes a significant issue is when the charges of aggravated penetrative sexual assault (punished under section 10 of the Act) and aggravated sexual assault (punished under section 6 of the Act) are raised. These offences provide for an increased punishment when *inter alia* this child victim is below the age of 12 years. This dispute regarding age in such cases has, however, been evident only in few cases.

### 3.3 Conviction Rate and Factors affecting Conviction

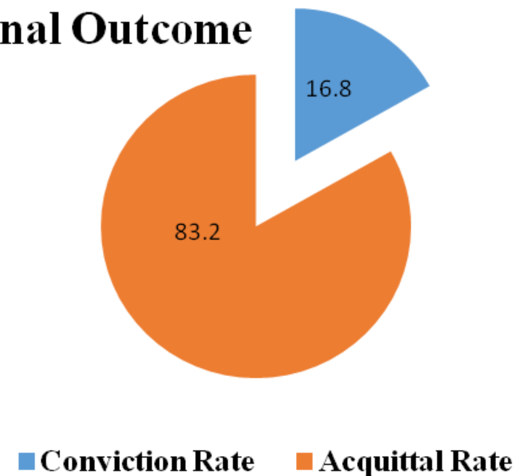
Conviction was awarded in 112 cases under the POCSO Act and the large majority i.e. 555 cases ended in acquittal. This pegs the rate of conviction at a measly 16.8%. **Thus, approximately only one in every six cases resulted in a conviction.**

Majority of convictions were recorded in cases in which the judges found the testimony of the victim/prosecutrix or eye-witnesses consistent and reliable.

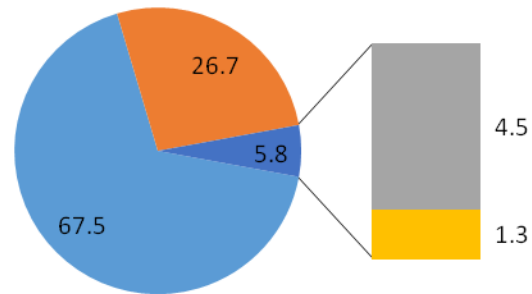
In two cases, the accused pleaded guilty of the charges under the POCSO Act and was thus convicted. In *State v GopalKirshan*[51]the accused pled guilty u/s.8 for catching hold of the hand of the victim girl aged 15 years with sexual intent and was convicted. In *State v. Irfan*[52], although material witnesses turned hostile the accused was convicted under Section 4, POCSO Act because he admitted to having made the deceased victim pregnant. The FSL reports also supported this.

[51] SC No. 59/14 decided on 06.06.14.

[52] SC No. 22/14 decided on 07.09.2015.

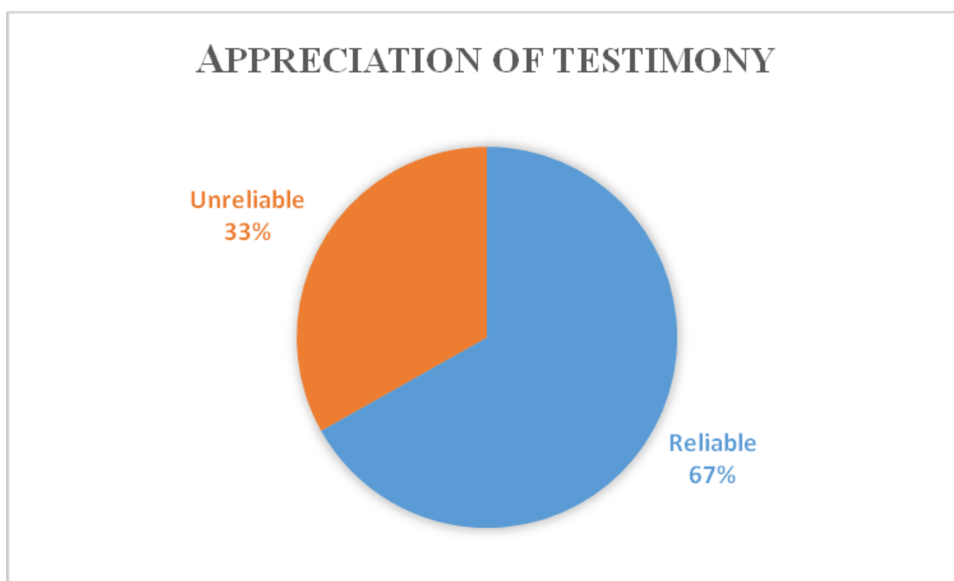



- In 46 cases the accused was convicted under the IPC, but acquitted under the POCSO Act. The two principal reasons for this were the failure of the prosecution to prove the ingredients of the offence under POCSO Act or establish that the victim was a minor.
- The prosecutrix/victim turned hostile in 450 cases - a staggering 67.5% and testified against the accused in only 178 cases - 26.7% cases.
- In 30 cases, the prosecutrix/victim did not appear or testify in court. The breakdown is as follows - the prosecutrix/victim did not testify in three cases, was untraceable in 16 cases, dead in three cases, deemed incompetent to testify due to tender years in seven cases and due to disability in one case.
- In 15 out of the above 30 cases, the testimony of a parent, family member, or eye-witness was considered by the court. In seven cases, the material witnesses testified against the accused while in seven cases they turned hostile. In one case in which the victim was deceased, the mother testified but admitted that the victim had not named the accused.
- In 9 cases, the victim admitted to a relationship with the accused, but neither testified against him or turned hostile.
- A total of 112 cases in which the victim was between 16-18 years resulted in acquittal. When the age contested cases in the 16-18 age group are also included, there are 167 cases that ended in acquittal. This constitutes 25% of the total acquittal and 89.78% of acquittals in the 16-18 category.




Reasons for acquittal even though the victim testified against the accused are as follows:

1. **Testimony found unreliable**: Of the 178 children who testified against the accused, the testimony of 58 children was found unreliable while that of 120 was found reliable.




2. **Ingredients of the offence under POCSO Act not made out:** In some cases, the accused was acquitted even though the testimony was reliable. This was because the judge was of the view that the ingredients of the alleged offence were not made out. In *State v Rambir Singh,*[53] the 8-year-old prosecutrix testified that the accused had taken her to his house to give her a doll without the knowledge of her parents, and the mother testified the same. Since neither the prosecutrix nor her mother referred to sexual assault, the Special Court held that the prosecution could not establish the ingredients of Section 8, POCSO. The accused was convicted under Section 363, IPC and acquitted under the POCSO Act.

   In *State v Bijender,*[54] a seven year old girl testified that the accused took her into the bathroom by force, slapped her and tore her jeans pant. Though Section 7, POCSO Act recognizes 'any other act with sexual intent which involves physical contact without penetration' to be sexual assault, the Special Court held that the act of tearing the clothes of the victim did not constitute physical contact even if sexual intent was present. The judge reasoned that this part of the provision has to be read *ejusdem generis* and therefore "cannot be extended to any sort of physical contact without penetration, although it may be with sexual intent." It was concluded that since the accused did not touch the vagina, anus or breasts of the child, the latter part of the section could not be

[53] SC No. 109/2013, Decided on 30.11.2013.
[54] SC No. 142/13 decided on 25.08.2014.

invoked against him. Instead, the court was of the view that the ingredients of Sections 354A and 354B, IPC were made out and convicted the accused under those provisions.

3. **Victim not a child:** In *State v Gurdeep Singh,*[55]the prosecution failed to establish that the victim was a minor and the accused was convicted under Section 354, IPC for catching hold of the victim, hugging her and pressing her breast. Similarly, in *State* v *Ravi Kant*[56] the prosecution failed to prove that the victim was a minor and he accused was convicted u/s.506, IPC.

## 3.4 Analysis of Charges

Charges under the POCSO Act were as follows: penetrative sexual assault in 215 cases (32.23%), aggravated penetrative sexual assault in 174 cases (26.08%), sexual assault in 170 cases (25.48%), aggravated sexual assault in 101 cases (15.14%), and sexual harassment in 148 cases (22.18%).

Charges were also framed under Sections 14, 17, 18, 21, 21 (2) of the POCSO Act. In *State v Vijay,*[57]a government school teacher had allegedly committed sexual assault against five students. A case was lodged against him as well as the Principal for the failure to report under Section 21(2). The case ended in acquittal as the children turned hostile.

In 630 cases charges were framed under POCSO and IPC, of which rape charges were framed in 335 cases (53.1%), sexual harassment charges in 222 cases (35.23%) and kidnapping charges in 195 cases (30.95%). In 101 cases, multiple charges under the POCSO were framed. Additional charges were also framed under the Arms Act, Child Marriage Restraint Act, Juvenile Justice Act, and the ITP Act.

Charges revealed the following grounds under aggravated penetrative sexual assault:

- Section 5(e) –Penetrative sexual assault by a doctor in a hospital
- 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

[55] SC No. 61/2013 decided on 11.04.2014.
[56] SC No. 45/13 decided on 20.12.2013.
[57] SC No.146/14 by decided on 22.05.2015.

- Section 5(p) – Penetrative sexual assault by a person in a position of trust or authority of a child in an institution or home of the child or anywhere else

Charges revealed the following grounds under aggravated sexual assault

- Section 9(f) – Sexual assault by a teacher
- Section 9(g) – Gang sexual assault
- Section 9(l)- Sexual assault on a child more than once or repeatedly
- Section 9(m) - Sexual assault on a child below 12 years
- Section 9(n) – Sexual assault by a relative of the child

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.

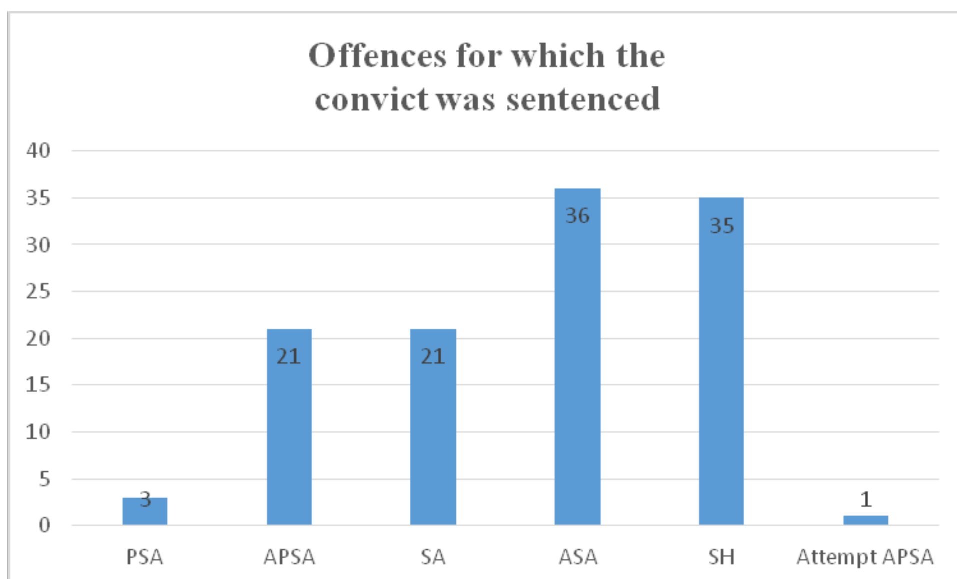
## 3.5. Sentencing Pattern

Minimum sentences have been prescribed for all sexual offences under the POCSO Act barring the offence of sexual harassment. Where a statute has prescribed a minimum sentence, courts do not have the discretion to pass lower sentences. In this regard, 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.[58]

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

[58] *State of J&K v. Vinay Nanda,* AIR 2001 SC 611.




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

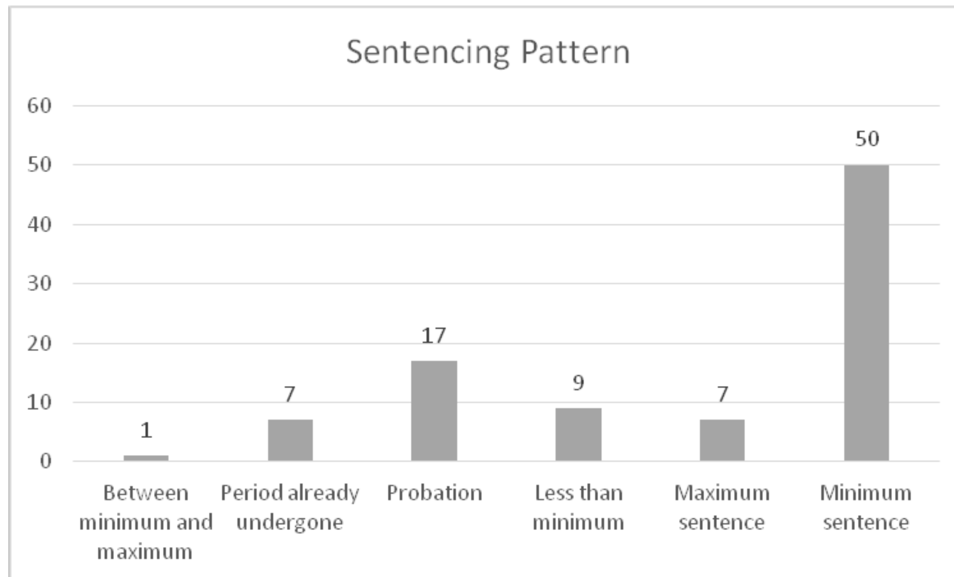
The highest sentence was recorded in cases of aggravated sexual assault followed by sexual harassment, aggravated penetrative sexual assault and sexual assault.

**Quantum of sentence**

- The mitigating factors that influenced the quantum of punishment were age of the accused, first offence, 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. Raghav*[59] where the offence of sexual assault and rape was committed on the victim by the maternal uncle over a period of three years, the Special Court was of the view that this warranted higher sentence and imposed life imprisonment.
- The maximum prescribed sentence was awarded in seven cases which comprised four cases of aggravated penetrative sexual assault, one case of aggravated sexual assault, one case of sexual assault, and one case of sexual harassment. The profile of the victim and the offender appears to have had a bearing in these cases. For instance, the cases of aggravated penetrative sexual assault involved

[59] SC No.127/13, decided on 03.03.2014.

two cases of 6-year-old boys being assaulted by their neighbours, and one case of assault by a maternal uncle. A case of aggravated sexual assault was that upon a 2-and-a-half-year-old child by her neighbor.




- In 50 cases, the minimum mandatory sentence under the POCSO Act was imposed. Judges struck a balance between the mitigating and aggravating factors while awarding the minimum sentence. For instance, in *State v Bobby*[60], the minimum prescribed sentence u/s.10 of the POCSO Act for sexual assault was imposed by balancing the facts that the defendant had abused his niece, breached the trust of his relations, and his young age as well as the fact that he was a first time offender.
- In nine cases, Special Courts prescribed less than the minimum sentence. This included seven cases in which probation was ordered, one case of aggravated penetrative sexual assault in which the person was sentenced to period already undergone during pendency of the trial and one case of sexual assault and aggravated sexual assault in which an amalgam of the deterrent and reformative approach was applied to impose fine and rigorous imprisonment of one year each under Section 8 and 10, POCSO Act followed by probation of two years.

[60] SC No.143/13, decided on 25.09.2013.

- Probation was awarded in 17 cases of which 10 cases were that of sexual harassment. Probation is neither prescribed nor expressly excluded in the sentencing section in the POCSO Act. Interestingly, the judges have exercised discretion and given probation for offences ranging from aggravated sexual assault as well as for sexual harassment. In cases where the Court was of the view that there are chances of reform then the benefit of probation was given. The award of probation in sexual harassment cases cannot be said to be against the spirit of the POCSO Act as it does not prescribe for a minimum sentence in this category, though a maximum of three years imprisonment is prescribed.
- The convicted person was sentenced to period already undergone in 7 cases. This included one case under aggravated penetrative sexual assault in which the accused was married to the victim and was also the father of her child.[61] In this case the victim had admitted her relationship with the accused and had also turned hostile. While, technically, this decision is not in compliance with the Supreme Court's decision in *Vinay Nanda,* the Special Court invoked other decisions of the Supreme Court[62] to balance social interest with the statute. The fact that the victim was in love with the convict, that "apparently [he] did not act out of lust to merely ravish the victim [], but stood by her to give her emotional support after the untimely death of her mother", that he brought her back home and waited till she turned 18 years to marry her, that she was pregnant, and that he did not conceal facts from the Court were among the ten mitigating factors the Special Court considered to arrive at this disposition.
- In all the cases where sentencing is awarded under the POCSO Act, fine was also imposed on the convict. In all the cases where there are more than one sentencing term passed either under different sections of POCSO or when sentenced both under the POCSO Act and the IPC, then concurrent sentences were awarded by the Judges.
- 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. Jongi*[63]the accused was convicted for sexually assaulting a girl aged 10-11 years. Even though the accused was charged with having committed aggravated sexual assault, he was convicted for sexual assault and sentenced to three years imprisonment, though it was noted that the age of the girl was below 12 years. On the other hand, in *State v MotiLal*[64]*,* the initial charge was under Section 8, POCSO Act because the accused had allegedly made a 3-year-old child hold his penis. The Special Court held that 'although accused has been charged under section 8 of POCSO Act but on careful perusal of provisions of POCSO Act, it is amply clear that offence of aggravated sexual assault as provided in Section 9 (m) of POCSO Act'. The accused was convicted and then sentenced u/s.10 to five years rigorous imprisonment and fine.

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[61]*State v. Parhlad,* SC No. 113/13 decided on 31.07.2014.

[62]*State of Uttar Pradesh vs. Sattan alias Satyendra and Others,* (2009) 4 SCC 736, *Shankar Kisanrao Khade vs. State of Maharashtra*, (2013) 5 SCC 546; *Bachan Singh vs. State of Punjab*, (1980) 2 SCC 684.

[63] SC No. 30/13, decided on 6.05.2013.

[64] SC No.111/2/2013, decided on 25.04.2015.

**Table No.4: Types of sentences passed by Special Courts in Delhi**

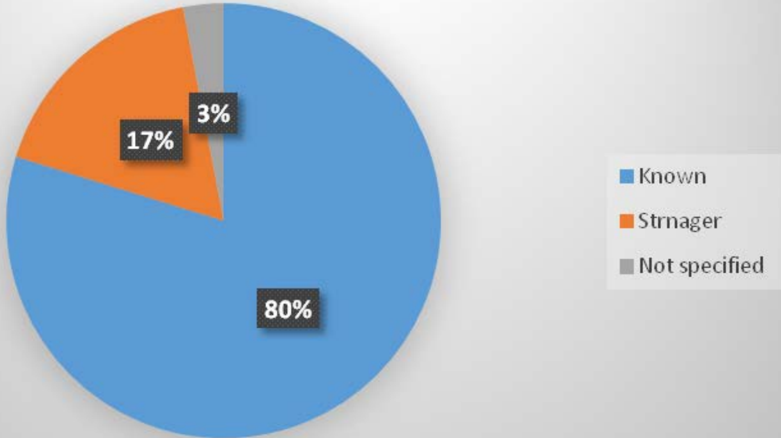
| Sentence | PSA | APSA | SA | ASA | SH | Total |
|---|---|---|---|---|---|---|
| **Probation** | | | 3 | 4 | 10 | 17 |
| **Minimum Sentence** | 2 | 11 | 12 | 25 | | 50 |
| **Maximum sentence** | | 4 | 1 | 1 | 1 | 7 |
| **Period already undergone** | | 1 | | | 6 | 7 |
| **Between minimum and maximum** | | | | 1 | | |

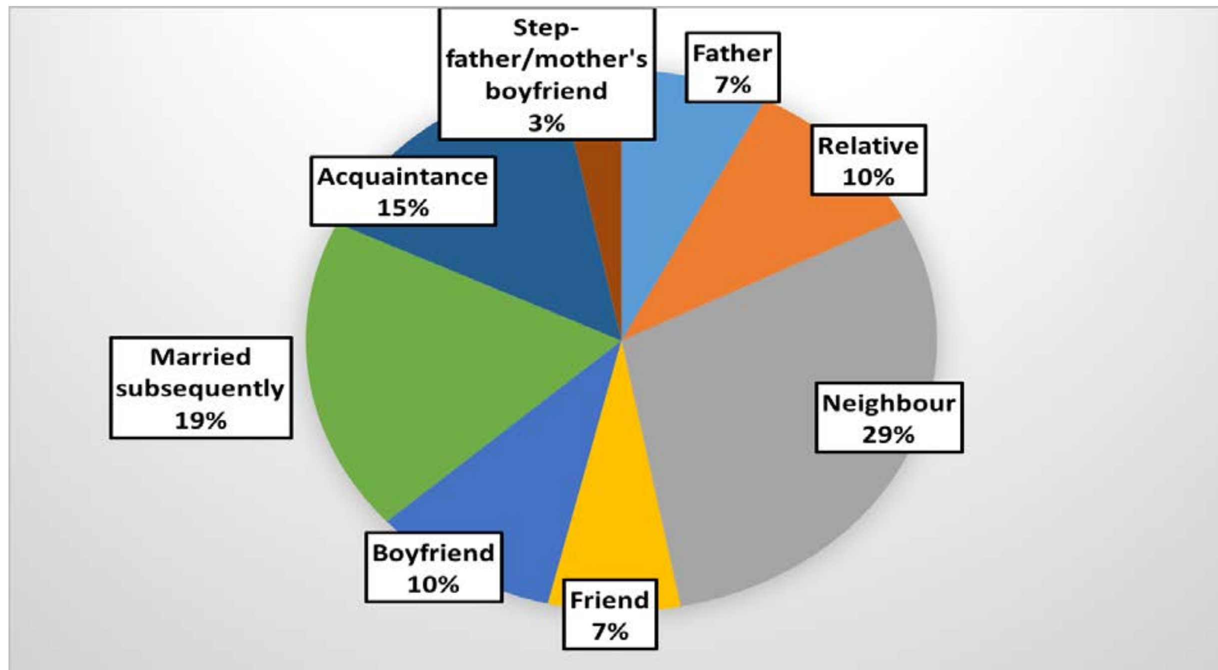
There are some cases in which the accused was charged under Section 8, POCSO Act, when the charges should have been levied under Section 10, POCSO Act because the victim was below 12 years. However, the judges tried and convicted the accused under Section 8. In *State v Ghasita Khan*[65], not only was this overlooked, probation was awarded instead of the minimum punishment of three years for sexual assault. The victim in this case was almost 10 years old.

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

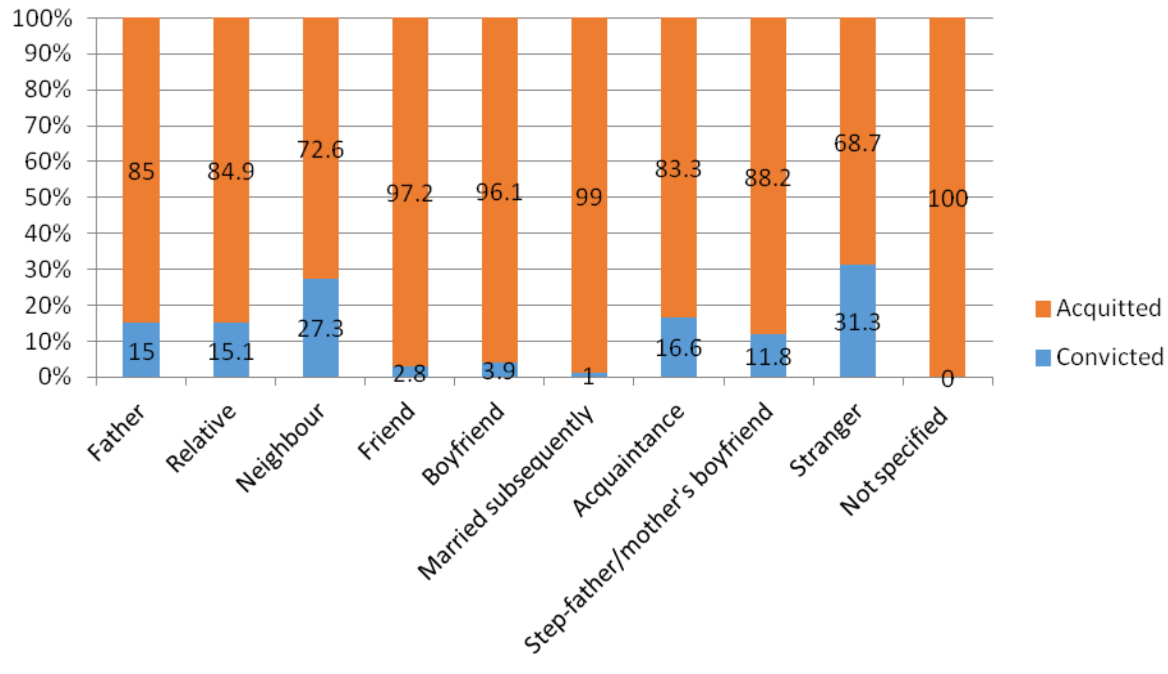
The accused was known to the victim in 80% of the cases, was a stranger in 17%, and his profile was not specified in 3% of the cases. All accused persons in the cases under study were male. In some cases, women were enjoined as co-accused, but were charged under other laws such as the Prohibition of Child Marriage Act, 2006 or under other non-sexual offences.

[65] SC No.36/2013, decided on 30.10.2013.


Profile of the Accused
3%
17%
80%
Known
Strnager
Not specified

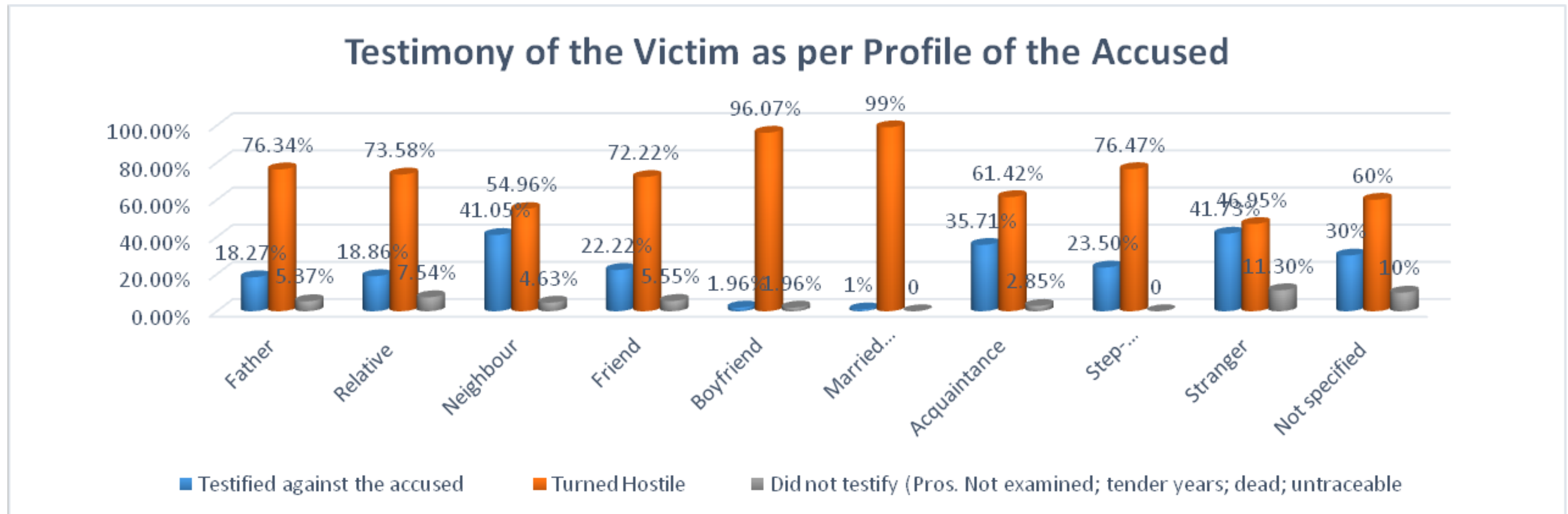



The breakdown of the profile of the accused persons known to the victim reveals that neighbours constituted the largest group (29%) followed by those related to the child by blood or through the mother – mother's boyfriend/stepfather(20%). Acquaintances also form a significant proportion of accused known to the victim. Acquaintances included brother's friend, shopkeeper, van driver, doctor, employer, former tenant, money lender, domestic help, watchman, religious leader, and fiancé of sister. The accused was allegedly married to the victim in 19% of the cases and was in a romantic relationship with the victim in 10% of the cases.




The graph above reveals that the rate of conviction was lowest in cases in which the accused was married to the victim (1%), and only 2.8% in cases which they were friends, and 3.9% in romantic relationships. Conviction was the highest in cases in which the accused was a stranger (31.3%) followed by neighbor (27.3%), acquaintance (16.6%), relative (15.1%) and father (15%).

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




- The highest percentage of cases in which the victim turned hostile were those in which she was married to the accused ((99%), in a romantic relationship with the accused (96.07%), step-daughter (76.47%), daughter of the accused (76.34%) and related to the accused (73.58%).
- The highest percentage of cases in which the victim testified against the accused was cases in which the accused was a stranger (41.73%), followed by neighbor (41.05%), acquaintance (35.71%), and friend (22.22%).
- The highest percentage of cases in which the victim turned hostile were those in which she was married to the accused (99%), followed by cases in which she was in a romantic relationship with the accused (96.07%), his step-daughter (76.47%), and daughter (76.34%). In 73.58% cases in which the victim was related to the accused, the child turned hostile.
- The highest percentage of cases in which the victim testified against the accused was cases in which the accused was a stranger (41.73%), followed by neighbor (41.05%), acquaintance (35.71%), and friend (22.22%).
- The percentage of victims who testified against the accused was least in cases in which they were married (1%) and in a relationship (1.96%). It was also low in cases in which the accused was a father (18.27%) or related to the child (18.86%).

- In 144 cases *i.e.,* 21.58% of the cases, the prosecutrix expressly admitted that she was in love with the accused. Of this, in 132 cases the prosecutrix turned hostile, in two cases she testified against the accused, and in nine cases she merely admitted the relationship and did not say anything else. In three cases, the prosecutrix admitted the relationship and testified against the accused. In two cases the accused was acquitted because the testimony was found unreliable[66] and in one case the accused was convicted because the girl was below 16 years and her consent was considered immaterial.[67]
- Of the 40 cases, in which father was the accused, 34 cases ended in acquittal and six in conviction. In these six cases, the prosecutrix testified against the accused in five cases and turned hostile in one case. In 7 cases the daughter testified against the father. However, in two cases the testimony was found unreliable. Conviction was recorded in the case in which the prosecutrix turned hostile because the Special Court was of the view that her explanation for calling the police (to complain against her father for verbally abusing her) was not believable.[68] The pressure to retract in such cases is apparent, as in an overwhelming number of cases (32 cases) the victim turned hostile. Common reasons cited were that the complaint was filed out of anger over him being an alcoholic or because of the constant quarrels between the parents. In one case, the child was too young to testify. In this case the mother testified on behalf of the child and turned hostile.
- Of the 100 cases in which the accused was married to the victim, conviction was ordered in only one case, even though the victim turned hostile and in this case, the accused was sentenced to the period already undergone. In only two of the 100 cases did the victim testify against the accused. However, the testimony was found unreliable in both cases.
- Of the 51 cases in which the accused and victim were in a romantic relationship, the victim turned hostile in 49 cases, testified in one case, and was dead in one case. The testimony was found unreliable in one case. Conviction was recorded in only two cases. In *State v AniketVishnoi @ Monu @ Ariyan*[69]*; the* victim's father had filed a missing complaint about his daughter aged 16 years. After recovery of the victim and the accused in a railway station, the victim testified that she had accompanied the accused on the pretext of his promise of marrying her and had sexual intercourse with him based on the promise. Her statement was corroborated by her neighbour in whose house the act was committed. The Special Court applied the presumption and held that the accused had failed to prove his innocence. Her consent was also deemed irrelevant because she was 16 years. In the case of *State v Irfan*[70]*,* the victim aged 12 years and pregnant was found dead and the accused admitted having physical relations with the victim. The FSL report also proved he was the biological father of the dead foetus. He was accordingly convicted under Section 4, POCSO Act and Section 376, IPC.

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[66] *State v Jai Prakash,* decided on 4.10.2013; *State v. Mukesh,* decided on 12.12.2014.
[67] *State v. AniketVishnoi,* SC No. 111/13 decided on 30.4.2014.
[68] *State v. Dinesh Sharma,* SC No. 155/2013 decided on 03.02.2014.
[69] Sc No.111/13 decided on 31.04.2014.
[70] SC No 22/14 decided on 07.09.2015.

- Of the 36 cases in which the accused and victim were friends, 26 turned hostile and 8 testified against the accused. In four cases, the testimony was found unreliable. Conviction was recorded in only 1 case. In the case of *State v Manish*[71] , the victim aged 17 years testified against the accused. The judge considered the relation between the victim and the accused, applied the presumption and held the accused guilty of offence. In *State v Vikash*[72]*,* the victim stated that she did not wish to continue with the case if the accused provided in writing that he would stop stalking her. Cases also resulted in acquittal on the ground that the prosecution failed to prove the victim was a minor at the time of the incident, or the ingredients of sexual assault were not satisfied.
- Of the 157 cases in which the accused was a neighbor, 64 victims testified against them and 87 turned hostile. Convictions were recorded in only 43 cases. The testimony of the victim was found unreliable in 16 cases. In two cases where the neighbour was the landlord, it was held to be a dispute over payment of rent. In 5 cases, the victim was untraceable. In most cases the victim or the prosecution witness turned hostile stating that there was a quarrel between the victim and the family of the accused over water, rent, or that the police made them sign on blank papers.
- Of the 53 cases in which the accused was a relative, 39 victims (73.5%) turned hostile and 10 testified against them. Four did not testify because they were untraceable or too young to testify. Relative included uncle, cousin, brother-in-law, grandfather, and brother. The testimony of two children was found to be unreliable and as a result conviction resulted in only 8 cases. In the case of *State v Shiv Dutt*[73]*,* the victim a 5 year old girl was sexually assaulted by her relative. The mother of the victim, in her cross- examination stated that her late husband's parents had property worth lakhs, the judge construed to mean that she "admitted" to this fact and was also aware that the property would be in her name if her in-laws did not keep anyone in the house. The case was construed to be that of a property dispute and the accused was acquitted of the charges
- Of the 70 cases in which the accused was an acquaintance, the victim turned hostile in 43 cases and testified against the accused in 25 cases. The testimony of 11 victims was found unreliable and conviction was recorded in only 13 cases.
- There were only 8 cases in which the accused was a teacher. In 6 of these cases, the victim turned hostile and testified against the accused in only 2 cases. However, no conviction was recorded as the testimony was found unreliable.
- Of the 115 cases in which the accused was a stranger, the victim testified against him in 48 cases (41.7%) and turned hostile in 54 cases. In 11 cases the testimony was found unreliable. In 5 cases the victim did not testify due to tender age (4 cases) and death (1 case). Conviction resulted in 36 cases.

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[71] SC No. 60/13 decided on 05.06.2014.
[72] SC No. 54/02/2013 decided on 18.10.2014.
[73] SC No.13/ 2014 decided on 21.07.2015.

- Of the 17 cases in which the accused was the step-father or mother's boyfriend, four testified against and 13 turned hostile. Only two were convicted and the testimony of the remaining two was found unreliable.

**Table No.5: Logit Regression results where dependent variable is Hostile**

| Variables | Model 1 | Model 2 | Model 3 | Model 4 | Model 5 |
|---|---|---|---|---|---|
| Age | 0.15* | 0.14* | 0.12* | 0.12* | 0.12* |
| | (0.02) | (0.02) | (0.02) | (0.02) | (0.02) |
| **Dummy** | | | | | |
| Romantic relationship | | 0.82** | 1.1* | 1.01* | 0.31 |
| | | (0.39) | (0.40) | (0.42) | (0.47) |
| Acquaintance | | | 0.82* | 0.73* | 0.02 |
| | | | (0.25) | (0.27) | (0.34) |
| Neighbour | | | | -0.21 | -0.92* |
| | | | | (0.24) | (0.31) |
| Stranger | | | | | -1.26* |
| | | | | | (0.33) |
| Constant | -1.19* | -1.11* | -1.13* | -1.03* | -0.32 |
| | (0.29) | (0.29) | (0.30) | (0.32) | (0.38) |
| Log Likelihood | -300.7 | -298.2 | -292.5 | -292.15 | -284.6 |

*, **, *** indicates significance at 1, 5, and 10 percent level

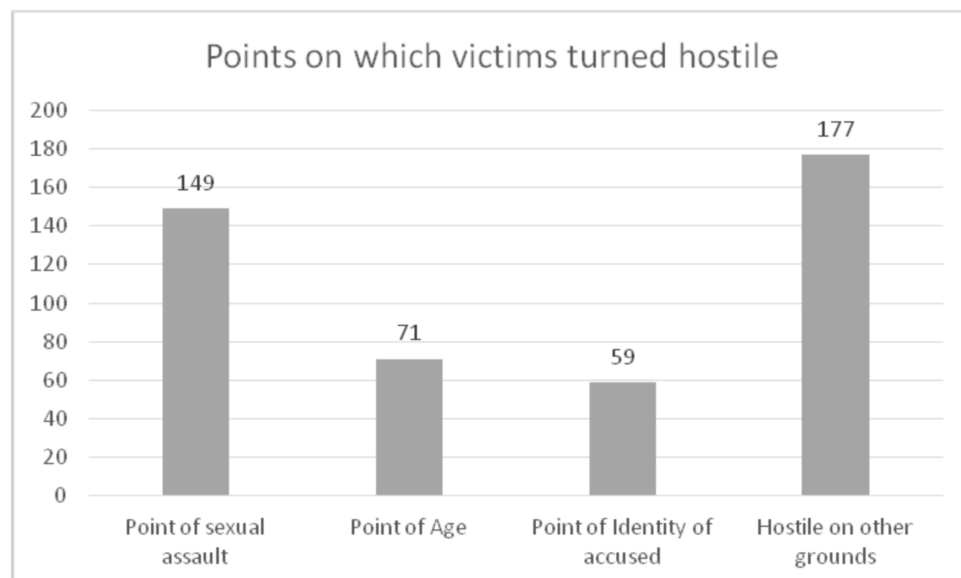
Family member/relative as alleged perpetrator has been considered as the base category in this regression. The regression results revealed that:

1. As age increases the probability of become hostile also increases.
2. Possibility of becoming hostile when the person is in a romantic relationship is no different from when the perpetrator is a family member.
4. Possibility of becoming hostile when the alleged perpetrator is known to the victim is no different from that of own family members.
5. Where the alleged perpetrator is a neighbour, the possibility of becoming hostile is lower as compared to when it is a family member.

6. Where the alleged perpetrator is a stranger, the possibility of becoming hostile decreases as compared to when it is a family member.
7. The possibility of becoming hostile is much lesser in case of strangers than neighbours.

## 3.7. Grounds on which victims turned hostile

The prosecutrix/victim turned hostile in 450 cases i.e., a staggering 67.5% and testified against the accused in only 178 cases i.e., 26.7%.




In 149 cases they denied that a sexual offence had taken place. In 71 cases they turned hostile on the point of age. In 59 cases, they stated that the accused was not the person who had committed the offence. In 177 cases, they turned hostile on other grounds and appeared ignorant about the complaint and stated that the police made them sign on a blank sheet of paper or a NGO person asked them to file a false complaint. In few cases, the child admitted that a false complaint was filed out of anger or under pressure.

**Hostile on the point of age**

In most cases, where documentary proof of age existed, the prosecutrix and/her family members claimed that a false date of birth was supplied to the school in order to secure admission. Material witnesses turned hostile on this point in cases of elopement. For instance, in *State v.*

*Ashutosh Anand,*[74] a case was instituted by the father of the prosecutrix stating that his 17-year-old daughter had not returned from her coaching class and could not be found. As per the proof of age obtained by the police, she was around 16-and-a-half years. Subsequently, the prosecutrix and the defendant surrendered before the Magistrate. The accused was arrested. The victim refused to undergo medical examination. In her deposition, the prosecutrix stated that they were neighbours and were in love with each other. Due to parental disapproval, she left home with him and voluntarily married him. They had sexual intercourse with her consent. As per statement, she gave birth to a baby boy three months later. She stated that he was her legally wedded husband and she wanted to live with him. She also stated that her age was recorded less in school records as well as the MCD certificate that was based on the school records. In his deposition, the victim's father stated his daughter's age to be 20 years. He later found out that his daughter had married the accused and was living with him. The Special Court noted that the girl voluntarily left with the accused, married him and now had a child and concluded that based on the statement of the prosecutrix and her father, she "comes out to be major" and acquitted the accused.

In *State v. Sonu Chauhan*[75]*,* as per the date of birth in the school records, the prosecutrix was around 11 years old. The radiological examination pegged her age between 14.5 and 15.8 years. Her mother stated that she would have been above 15 years. The prosecutrix and her father stated that she was above 18 years on the date of the incident and a false date of birth was given at the time of admission. In this case, the prosecutrix was five weeks pregnant when the complaint was filed. She claimed to have married the accused in a temple. A formal wedding was organised by her parents three months after the case had been filed. The judge ignored the findings of the radiological examination and accepted the statement of the prosecutrix and her father on the point of age and acquitted the accused.

**Hostile on the point of identity**

In 59 cases, the prosecutrix and material witnesses turned hostile on the point of the identity of the accused. For instance, in *State v. Ajay*[76]*,* a 17-year-old girl had been allegedly raped by her landlord. Her statement was recorded by the police as well as the Magistrate under Section 164, CrPC. However, in court she deposed that she was raped by a person who dragged her in a room which was dark. She raised an alarm after which he ran away from there. She heard her landlord's voice from another room and told him about the incident. She stated that the accused was not the person who raped her.

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[74] AIR 2001 SC 330
[74] SC No. 10/14 decided on 15.03.2014.
[75] SC No. 97/13 decided on 28.02.2014.
[76] SC No. 197/13 decided on 14.03.2014.

In the case of *State v. Jang Bahadur @ Babloo*[77], the victim aged 4.5 years stated that the accused urinated in her mouth. However, the accused was acquitted as the victim did not identify the accused in the court and the other prosecution witnesses that includes her mother and father, deposed that they had not seen the accused after arrest, accused was not interrogated in her presence and police obtained signatures on blank papers. They were declared hostile by the court and the accused was acquitted

**Hostile on other grounds**

In some cases, the prosecutrix stated that false accusation was levied out of fear of parental disapproval, anger, or at the behest of a family member. For instance, in *State v. Anil Soni*[78]*,* the prosecutrix had lodged a report of sexual assault at the police station against Anil Soni, her tuition teacher. She alleged that he had tried to sexually abuse her and when she protested, he threatened to kill her and then committed rape. She further claimed to have become pregnant. He then provided her with medicines to terminate the pregnancy and continued to rape her. Based on this information, he was arrested and a case under Section 376/506 IPC and 4, POCSO Act was registered against him. In her testimony in court, the prosecutrix claimed that she was in love with a man named Raju and that they were having sexual relations. Anil was a family friend and she told him about her affair with Raju. Anil asked her to cease her relations and to focus on her studies. One day, Anil spotted Raju with her. When she was having abdominal pain, Raju had arranged a pregnancy test for her which was positive. She shared this information with Anil who scolded her and said that he would inform her parents. She got scared and instead of naming Raju, falsely implicated Anil before her mother. She stated that Anil had not done any "wrong act" and that she would continue to maintain her relations with Raju and planned to marry him. Her mother testified that she had initially told her that Anil had sexually abused her, but later shared that she was having an affair with Raju. The mother stated that she had apprised the police about this but they did not pay heed. She deposed that her daughter will be marrying Raju soon and that Anil is innocent. The Special Court observed that they had both turned hostile regarding the involvement of the accused and acquitted him. Raju was never produced before the court. The status of the pregnancy was not mentioned in the judgment. The age of the prosecutrix was not mentioned, though it is stated that she was studying in Class VIII in 2012. She was admittedly below 18 years of age and was pregnant. There was no direction by the court to the prosecution or the police to verify the existence of Raju and to charge him under the POCSO Act.

In *State v. Baljeet*[79]*,* the victim told the police that the accused, her neigbour, came into her house, stated that he wants to marry her, asked her to come with him, caught hold of her hand, pulled her towards him and caught hold of her waist. She was rescued by her mother and sister. Thereafter, the accused went away threatening to kill her. She stated that the accused used to follow her, was an alcoholic and used to

[77] SC No. 43/2013 decided on 27.11.2013.
[78] SC No. 139/13 decided on 24.09.2013.
[79] SC No. 40/14 decided on 23.08.2014.

forcefully enter her house and tease her. The complaint was registered and the accused was arrested. Charge sheet was filed under Section 354/354A/354D/506 IPC & 11/12 POCSO Act. In her deposition, the victim stated that her mother and the accused were quarreling over water. She filed the complaint against the accused in anger because of the quarrel. The accused had not misbehaved with her. Her mother also testified similarly. The judge acquitted the accused because both material witnesses had turned hostile.

A common statement made by victims turning hostile was that no sexual assault took place. For instance, in *State v. Hira Lal,*[80]the victim, 12-year-old boy told the police that he had been sexually assaulted by his neighbor. However, in court he deposed that the accused had asked him to buy liquor and was slapped when he refused. In *State* v *Kulwant*[81]victim a boy of 12 years age, complained of unnatural sex committed on him by an acquaintance. He and his father turned hostile in the Court, that it was a false case filed since the accused slapped the victim for smoking. Similarly, in *State v. Mohd GulBahar*[82]*,* the 16 year old prosecutrix alleged that the accused caught her hand and tried to take her to the park and left her only when she raised an alarm. In court, however, she stated that the accused caught her hand because she was filling her bucket of water out of turn.

A common plea taken in incest cases was that the complaint was lodged due to a quarrel or at the instance of the police or a NGO. In *State v. Raju,*[83]the 11-year-old prosecutrix said that her parents used to quarrel and her mother called the police. She completely retracted her 164 statement in which she had stated that her father had inserted his penis in her mouth and also inserted his fingers into her vagina. In court she said that she made these statements under the influence of a NGO person and the police. She could not name or identify this NGO person. In *State v. Mohd Sallauddin*[84]*,* the prosecutrix aged 13 years told the police that her father had been inserting his finger into her private parts for almost 3-4 years. In court, however, she stated that he had scolded her for not listening to him and so she called the police. There is nothing in the judgment to indicate whether she had been produced before the CWC considering that she was living in the same house with the alleged perpetrator. In*State v. Inder Lal,* the prosecutrix aged 15 years told her class teacher that she had been sexually assaulted by her step-father. The Principal informed Child Line and a representative from Child Line took her to the police station. In her complaint she stated that her step-father had been committing penetrative sexual assault upon her for the past two years. In court, however, she denied that her step-father had sexually abused her and stated that her signatures were obtained on blank papers.

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[80] SC No. 119/13 decided on 30.10.2013.
[81] SC No. 55/14, decided on 10.05.2014.
[82] SC No. 225/13 decided on 14.11.2014.
[83] SC No. 45/2015 decided on 29.09.2015.
[84] SC No. 35/14 decided on 02.09.2014.

In *State v Sunil Kumar,* [85]the prosecutrix aged 14 years alleged that her brother-in-law had committed penetrative sexual assault upon her. In court she stated that she had filed a false complaint because she wanted to teach him a lesson for fighting with her sister. In *State v Raju*[86]*,* the victim told the police that the accused had committed penetrative sexual assault with him for over 2-3 years. In court, however, he stated that he made these allegations at the instance of his aunt because the accused used to harass the aunt's daughter.

In *State v. Ashok Arora*[87]*,* the prosecutrix, a 17-year-old girl, filed a police complaint alleging that the accused, her employer, had committed penetrative sexual assault upon her. She stated this in her statement under Section 164, CrPC before the Magistrate. However, in court she stated that the accused had not paid her wages for three months and she approached the police. They made her sign blank papers. She stated that she was tutored to allege penetrative sexual assault before the Magistrate so that she could receive payment from the accused. She feared that if she did not make such a statement before the Magistrate she would be sent to jail. The accused was acquitted on this ground.

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

Out of the 667 cases decided by the Special Courts in Delhi, presumption was applied and mentioned in 83 cases by 13 out of the 20 judges. For instance in the case of *State v Bhagwat Singh*[88]*,* the victim was a 7 year old girl who was sexually assaulted by a shopkeeper. The accused defended by stating he had been falsely implicated due to previous animosity between victim's father and himself. The Special Court held that "this bald defence has not been elaborated upon by the accused", he further stated it was within the special knowledge of the accused regarding the inimical relations that existed between him and the victim's father and as per section 29 and 30 of the POCSO Act, the onus was on him to prove that there existed such reasons to falsely implicate him. While in few other cases, there has been a mention of section 29 and 30, in the case of *State v Rajesh*[89], victim aged 3 years was subjected to sexual assault by her relative, the court convicted the accused and held "accused has failed to prove on record any iota of evidence or circumstance so as to suggest that he did not commit the act complained of", this inference was not applied to decide the case, but the cases was decided on the testimonies of the prosecutrix and prosecution witnesses  However, in 112 cases that resulted in conviction, presumption was applied in 46 cases. In the remaining cases the pattern has been such that, the judges have relied only on the testimony of the victim coupled with deposition of other prosecution witnesses and/or medical evidence. In some cases, conviction was awarded because the accused pled guilty. For instance, in

[85] SC No. 231/2013 decided on 19.05.2014.
[86] SC No. 112/14 decided on 09.10.2014.
[87] SC No. 295/2013 decided on 26.02.2014.
[88]SC No. 109/2013 decided on 21.08.2015.
[89]SC No 44/13 decided on 25.09.2013.

*State v Gopal Krishan*[90], the victim aged 15 years was sexually assaulted by a stranger and in *State v Jagga @ Lakhami Dhar Bharik*[91],the victim aged 11 years was sexually assaulted and harassed by her neighour. In both cases, the accused pled guilty and hence there was no requirement for application of presumption

**Cases resulted in conviction but no application of presumption:-** In the case of *State v Dharam Raj*[92], the Special Court convicted the accused of sexual assault based on the testimony of the victim aged 17 years as he found it to be cogent, convincing and reliable. There was no application of presumption. The same outcome was arrived at in the case of *State v Rakesh Jha*[93], where the victim aged 16 years was sexually assaulted by a stranger. The Special Court held the accused guilty of offence under Section 11, POCSO Act, based on the sole testimony of the prosecutrix. The judge relied on the apex court's decision in *State v. Asha Ram*[94],wherein it was held:

> …it is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault alone is sufficient ground to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under give circumstances. The evidence of the prosecutrix is more reliable that that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

In the case of *State v Lalkumar*[95] where the accused was charged under section 10 of the POCSO Act and the victim aged 6 years testified against the accused. While deciding the case, the Special Court did not apply presumption, but convicted the accused on the basis of the testimony of the child witness which he identified to be cogent and convincing coupled with the corroborative deposition of prosecution witness.

**Cases in which the presumption was rebutted by the accused:** In *State v. Avinash Gupta*[96], a 14.5 year old girl was sexually assaulted by her step-father. The Special Court held that though presumption is in favour of the prosecution however, it can be rebutted by referring to

[90]SC No 59/14 decided on 06.06.2014.
[91]SC no. 74/14 decided on 09.04.2014.
[92] SC No. 177/13 decided on 07.05.2014.
[93] SC No. 72/13 decided on 17.12.13.
[94]2006 Crl. L.J. 139.
[95]SC No.08/14 decided on 27.06.2014.
[96] SC No. 135/13 decided on 30.9.2015.

prosecution evidence and there is no requirement for the accused to present any independent evidence to rebut presumption. In the above mentioned case accused demolished the prosecution case by referring to the evidence lead by prosecution.

In the case of *State v Amar*[97], a victim aged 16 years testified against her friend who had allegedly committed penetrative sexual assault on her. The Special Court explained presumption under the POCSO Act:

> The use of expression "shall presume" has been defined in Section 4 of the Indian Evidence Act, 1872. As contrasted from the expression "if presume", the expression "shall presume" whenever used connotes "legal presumption" or "compulsory presumption" as contrasted from "factual presumption" or "discretionary presumption" emanating from the expression "may presume". "Legal presumptions" or "compulsory presumption" as are signified by the use of expression "shall presume" are inferences or proposition established by law, which the law peremptorily requires to be made whenever the facts appear which it assumes as the basis of that inference. The presumption of law are in reality rules of law, and part of the law itself and the court may draw inference whenever the requisite facts are developed in pleadings.
>
> Similarly whenever any law prescribes that the Court shall presume the existence of culpable mandatory stage or to draw a presumption regarding commission of any offence, unless the contrary is proved, the onus to prove the contrary undoubtedly shifts upon the accused. However, it does not discharges the prosecution of its duty to first establish and prove the facts, the existence of which can only lead to drawing of any such compulsory presumption or legal presumption by the use of the expression "shall presume".

The judge also considered a situation where the accused has been charged under both IPC and POCSO. The question was that in such situations should the accused lead evidence under POCSO and the prosecution under IPC? The Special Court explained that there could be two ways in which the defence could rebut the presumption:

(a) The accused could show that the ingredients of the offence have not been established by the evidence led by the prosecution. The accused could also establish that evidence of the prosecution witness is not cogent, convincing and reliable. This can be done by cross-examining the prosecution witnesses.

(b) The accused can lead evidence in his defence. This would be positive evidence that "signifies the nature of evidence which could make the commission of the offence in question by the accused improbable." An example of this could be "a plea of alibi which may show that the accused could not have been present at the relevant time and place where the alleged act is stated to have been committed by him or by statement of other witnesses, who admittedly were present at the scene of occurrence, that the accused did

[97] SC No. 57/13 decided on 20.03.2014.

not commit the offence in question." Another example is in a case of penetrative sexual assault, the fact that the accused was impotent could be presented as a positive evidence that he could not have committed the offence.

The Special Court observed that the accused cannot be expected to lead negative evidence for offences stated in Section 29. According to him, "negative evidence can only be led in those cases where the omission to do an act is an offence, such as an offence U/s. 21 POCSO Act where failure to report or record case by a person under this Act is itself an offence." He concluded that a harmonious construction should be adopted otherwise it would lead to an absurd situation. Thus, the prosecution will have to lead the evidence and establish the ingredients of the offence under the POCSO Act as well as the IPC beyond reasonable doubt.

**Some cases where presumption has been applied and resulted in conviction:-**

- In *State v Rajesh Shah*[98], victim aged 3 years was sexually assaulted by her relative. The Special Court applied presumption under section 29 and 30 of the Act and convicted the accused u/s 9 of the POCSO Act based on the sole testimony of the eye-witness.
- In *State v Jongi @ Ravi*[99], victim aged 11 years had testified against the accused who was a stranger. The Special Court convicted the accused as no reason for the victim to have falsely implicated the accused could be established by the accused and the presumption of culpable mental state could not be rebutted. The accused was convicted.

## 3.9. Outcomes in 'romantic' cases

In a large number of cases of romantic relationships, a missing complaint was filed by the family after which the prosecutrix and the accused were traced and found to have married each other. In most cases, the ceremonies of marriage were not performed, but this aspect was not scrutinized by the court. The accused and the prosecutrix usually exchanged garlands in a temple and considered themselves married. For instance, in *State v. Karan*[100], the prosecutrix stated that the accused said a few words to her inside a room and they were married. Subsequently, the parents solemnized their marriage. In *State v. Bobby*[101], the prosecutrix stated that the accused and she got married in a small temple and started living as husband and wife thereafter.

In few cases, the complaint was filed by the prosecutrix because of a breach of the promise to marry.

[98] SC No. 44/13 decided on 25.09.2014.
[99]SC No 30/13 decided on 06.05 2013.
[100] SC No. 127/13 decided on 25.02.2014.
[101] SC No. 69/14 decided on 28.11.2014.

The testimony of the prosecutrix in these cases were largely similar:

(a) In cases of elopement and marriage, the prosecutrix stated in court that she willingly accompanied the accused and that he did not coerce her. She also stated that she entered into a physical relationship with the accused voluntarily. In majority of the cases, the girl refused internal medical examination. In several cases, the girl also stated that she was above 18 years of age when she left with the accused. The family members of the girl also turned hostile in court. In some cases, they openly stated that they had accepted the relationship and did not want any action to be taken against the accused. There were several cases in which the prosecutrix was pregnant or had already had a child at the time of her deposition.
(b) In cases of breach of promise to marry, the prosecutrix admitted in court that she had filed the case out of anger because of the accused person's refusal to marry her. In some cases, the accused married her during the pendency of trial and in others the matter appears to have been compromised. In the latter cases, the prosecutrix stated that they were in love, but had not entered into any physical relationship.

In none of the cases in which the proseutrix admitted to a romantic relationship was the voluntary nature of the relationship or the age gap between them scrutinized by the court.

The outcomes in these types of cases have been as follows:

**(a) Acquittal because the prosecutrix turned hostile.**

The prosecutrix and other material witnesses turned hostile by either claiming that the girl was above 18 years and/or stating that no physical relationship had been established until after the marriage. There has been a general lack of scrutiny of age when the statements of the prosecutrix and material witnesses contradict the documentary proof and/or the results of the ossification test. In some cases, the girl also stated that the complaint had been falsely filed by her parents because they disapproved her relationship with the accused.

In *State v. SonuChauhan*[102]*,* as per the date of birth in the school records, the prosecutrix was around 11 years old. The radiological examination pegged her age between 14.5 and 15.8 years. Her mother stated that she would have been above 15 years. The prosecutrix and her father stated that she was above 18 years on the date of the incident and a false date of birth was given at the time of admission. The prosecutrix was five weeks pregnant when the complaint was filed. She claimed to have married the accused in a temple. A formal wedding was organised by her parents three months after the case had been filed. The findings of the radiological examination were ignored and the statement of the prosecutrix and her father on the point of age were accepted and the accused was acquitted.

[102] SC No. 97/13 decided on 28.02.2014.

In the case of *State v. Hemant*[103], the victim lodged a complaint stating that the accused had committed penetrative sexual assault on her. However, during her examination in the court she stated that the accusation was made based on the pressure by police and her parents and she also admitted to have married the accused. The father of the victim also reiterated the statement of the victim, stating they are married and he made the complaint out of angst as he did not like the relation between the accused and his daughter.

In *State v. Mohd Sakir Salmani*[104], the prosecutrix aged 16.5 years eloped and married the accused. While in her statement u/s 164, CrPC she stated that she was living with him for 4 months based on a promise to marry, in her examination-in-chief she stated that they had performed *nikah*. She also said she was above 18 years even though as per school records she was 16.5 years.

**(b) Acquittal justified on the basis of interpretation of provisions of the Act**

**(i) Acquittal based on interpretation of 'assault'**

One judge of a Special Court in Delhi relied upon the definition of assault in the IPC to arrive at the position that in cases involving children between 16 and 18 years, the term assault will be interpreted as implying coercion, intimidation, fear or exploitation.

In *State v. SumanDass*[105], the Special Court rejected the argument that under the POCSO Act, a married man could not have sex with his wife below 18 years. The explanation clause in the IPC was cited which states that sexual intercourse by a man with his own wife, wife being not below the age of 15 years, is not rape. According to the Special Court, the concept of consent is absent in POCSO Act and the focus is instead on 'assault'. With respect to the charge under Section 3, POCSO Act, it was held, "bare perusal of the said provision provides that sexual intercourse with a child is punishable u/s 4 of the POCSO Act provided it is in the nature of an 'assault'." He applied the IPC definition of the term 'assault' which means mean "any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person." Further "[o]ffence of "criminal force" is defined u/s 350 of IPC to mean "intentional use of force to any person, without that person's consent, in order to committing of any offence, or intending by the use of such force to cause or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance."

The State's obligation under the UNCRC to prevent exploitation of children was cited, and it was observed,

[103] SC No. 14/2014 decided on 03.09.2014.
[104] SC No. 41/2015 decided on 22.07.2015.
[105] SC No. 66/13 decided on 17.08.2013.

> …a perusal of the objects and reasons of the POCSO Act would show that the present enactment aims to curb such acts of sexual assault or harassment that are likely to bring an irreparable impact on the mental, physical and psychological health, freedom and dignity of a child.

The Special Court took into account that widowed mother and the community accepted the girl and of their marriage and concluded that "it would not be conducive to mental, psychological, physical health of the prosecutrix that her lawfully married husband be sent to the Jail." It was acknowledged that marriage at such tender age is a concern, but took the view that "Law cannot and should not prohibit teens from experimentation of such nature." The Special Court rejected the argument by the counsel on behalf of the Delhi Commission for Women that POCSO Act prohibits adolescents from having any kind of sexual relationship and observed that:

> if that interpretation is allowed, it would mean that the human body of every individual under 18 years of age is the property of State and no individual below 18 years of age can be allowed to have the pleasures associated with on[es'] body.

In *State v. Shiv Nand Rai,*[106] the defendant was accused of kidnapping a 14 year old girl, marrying her and committing aggravated penetrative sexual assault. At the time of recording her statement under Section 164, CrPC she stated that she was 19 years of age. She also stated that she went with the accused on her own and got married. Her marriage was registered based on her affidavit stating that she was more than 19 years. At the time of evidence, her father provided another date of birth which pegged her just above 16 years. The Special Court concluded that 'in the absence of any ossification test of the prosecutrix couple with doubts on her exact date of birth, the case of the prosecution that girl child was less than eighteen years of age is on slippery grounds.' The prosecutrix stated that she loved the accused. Her parents had agreed to her marriage with the accused but backed out due to caste considerations. They decided to elope and got married in a temple and started cohabiting. Based on *Varadarajan*[107]*,* the Special Court exonerated the accused of charges under Sections 363 and 366, IPC. With respect to the charge of rape, it was observed that:

> at the time she decided to elope with the accused…, if the accused had consensual sexual intercourse with her believing that she was above 18 years, accused cannot be held guilty of committing rape either by virtue of clause sixthly to Section 375 of IPC. Moreover, the culpability under the amended Section 375 (sixthly) effected w.e.f. 03.02.2013 cannot be applied upon him.

[106] SC No. 56/13 decided on 09.10.2013.

The definition of assault in the IPC was used to interpret Section 3, POCSO Act and emphasis was laid on the evidence of the girl in which she had stated that the accused had not subjected her to cruelty, fear, coercion, undue influence nor intimidated her in any manner nor was she exploited. Finally, the accused was acquitted under the POCSO Act by holding that:

> …in case of critical age between 16 years to 18 years, Section 4 of the POCSO Act has to be interpreted distinguishing between an act which is per se criminal for being in the nature of coercion, fear, inducement or exploitation committed upon a child from an act which would otherwise criminalize a person for having done something which is without any malice, ill will or ulterior motives.

The same reasoning was also applied in *State v. Suresh Kumar,*[108] *State v. Varun*[109] and *State v. Vicky*[110]. In *Suresh Kumar*, a girl aged 16 years and three months had eloped and married the accused, a 19-year-old boy. She was two months pregnant when the case came to trial. The Special Court noted the argument by the prosecutor that the ceremonies of marriage had not been performed, but given her pregnancy and their continuous cohabitation he observed: "there are available certain reciprocal rights and duties to them that are enforceable in law. Whether this "zaleem society" recognizes or not, for all practical purposes they are a married couple." He also directed that the girl be released from Nirmal Chhaya and be handed over to her husband and relied on the Delhi High Court's judgment in *Jitender Kumar Sharma v. State,* WP (Cri) No. 1003/2010 dated 11.08.2010 in support.

**(ii) Acquittal based on absence of knowledge that victim is below 18 years**

In *State* v *Avadesh*[111]*,* the prosecutrix age 15 years 4 months had gone missing with the accused. On being found, the prosecutrix told the police that the accused had kidnapped her after enticing her that he would marry her. He had taken her to Kanpur and they had spent a night in a rented accommodation where the accused had had sexual intercourse her. She also stated that she wanted to marry the accused and live with him. In his disclosure statement, the accused stated that the victim and he were in love with each other. She had asked him to take her away otherwise she would commit suicide as her parents wanted to marry her off to someone else. He also stated that she told him she was 18 years old. According to him, they had entered into a physical relationship voluntarily and without any influence or promise. They solemnized their marriage and at the time, the victim claimed that she was 18 years old. He also stated that the victim had made a false statement under the influence of her parents. In her cross-examination, the victim admitted that she had represented herself as a major at the time of marriage and

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[108] AIR 1965 SC 942
[108] SC No. 113/13 decided on 08.10.2013.
[109] SC No. 108/13 decided on 29.10.2013.
[110] SC No. 147/13 decided on 07.12.2013.
[111] SC No.82/13, decided on 01.08.2014.

that she was in love with him and had eloped because her parents intended to marry her off to someone else. The prosecution argued that since the victim was below 18 years her consent was immaterial. The Special Court referred to provisions of the MCOCA Act and arrived at the conclusion that:

> ...no presumption lies in favour of prosecution qua the age of child, this has to be proved like any other normal fact. *In order to show mensrea on the part of accused, prosecution has to show that either accused knew that the victim was child or to produce circumstances to show that there are reasons to believe for a prudent person that the victim was a child at the time of commission of offence. Thus, it can not be said that Section 30 excludes the mensrea qua the factum of age of victim altogether.*
>
> To bring home the guilt of accused for the offence punishable for any offence under POCSO Act, first fact prosecution has to prove beyond all reasonable doubt that the victim was below 18 years on the date of commission of crime. *Simultaneously, to show mensrea on the part of accused, prosecution is also bound to prove that either accused knew or having reasons to believe that the victim was below 18 years of age on the date of commission of offence. Unless prosecution proves the above fact by adducing sufficient evidence, prosecution will not be able to prove the guilt of accused for the offences punishable under POCSO Act.* (emphasis added)
>
> For instance, if a child who is just going to complete 18 years but few days before attaining majority, represented his/her friend or someone else as major and invited him/her for some sexual acts and on the basis of such representation and invitation such person indulges in sexual activities with such child. To my mind, in such a situation, the person (he/she) can not be held guilty under POCSO Act mere on the ground that the child has not completed his/her 18 years. The real test is as to whether the person (he/she) knowingly or having reasons to believe that the such child (he/she) was minor and if despite that he/she indulged in any sexual activities prohibited under the POCSO Act with such child, such person shall be liable for punishment under POCSO Act otherwise not. *In other words, if any person knowingly or having reasons to believe that he/she is below 18 years of age and thereafter indulged any activities which are prohibited under POCSO Act, such person shall be liable for the offences punishable under POCSO Act but if he does not know or does not having any reason to believe the same, he will not be guilty for any such act as in that situation mensrea will be lacking.*

Applying the above reasoning, the Special Court acquitted the accused under the POCSO Act, but convicted him for rape under Section 376, IPC because he had forcibly had sexual intercourse with the victim against her will before the marriage.

**(iii) Acquittal based on a distinction between acts arising out of a friendship and acts that hurt or annoy**

In *State v Ankit Dubey*[112], the accused had proposed marriage to the proseuctrix aged about 17 years and 9 months in a public place in front of several people. He also asked her to elope with him otherwise he would kill her family members. The prosecutrix admitted to having been in a relationship with the accused and opened up about it after her mother was sent outside the courtroom. The Special Court interpreted the offence of sexual harassment under Section 11, POCSO Act as requiring:

> something on the part of wrongdoer which may annoy the victim in one way or another way. But when a friend or lover of a child do some activities or pass some comments, which do not hurt or annoy the child, are not sufficient to attract the provisions of sexual harassment.

The Special Court reflected on friendships and noted that interactions and acts between friends would come not under the purview of the POCSO Act just because of parental disapproval. It was held:

> It is pertinent to state that provisions of POCSO Act do not prevent a child to have friendship or even love affair with opposite sex. It is pertinent to state that love always does not mean sexual relations. One may have even healthy love affair with his/her partner. To have a friendship is one of the basic human rights, and no child can be deprived from his/her said right. If any person exceeds the limits of friendship with a child, sufficient provisions have been enacted to deal with such person. *Mere fact that the conversation or activities between friends/lovers is not liked by other persons including their parents is not sufficient to invoke the provisions of POCSO Act*

**(c) Acquittal because of marriage**

Though the POCSO does not create an exception for marriage, several judges have acquitted the accused on the ground that the accused had married the victim and the victim and her family had no objections against the accused. In some cases, the accused was granted interim bail so that he could marry the victim.

In *State v. Kuldeep*[113], the 17 year old prosecutrix was engaged to the accused. The engagement was broken off when her family found that he used to take drugs. He visited the prosecutrix when her mother was hospitalized and had forcible relations with her against her consent. A police complaint was filed. The accused was granted interim bail so that he could marry the prosecutrix who was pregnant. The court acquitted the accused.

In *State v Fateh*[114], the prosecutrix had lived with the accused in different places based on his promise to marry her. They had had sexual intercourse and she became pregnant. He refused to marry her. She then went and filed a complaint with the police. In her statement in court

[112]SC No.95/13 decided on 26.05.2014.
[113] SC No. 71/2014 decided on 07.03.2015.
[114] SC No. 55/2014 decided on 25.02.2015.

she stated that she was now married to him and did not want to take any action against him. She also said that she did not have any physical relations with him prior to the *nikah*. The judge did not consider her pregnancy at the time of filing the police complaint or her age, which was not specified in the judgment and acquitted the accused.

In *State v. Jay Prakash*[115]*,* a missing complaint was filed by the mother of the proseuctrix aged 17 years 11 months. She was recovered from the custody of the accused in a village in Uttar Pradesh and brought to Delhi. In her statement under Section 164, CrPC she stated that she had gone with her boyfriend and they got married in his village and she wanted to live with her in-laws. In his disclosure statement, the accused stated that the prosecutrix accompanied him and they got married. He denied having sexual intercourse with her. However, in her testimony in court, the prosecutrix stated that the accused took him to his village and promised to marry her but no marriage took place. She also stated that the accused had sexual intercourse with her without her consent. When a leading question was put to her, she accepted that the accused applied *sindoor*on her forehead, gave her the ceremonial bangles and a new wedding suit, but that no marriage took place. The Special Court relied on *S.Varadarajan v. State of Madras*[116]and exonerated the accused from the kidnapping charges because the prosecutrix had accompanied him willingly. He also exonerated the accused under Section 366, IPC because there was no evidence that the prosecutrix had been forced to marry the accused. On the point of sexual intercourse, the judge considered her age, her behaviour, her refusal of an internal examination, and her failure to state the fact of sexual intercourse in her 164 statement and to the doctor and concluded that it did not inspire confidence. It was also noted that the accused made no mention of having sexual intercourse in his disclosure statement even though this statement is not admissible as evidence. He concluded that there is no corroboration of her statement in court on record and that "if her version of sexual intercourse … is believed, *it was consequent to her marriage or ceremonies akin to a marriage and no assault was committed in the process."* He also highlighted that the defence had drawn out the fact that the accused and the prosecutrix belonged to different castes and her family were opposed to their marriage due to caste factors. He interprets these facts as proof of tutoring of the prosecutrix by her parents "to sacrifice her feelings, betray her love for the accused, and instead honour their social status."

In *State v. Aas Mohammad*[117]*,* the prosecutrix aged 14 years alleged that the landlord had repeatedly raped her and had threatened harm to her family if she were to tell anyone about it. The matter came to light when her mother took her to the doctor and an ultrasound revealed that she was six months pregnant. At the bail hearing, the accused informed the Special Court about his decision to marry the prosecutrix.

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[115] SC No. 89/13 decided on 04.10.2013.

[117]AIR 1965 SC 942.
[117] SC No. 78/2013 decided on 13.08.2013.

The prosecutrix and her mother also agreed to the marriage. The father of the accused agreed to provide shelter to mother of the prosecutrix and her other children, give his family name to the baby, deposit Rs.30,000 vide FDR in the name of the prosecutrix, and purchase a jhuggi for the mother. He also offered to allow the mother and other siblings to live in his house till the jhuggi was bought. The Special Court granted the accused bail based on the statements of his father, the prosecutrix and her mother "subject to the conditions that he will marry the prosecutrix and as per undertakings given by his father in his statement" and the other conditions would be met before the next hearing. However, on the next date the court was informed that all conditions had been met except the FDR, as she did not have any identity proof and the marriage. Since the proseuctrix had delivered a child, as per Islamic customs marriage could be solemnized only after 40 days of the delivery. The Special Court extended the bail and the accused paid Rs 30,000 in cash to the proseuctrix. The prosecutrix turned hostile in court and stated that she was in love with the accused and had sex with him under the belief that he would marry her. When he refused, her mother and she approached the police. She said the accused had married her when he was out on bail and she was living with him as his wife. Her mother testified similarly and also stated that no definite age proof was available and the prosecutrix was about 18 years. No ossification test was conducted. Based on the statements of the prosecutrix and her mother and the fact that the accused had married her and accepted the child, the Special Court acquitted the accused.

(d) **Conviction but no sentence**

In only one case of marriage, the accused was convicted under the POCSO Act. In *State v. Parhlad,*[118] the prosecutrix aged 17 years and two months, eloped and married the accused willingly without any enticement or pressure from him. She had been in a relationship with him for four years. In his disclosure statement, the accused claimed that the prosecutrix was above 18 years when they got married and that her father registered a false case against him because he was opposed to their relationship. Their marriage lacked legal sanctity because the ceremonies of marriage were not performed. They got married again after she was released from the Children's Home upon attaining the age of 18. The victim turned hostile during the examination-in-chief. On the point of age, the Special Court concluded that the defence could not disprove the authenticity of the school record. The Sub-registrar (Birth and Death) was examined to prove the birth certificate. While the Special Court acquitted the accused of the kidnapping charges, she found him guilty under Section 5(l), POCSO Act because the prosecutrix was below 18 years. While under Section 6, the minimum sentence is 10 years imprisonment that may extend to life imprisonment. Reliance was placed on judgments of the Supreme Court (*State of Uttar Pradesh vs. Sattan alias Satyendra and Others,* (2009) 4 SCC 736, *Bachan Singh vs. State of Punjab,* (1980) 2 SCC 684 and *Shankar Kisanrao Khade vs. State of Maharashtra,* (2013) 5 SCC 546) that outlined guidelines on sentencing and drew up a list of 10 mitigating factors, which included factors such as follows:

[118] SC No. 113/13 decided on 31.07.2014.

(iv) The convict apparently did not act out of lust to merely ravish the victim K, but stood by her to give her emotional support after the untimely death of her mother.
(v) Though, victim went with convict on 30.10.2012, the convict brought victim back on 31.10.2012 and thereafter, they both decided to wait for their marriage, till victim became 18 years old.
(vi) Though, victim K again went away with the convict on 19.03.2013, they first got married and then cohabited together, but unfortunately said marriage had no legal sanctity.
(vii) The convict waited for victim K to attain age of 18 years and then solemnized marriage with her at AryaSamajMandir…and took her home with him.
(viii) The entire conduct of the convict shows that he wanted a long term relationship of marriage and companionship with victim K and not to take advantage of her vulnerability and strained relations with her father.
(x) The victim K is now a legally wedded wife of the convict and is 5 months pregnant.

Based on the mitigating factors, the defendant was sentenced to the period already undergone during trial.

**(e) Conviction and sentence**

In *State v. Irfan*[119]*,* the accused had allegedly made the victim aged 12 years pregnant and murdered her. In court, her parents turned hostile but the accused admitted that he had been in a relationship with the victim for over a year and had fathered the foetus, a fact that was confirmed by the FSL report. The charges of murder could not be proved and the accused was convicted under the POCSO Act.

In *State v. AniketVishnoi*[120]*,* the prosecutrix admitted to being in a relationship and having sexual intercourse with the accused because he promised to marry her. Since it was established that she was below 16 years, the accused was convicted. The Special Court observed:

> Clearly when prosecutrix was minor and was even below the age of 16 years, her consent becomes completely immaterial and is of no consequence. The prosecutrix clearly stated that accused induced her away on the promise of marriage. She also stated that accused established sexual relations with her repeatedly on the promise of marriage. This inducement also clearly explains as to why prosecutrix did not object to the acts of the accused or did not raise hue and cry when accused established physical relations with her.

**(f) Convicted for kidnapping under the IPC but acquittal under the POCSO Act.**

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[119] SC No. 22/14 decided on 07.09.2015.
[120] SC No. 111/13 decided on 30.4.2015

In *State v. Nizam Ahmed,*[121]the prosecutrix aged 14 years admitted that she was in a relationship with the accused and had accompanied him voluntarily. While in the statement under Section 164, CrPC she admitted to having had sexual intercourse with him, she denied this during the examination in court. The Special Court acquitted the accused of the charge of kidnapping by placing reliance on *S. Varadarajan v. State of Madras*[122] in which the Supreme Court held that:

> It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purpose of S.361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in formation of the intention of the minor to leave the house of the guardian.

In nine cases, the accused pled guilty to the charge of kidnapping the prosecutrix, but denied having physical relations with her. For instance, in *State v. Manish Sharma,*[123]*State v. Mohd Azad*[124]*,* and *State v. Virpal,*[125]the accused were charged with offences under the POCSO Act and the IPC. In *Manish,* the prosecutrix was 13 years old, in *Virpal*15 years old, while in *Azad,* she was a student of class X. In *Manish,* the prosecutrix stated that she went away with the accused, married him, lived with him but denied having sex with him. In *Azad,* the prosecutrix stated that her parents had misunderstood her relationship with the accused and had falsely implicated him. However, in both cases, the accused admitted to the kidnapping charges. In these cases, they were convicted under Sections 363/366 IPC and acquitted under the POCSO Act. Interestingly, in *Azad,* though the prosecutrix claimed that she was above 18 years, the judge held her to be a minor because of the admission by the accused and his non contestation of her school record.

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[121] SC No. 17/2014 decided on 11.12.2014.

[123]AIR 1965 SC 942.
[123] SC No. 191/13 decided on 22.07.2014.
[124] SC No. 113/13 decided on 07.04.2014.
[125] SC No 191/14 decided on 17.7.2015.

## 3.10. Special Courts' response to investigation lapses

Judges have taken serious note of the discrepancies in most of the cases and have criticized the police and the investigation agency for shoddy investigation.

**(a) Direction to initiate departmental action**

In *State v Rashid,*[126] the Special Court directed departmental action against the police for several lapses in investigation and making false statements under oath. These included inexplicable delay in registration of the FIR, inordinate delay in recording the statement, unreasonable delay in sending the accused for medical examination, non-compliance with Section 157, CrPC and Section 19(6), POCSO Act, and false pleas to explain the lapses. The court directed the judgment copy to be sent to the Commissioner of Police so that necessary departmental action could be taken against the errant officials.

In *State* v *Laxmi Kant*[127]*,* the Special Court explained the damage caused to the prosecution's case by the police's attempt to stage the investigation:

> …there is no requirement under the law to conduct the entire investigation at the spot. The only requirement of law is that the investigation should be fair, transparent and unbiased. In the zeal of projecting that entire investigation was conducted at the spot, investigating officers commit inherent defects in the investigation ... which ultimately create hurdles for the prosecution to prove the guilt of accused. This attitude is not in the interest of administration of criminal justice and this requires to be changed.

The Special Court ordered that a copy of the judgment be sent to the Commissioner of Police so that this malpractice could be addressed and appropriate action could be initiated against the erring investigating officer.

**(b) Criticism of shoddy investigation**

[126] SC No. 56/13, decided on 31.10.2014.
[127] SC No. 134/13 decided on 22.05.2014.

In *State v Avadesh*[128], the Special Court criticized the police for shoddy investigation and deliberate failure to bring on record documents related to the solemnization of marriage between the accused and the victim. The court observed that investigation has to be impartial otherwise it will erode public's faith in criminal justice administration. The casual and irresponsible approach of the IO was also criticized as the disclosure statement of accused, arrest memo, personal search memo did not carry the signature of the SI; the memo and site plan did not bear signature of witness constable and the seizure memo of exhibits of accused did not bear the signature of constable. The judge also pointed out that even during trial no sincere effort was made by investigating agency to furnish any reasonable explanation for these lapses.

In *State v Tarun*[129], the Special Court was critical of the fact that the police had called the victim to the police station late in the night to record her statement. The IOs explanation that the victim came to inquire about the time for the 164 statement was not accepted by the court as-

> By no stretch of imagination it can be said that victim would go to police station after the midnight to know the date of recording of her statement U/s 164 Cr.P.C. The statement of the mother of victim that the police asked them to come to PS is relevant here as they were taken to the police station and interrogated there. There is no doubt that IO had given false justification...These facts raises serious doubt about the investigation done by police.

The Judge also noticed the inconsistencies in the investigation conducted by police, as the victim had stated that complaint, and site plan, were prepared in the police station and the arrest memo, personal search memo was signed by her in the police station, whereas the IO stated that these documents were prepared on the spot.

In *State v Dashrath Sharma,*[130]the Special Court criticized the investigating agency and the prosecution for not filing the PCR form as it 'was primary documentary evidence to prove the nature of information which was given to the police'. The court observed that the document was withheld by prosecution and police without any reasonable explanation. In *State v Shiv Ram*[131]and *State v Sajid Ali*[132], the investigating Officer had failed to find out who made the call to the police station. In *Sajid Ali*[133]*'s* case IO did not even record the statement of the PCR officials, which again reflect on the fact that the investigation was not conducted properly.

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[128]SC No.82/13 decided on 01.08.2014.
[129] SC No. 131/13, decided on 30.04.2015.
[130]SC No.9/14, decided on 22.09.2014.
[131] SC No. 167/13, decided on 22.05.2014.
[132] SC No. 165/13, decided on 22.08.2014.
[133] SC No. 165/13, decided on 22.08.2014.

Special Courts have criticized IOs for not collecting documents to prove the age of victims in several cases. In *State v Bijender,*[134] the accused was acquitted under POCSO because of the failure to establish the age of the victim and was convicted under IPC instead. IOs have also been reprimanded for not getting age determination done through a medical board.[135]The duty of senior police officials to ensure compliance with procedures was emphasized and it was observed that:

> Since, the victim was not having any document qua her age, it was the duty of the investigating officer to have the victim examined by Medical Board for determination of her age, but he has failed to do so for reasons best known to him. It has been repeatedly observed by this court that the Investigating Officers make no effort to collect documents relating to age of the victim/prosecutrix in border line cases, where the age of the victim/prosecutrix is between 15/16 years and above, thus, giving a readymade defence to the accused to take a plea that the victim was above 18 years of age as on the date of commission of offence. This also has an adverse effect of taking the case out of the purview of the POCSO Act, which prescribes more stringent punishment for offences of sexual assault and sexual harassment etc. as compared to corresponding provisions under the Indian Penal Code. It is unfortunate that the I.Os in such cases come up with plea that such cases are amongst first few cases investigated by them. Even then, the duty of the senior officers i.e. the SHO and the ACP concerned, who forward the charge sheet to scrutinize the same does not get absolved. Such instances indicate malafide intention on the part of the Investigating Officers/Investigating Agency and are required to be addressed through appropriate directions/standing orders in this regard, from the Commissioner of Police.

In *State v Mullah Muzib,*[136] the Special Court criticized the IO for the lack of sincere effort to collect scientific evidence, failure to act diligently to collect the inner clothes of both victim and accused. It observed: 'Had the semen of accused be found at the underwear of the victim, it would have been substantive piece of evidence to prove the guilt of accused'. In the case the accused was acquitted as the prosecution failed to prove the charge of carnal intercourse against him.

**(c) Lapse of joining public witnesses**

The lapse of joining public witnesses was pointed out by several judges. For instance, in *State v Sunny*[137]*,* the IO failed to record statement of public witnesses though the alleged incident of eve-teasing happened on the road. He also failed to record statement of blood relatives.

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[134]SC No. 142/13 decided on 25.08.2014.
[135]*State v. Gurdeep Singh,* SC No. 61/13 decided on 11.04.2014.
[136]SC No.204/13 decided on 04.12.2014.
[137] SC No.122/13, decided on 30.04.2014,

The IO was further criticized for not taking action against the blood relatives who refused to give statement because they did not want to attend the Court, which is a flimsy ground.

The lapse of the IO in not mentioning the child as a witness while framing charge was pointed out in the case of *State v. Badku*[138], though he had recorded her statement u/s.161 CrPC and had also got recorded her statement u/s.164 CrPC. Considering that the child was a school going child of about 8 years and was the only witness to the alleged acts of sexual assault committed by the accused and threats extended to her by the accused, the Special Court deemed it appropriate to examine her as a court witness on request made by learned Additional PP.

In *State* v *MohdZahid,*[139] the IO was criticized for not recording any statement of the public witnesses, which would have corroborated the evidence of the victim. The Special Court convicted the accused despite this lapse and observed that "it does not mean that no person had witnessed the incident. Mere fact that investigating officer failed to trace out any such person is not sufficient to discard the testimony of victim, which appears otherwise to be trustworthy."

**(d) Inconsistencies between the versions of the victim and that of the police**

In *State v Dalip*[140]*,* the Special Court noted that, a complaint about quarrel was received in the police station through a phone call, however the same was not recorded. This is recognised as crucial because it is the earliest version of information received by the police. In the same case, in his cross examination, the IO stated that he reached the spot of incident 10 minutes after receiving the phone call. However, the statement of the victim and her mother is different and they submit that they had gone to the police for making complaint of the incident. Many such discrepancies regarding the IO's versions and the version of prosecution witnesses was identified by the judge with reference to verifying the authenticity of the age proof of victim, presence of eye witness and the presence of the accused in the spot of incident. The biggest loophole in the investigation was the place of occurrence of the incident, the site plan and the statement in the court provided by the IO indicated different locations, referring to which Judge stated, "What more an IO can do to destroy his own case and he has successfully done atleast with this case".

[138] SC No. 173/13, decided on 06.01.2014.
[139] SC No.103/13, Decided on 08.10.2013, .
[140] SC No. 120/2013 decided on 16.01.2015.

In *State v Dushyant*[141], the prosecutrix and her mother testified against the accused. However, the court concluded that there has been "no fair investigation" and pointed to discrepancies in crucial aspects such as the IO stating that he recorded the statement of the prosecutrix and her mother at the spot of the incident whereas the prosecutrix in her cross- examination has stated that the police did not visit her house.

A poor investigation casts a shadow on the prosecution's entire case. In *State of A.P. v. Punati Ramulu,* 1994 Supp (1) SCC 590, the Supreme Court held:

> Once we find that the investigation officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stopped to fabricate evidence and create false clues....

This was relied upon in several cases in which Special Courts found discrepancies in the date of arrest and place of investigation.[142] In *State v Rohit,*[143]the IO tried convincing the Court that the victim's statement was recorded in the hospital, which was actually not true. The court concluded that the IO was neither acting diligently nor in accordance with law.

In *State v Arun*[144]*,* the Special Court noted that not only was the statement of victim child recorded by a police officer of the rank of Head Constable but the entire subsequent investigations were also entrusted to the said Head Constable in utter contravention of Section 24 (1) of the POCSO Act. However, the court also observed that the testimony of the victim cannot be discarded due to this and convicted the accused.

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[141] SC No. 41/2014, decided on 26.04.2014.

[142]*State v. Gulshan,* SC No.16/14 decided on 13.04.2015; *State v. Laxmi Kant,* SC No. 134/13 decided on 22.05.2014; *State v. Tarun,* SC No. 131/13, Decided on 30.04.2015.

[143]SC No.127/14, decided on 29.08.2014.

[144]SC No. 73/13, decided on: 31.03.2014,

## 3.11. Special Courts' response to delays in the filing of the FIR

In the case of *State v. SurajTiwari*[145] a 3 day delay in filing of FIR went against the victim in a case of incest by the father. The delay in filing FIR and recording statement became fatal in the case of *State v Shiv Ram*[146]as there was no corroborative evidence or medical evidence to support prosecution case and testimony of victim. There was no reasonable explanation given and the explanation given was not convincing to justify the delay. However, in *State v. Tej Kumar,*[147]the court did not discard the prosecution case on account of delay in filing FIR or on the delay in recording 164 statement or for not conducting the investigation fairly and diligently by the IO. In the case IO, sent the victim and accused for medical examination and only when they returned from the hospital the FIR was filed. IO did not file the FIR despite the fact that victim's statement alone was sufficient to file the FIR as it pertained to a cognizable offence. In *State v Pappu*[148]*,* the Special Court looked in to the circumstances on the day of the incident, where the child after being subjected to aggravated sexual assault was in a state of shock and mentioned about the incident to her mother the next day. The court considered the typical orthodox Indian scenario, taboo surrounding exposure of one's daughter to the police about sexual assault and the trauma a mother faces. The court considered the psychosis of the victim's mother and did not find it as a reason to be fatal to the prosecution case.

## 3.12. Consideration of Medical Evidence

The judgment analysis revealed that medical evidence has not comprised an important component of the criminal trial under POCSO Act. Where the victims turn hostile, medical evidence is rarely looked into and the case is disposed. For instance in *State v. Shiva*[149] a minor girl alleged to have been subjected to penetrative sexual assault failed to testify against the accused and turned hostile. When the prosecution sought to put forth the medical evidence in the matter, the judge dismissed the case stating:

> In the present facts and circumstances, this evidence would have been relevant to support the oral testimony of the witness. The scientific evidence in this case is only of corroborative nature. It does not substantiate the charge against the accused sans the

[145]SC No. 97/13, decided on 14.09.2015, hi.
[146] SC No. 167/13, decided on 22.05.2014, i.
[147] SC No.53/13, decided on 08.10.2013i.
[148] SC No. 100/2014, decided on 06.02.2015.
[149] SC 32/2014, decided on 14.10. 14

factual testimony of witnesses as aforesaid. This Court is of the view that although the relevance of scientific evidence is very important during the course of a criminal trial, yet the relevance of something does not exist in a vacuum. The relevance must be related to some existing and incriminating facts. In this case there is no incriminating facts from the mouth of the victim who could be the sole link between the offence and the offender. Hence this plea of relevance is of no use in the present circumstances.

Similarly, in *State* v *Aasif*[150] the victim was a mentally challenged girl and was found to be incompetent to testify. There was medical evidence to show that there was a fresh tear and a little blood oozing out of her private part. The mother and the eye witness resiled from their statements and the medical evidence was not appreciated in this case.

In several of the cases, either the victim herself or the parents of the victim refused internal gynecological examination. In few cases, judges drew an adverse reference because of the refusal to consent to medical examination (*State v. Md. Afroz*[151]). However, this was not the dominant trend. For instance, in *State v. Pappu*[152] a 4 year old girl was alleged to be sexually assaulted. The defence counsel in the case argued that the accused was innocent by stating that the mother of the victim had refused internal gynecological examination of the child. However, the judge dismissed this argument observing that:

> Seeing it in typical orthodox Indian scenario also, the refusal of mother in such circumstances cannot be faulted and in any case, in the teeth of unshaken testimony of child victim N, non-examination of child victim N gynecologically is not fatal to the prosecution case.

In the case of *State v KapilTyagi*[153], a child aged 9 years was sexually assaulted by the accused who had pulled her inside a room and touched her mouth with his mouth. Rejecting the plea of the accused that no medical evidence was available, the Special Court observed:

> It is difficult to comprehend that what kind of medical evidence could have brought by the prosecution to corroborate this act. It is not the story of the prosecution that excessive force was used by the accused against the victim or the victim resisted that force and in that process she got injured. The medical evidence also cannot be collected when the allegation is about touching of mouth with the mouth of other person.

However, a different approach was adopted in *State v. Deshraj.*[154] In this case, the child aged 4-5 years had stated that the accused inserted his penis in her mouth and that he had inserted his finger into her private parts to the police and in her S. 164 statements. The accused had not ejaculated in the child's mouth. As the child witness was not feeling comfortable to depose on date fixed for hearing it was adjourned.

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[150] SC No.206/13, decided on 08.09.2014.
[151] S.C. No. 159/13 decided on 10.03.2014.
[152] S. C 100/2014 decided on 06.02.2015
[153] http://indiankanoon.org/doc/74636257
[154] SC No. 136/2013 decided on 19.04.2014.

A month later the mother of the child and the child turned hostile and denied having subjected to sexual assault. Although the prosecutor pointed to the presence of other scientific evidence that could be appreciated, court was of the view that

> …in absence of any inculpatory evidence from the mouth of victim and her mother i.e. complainant, it would be shear wastage of time and resources of the Court to allow further prosecution evidence that too for nothing.

There are a very few cases where medical evidence has been considered despite the hostile testimony of the victim. For instance, in *State v. Irfan*[155], the victim was unable to testify as she was dead but the court relied upon medical evidence. FSL report was used to convict the accused, although all material witnesses turned hostile. FSL report revealed that the accused was the father of the fetus within the dead victim child. However, in this case it is important to note that the accused admitted his physical relationship with the victim and claimed to be in a consensual relationship with her.

In several cases especially where the victim turns hostile, the medical evidence in the case has been cited to dismiss the charges against the accused. It is often stated by judges that even the medical evidence does not support the case of the prosecution.

In one case, medical evidence has been used to lower the charge against the accused. For instance in the case of *State v. Ram AvtarGiri*[156], the victim, a boy aged 5 years, alleged that he was penetrated by the accused but medical evidence could not corroborate the element of penetration and hence the accused was only convicted for aggravated sexual assault (although he was charged for aggravated penetrative sexual assault.)

It is seen that in several cases, as a routine, a medical examination and potency test of the accused is conducted. Sometimes the medical examination is conducted even where it is unrelated to the charges alleged. For instance, in *State v. Deelip*[157]a medical examination was conducted although the accused was only charged for the offence of Sexual Harassment which is a non-touch based offence. A number of cases reveal that the medical examination of the girl victim is done by a male doctor (eg. *State v. Pancham*[158]).

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[155] S.C. No. 22/14 decided on 07.09.2015.

[156] S.C. No. 78/13 decided on 30.03.2015.

[157] S.C. No. 36/14 decided on 20.05.2014.

[158] S.C. No. 02/14 decided on 25.07.2014.

# Chapter IV. Challenges and Issues

Challenges faced by victims, prosecutors, and judges during trial, as well as issues arising in the interpretation and application of the POCSO Act have been identified, drawing from the interviews with the stakeholders as well as the analysis of judgments.

## 4.1 Inconsistent approach of Special Courts with respect to age-determination

Age determination formed a crucial part of the inquiry in most cases owing to the poor state of age documentation. In several cases, the parents of the victim were uncertain regarding the exact date of birth of the child. In addition to lack of documentation, the age of the victims (or even the alleged age) were not clearly specified in about 108 cases (16%) despite age being an important factor in POCSO cases. Many cases instead refer to the victim in relation to the class that he or she was studying. Although school records of the child are adduced in most of the cases, the records in turn reveal that the age of the child was entered only upon the oral statement of the parents and were not on the basis of any official date of birth certificate.

The ambiguity in regards to the age of the child is sometimes so stark that during the course of the case the allegations regarding the age of the child vary anywhere from11-12 years and sometimes extends till even 27 or 28 years old. This in turn has resulted in ad hoc age determination processes especially in borderline cases where the application of the POCSO Act hinges on the minority of the victim. For instance, in *State v. Santosh Kumar*[159], the father of the victim initially filed a complaint alleging that his 13 year old daughter was missing from home. The victim was later recovered from the house of the accused with whom she had eloped and even conceived a child. Her school records revealed her age to be 11 years on the date of incident. During the evidence stage, the victim alleged to be 20 years of age while in her statement recorded under section 164 of the CrPC she claimed to be 19 years on the date of incident. The complainant who is the father of the victim was unable to produce any birth certificate and instead testified that:

> …he got married in his Village at UP about 21 years ago. He shifted to Delhi about 10 years ago and he had brought prosecutrix from Village to Delhi 2 years back and got her admitted in 4th class. Prosecutrix had already completed her 5th class in Village. Prosecutrix was admitted in the school in the year 2012 but he does not remember the date and month.

[159] SC No. 106/13 decided on 14.02.14.

Thus, in the above case the victim is alleged to be anywhere between 11 to 20 years of age on the date of incident. Despite the large ambiguity in regard to the age of the victim, no ossification test was conducted. Based upon the above testimony of the father, the court determined that the date of birth of child in the school records was wrong and held that "[a]s per evidence discussed above, it appears that prosecutrix was 16-17 years of age at the time of this incident."

Section 34(2), POCSO Act provides a sketchy process for age-determination. It states that the age should be "determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination." The matter of age-determination has been addressed in great detail under the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 (Delhi JJ Rules) and by the Supreme Court in several judgments. Rule 12(3) of the Delhi JJ Rules state that the Court or Juvenile Justice Board or Child Welfare Committee should seek evidence by obtaining:

> (a)i. the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> ii. the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> iii. the matriculation or equivalent certificates, if available;
>
> (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

In *Jarnail Singh v. State of Haryana,*[160] the Supreme Court held "though Rule 12 [of the Juvenile Justice Model Rules] is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime."[161] No reliance was, however, placed on this provision or on *Jarnail Singh* in majority of the judgments under the study. For instance, in *State v. MunnaLal*[162] where school documents showed victim to be 16 years of age was accepted citing *Jarnail Singh, Ashwani Kumar*, the JJ Rules and Delhi JJ rules although the school authorities admitted that no birth

[160] *Jarnail Singh v. State of Haryana,* Criminal Appeal No. 1209 of 2010, available at http://indiankanoon.org/doc/70565223/. The ruling in this case was upheld in the case of *Mahadeo S/o KerbaMaske Vs. State of Maharashtra and Anr.*, (2013) 14 SCC 637

[161] *Id.* at para 20

[162] S.C. No. 85/2013 decided on 30.10.2013.

certificate or documentary proof of age was submitted at time of admission. The judge concluded that "[n]othing has been brought on record to show that the school authorities were in any manner motivated to manipulate their record to favour the case of the prosecution." In several other judgments, reliance has been placed on older rulings of the Supreme Court on age-determination.

In *Ashwani Kumar Saxena v. State of Madhya Pradesh,*[163] the Supreme Court observed that several courts in the country were not merely making an inquiry into age as mandated by the JJ Act but were proceeding to conduct a trial into this matter and held that:

> There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. **Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination.**[164] (emphasis added)

The Court further stated that:

> We have come across several cases in which trial courts have examined a large number of witnesses on either side including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted.[165]

Thus the court in *Ashwani Kumar Saxena* has categorically stated that courts cannot look into the correctness of the documents adduced but must accept them at face value.

Recently, the Supreme Court in *State of Madhya Pradesh v. Anoop Singh*[166] involving a charge of statutory rape under section 376 of the IPC against a child less than 16 years of age, overlooked the discrepancy of two days between the birth certificate and the date of birth mentioned in the school records. As per medical opinion, the child was above the age of 15 but below the age of 18 years. The defence put forth the argument that since there was a discrepancy in the records of the victim, the medical opinion should be relied upon which does

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[163] *Ashwani Kumar Saxena v. State of Madhya Pradesh,* AIR 2013 SC 553, available at http://indiankanoon.org/doc/57506863/
[164] *Id.* at para 36
[165] Id. at para 37
[166] Criminal Appeal No. 442 of 2010, available at http://supremecourtofindia.nic.in/FileServer/2015-07-06_1436158822.pdf

not confirm that the child was below the age of 16. The Court, however, rejected the argument and placed reliance on the documentary evidence as the discrepancy was considered immaterial.[167]

However, in earlier decisions of *Omprakash v. State of Rajasthan*[168], and *BiradmalSinghvi v. AnandPurohit*[169] it has been held that where the school records themselves are ambiguous and does not conclusively prove majority, a medical opinion cannot be overlooked. The Court did not uphold the primacy of school records as done in *Ashwani Kumar Saxena*. The court in Omprakash in this regard observed that:

> The benefit of benevolent legislation under the Juvenile Justice Act obviously will offer protection to a genuine child accused/juvenile who does not put the court into any dilemma as to whether he is a juvenile or not by adducing evidence in support of his plea of minority but in absence of the same, reliance placed merely on shaky evidence like the school admission register which is not proved or oral evidence based on conjectures leading to further ambiguity, cannot be relied upon in preference to the medical evidence for assessing the age of the accused.

While looking into the ruling in the above cases it is important to note that these cases with the exception of *Jarnail Singh* have all concerned age determination of child accused to be in conflict with law and not child victims although the same legal framework applies for both categories of children. Besides, the ruling in *Ashwani Kumar* is later in time and has been reiterated in several cases of the Supreme Court since then with the aim of ensuring that that the benefits of the JJ Act are accorded to the accused.

The Delhi High Court has issued guidelines to IO's, Magistrates and other stakeholders involved in the implementation of the JJ Act 2000, with respect to age determination of juveniles.[170] These set of guidelines should also be borne in mind by Special Courts.

Special Courts have not accorded face value to the documents which are adduced despite the ruling in the *Ashwani Kumar* case as in many cases the victim herself testifies that the date of birth given at the time of school admission was incorrect. An inquiry into these documents often reveals that date of birth entries into school records are made upon the oral statement of the parents or upon an affidavit given by them and are seldom based upon any official date of birth certificate. For instance, in the case of *State v. ChiranjitLal*[171], the documentary proof showed victim less than 18 but reliance was not placed on it because it was based on the oral statements of the father. Reliance was placed on *Birdi Mal Singhavi v. AnandPurohit,*[172] a case under the Representation of the People Act, 1951, in which the Supreme Court held

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[167] Id. at para 11
[168] 2012 AIR SCW 2462
[169] 1988 (Supp.) SCC 604
[170] *Court On Its Own Motion v Dept. of Women and Child Development &Ors.;* 2013(3)RCR(Criminal)382
[171] S.C. No. 199/13 decided on 30.08.2014
[172] 1988 Supp. SCC 601

that no evidentiary value could be given to date of birth entry in absence of material on which entry is made. The court relied upon this despite the contrary opinion in *Ashwani Kumar* case.

Special Courts have adopted a lenient approach towards age-determination in most cases in which the allegation reveal that the child was in a relationship with the accused or voluntarily left with him to get married. For instance, in *State v. Ajit Kumar*[173]the mother of the victim filed a complaint that her daughter aged 14 years went to school and never returned. Three months later the daughter was found and it transpired that she voluntarily went with the accused, married him and later even had a child with him. The examination of witnesses in the present case took place two years after the institution of the case and by that time even the parents of the victim had turned hostile and both of them testified that the victim was 20 years of age as on the date when she left home. The victim also testified that she was 20 years old and went further to state her parents gotten her wrong age recorded in the school records. The judge admitted this testimony of the victim and observed that "[p]arents of the prosecutrix are the author of the date of birth of the prosecutrix in the school records. In view of their statements, no reliance on the school records can be placed."

Even where judges are accommodative of the oral testimonies of the parents with regard to age, the discrepancy in testimonies amongst the parents itself compels these judges to record a finding that minority could not be proved. For instance, in *State v. Yashpal*[174], the parents of the victim had not registered the birth of the child. The father testified that he had not maintained any record of date of birth of his children while the mother testified vaguely that she had written down the date of birth of all her five children but could not produce such a record before court. Further, while the father testified that the victim was born two years after the birth of their first child, the mother testified that the victim was born four years after the birth of their first child and stated that a child born in-between her first child and the victim had died. The victim was also inconsistent in her testimony regarding her date of birth. Hearing the above testimonies of the witnesses, the judge concluded that the prosecution had failed to establish that the victim was minor when she went missing form her house and thus POCSO Act cannot apply.

Sometimes even where a birth date has been registered, the information is either recorded poorly or maintained so carelessly, that they cease to be of any value when needed. For instance in the case of *State v. Kanwaljeet Singh*[175], the court did not rely upon the birth certificate as it stated the prosecutrix to be 'male'. Further in the case of *State v. Dinesh Kumar*[176], a date of birth certificate issued by Gram panchayat was produced. However, when the Gram Vikas Secretary of panchayat was summoned before court to prove the genuineness of the

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[173] SC No. 39/14 decided on 28.07.2015.
[174] S.C. No. 98/14 decided on 18.11.2014.
[175] S.C. No. 43/14 decided on 29.09.2014.
[176] S.C. No. 163/13decided on 11.11.2014.

record, it was revealed that all records prior to December 2009 were lost in a fire. Further, the witness could also not identify the signatures of the Gram Sewak who had issued the certificate. The minority of the child in this case was consequently held to not be proved.

In some cases even though as per the school record the victim was a minor, the accused was acquitted because the prosecution had failed to adduce a government record.[177] In *State v. Chandan,*[178] it was held that where there was a confusion as to age, preference has to be given to the age as stated by the family members.

There has been no uniformity in the determination of whether a victim needs to be sent for ossification test or age determination by a Medical Board. A perusal of the cases in the Delhi State suggests that these decisions largely depend upon the Investigating Officer in charge. Although the Delhi JJ Rules clearly require that victims be sent before a Medical Board for age determination in cases where no documentary evidence in available, this is not carried out in all cases and instead sometimes carried out even where documentary evidence exists. For instance, in the case of *State v. Manoj Rajput*[179], an ossification test was conducted despite the fact that school records were produced by the prosecution proving her to be a minor as on the date of incident. The ossification test estimated the age of the child between 17 and 18 years, and consequently lead to the acquittal of the accused.

The lapse of investigation officers in this regard was pointed out in *State v. Gurdeep Singh*[180], wherein the IOs were reprimanded for not having done an age determination as per procedure:

> Since, the victim was not having any document qua her age, it was the duty of the investigating officer to have the victim examined by Medical Board for determination of her age, but he has failed to do so for reasons best known to him. It has been repeatedly observed by this court that the Investigating Officers make no effort to collect documents relating to age of the victim/prosecutrix in border line cases, where the age of the victim/prosecutrix is between 15/16 years and above, thus, giving a readymade defence to the accused to take a plea that the victim was above 18 years of age as on the date of commission of offence. This also has an adverse effect of taking the case out of the purview of the POCSO Act, which prescribes more stringent punishment for offences of sexual assault and sexual harassment etc. as compared to corresponding provisions under the Indian Penal Code. It is unfortunate that the I.Os in such cases come up with plea that such cases are amongst first few cases investigated by them. Even then, the duty of the senior officers i.e. the SHO and the ACP concerned, who forward the charge sheet to scrutinize the same does not get absolved. Such instances indicate malafide intention on the part of the Investigating Officers/Investigating Agency and is required to be addressed through appropriate directions/standing orders in this regard, from the Commissioner of Police.

***Benefit of doubt to the victim or the accused?***

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[177] *State v Praveen,* S.C. No. 254/14 decided on 04.06.2015; *State v. Muntiaz,* S.C. No. 26/15 decided on 04.08.2015.

[178] S.C. No. 127/13 decided on 06.01.2015.

[179] S.C. No. 110/13 decided on 31.10.2013.

[180] S.C. No. 61/13 decided on 11.04.2014.

Where there is an ambiguity with regard to whether a child is minor or not, there has been no uniformity in deciding who gets the benefit of doubt. Different judges have accorded the benefit differently.

For instance in *State v.Varun*[181]it washeld that "in view of the objectives of the Protection of Children from Sexual Offences Act, 2012 if there is any doubt about the age of the girl child, we must lean towards the juvenility of the victim."However, in the case of *State v. Ranjay Patel*[182]benefit of doubt was instead given to the accused where it could not be proved that victim was less than 18 years. Here the court cited *Mathura Dass&Ors. vs. State*[183], wherein it was held that

> At the final stage, if two views are possible thenthe view which is favourable to accused has to be accepted, but at the stage of framing a charge the view favourable to prosecution has to be accepted so that in Court at trial, prosecution may come out with its explanations in regard to drawbacks, if any pointed out by the accused.

However, this case concerned the death of a woman in her matrimonial home due to burn injuries and had stated in her dying declaration that the injuries were accidental. The context was completely different from the case at hand and had no bearing on the appreciation of an ossification test.

In the case of *State v. Manoj Rajput*[184], an ossification test was conducted upon the victim despite the fact that school records were produced by the prosecution proving her to be a minor as on the date of incident. The ossification test estimated her to be aged between 17 to 18 years. The victim herself testified to be a major and to having eloped with accused on her free will. The judge determined that the victim was not proven to be a minor citing the opinion of the Delhi High Court in the case of *SonuVs State (NCT) of Delhi*[185], wherein it was held that the age determined through radiological examination is not exact and may vary by two years on either side. Margin of error in such a radiological examination is two years on either side and according to the settled principles of criminal jurisprudence benefit of this variation must go to the accused. Reliance was also placed on *Jaya Mala v. Home Secretary, Government of Jammu & Kashmir &Ors.*[186]where it was held by Hon'ble Supreme Court that margin of error in age ascertained by radiological examination is to be taken as two years on either side. Consequently, the benefit of doubt was given to the accused in this case and his detention was quashed. It is pertinent to note that this case predates the JJ Act, 1986 and concerned the detention of a 17-year-old boy under the draconian Public Safety Act, 1978.

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[181] SC No. 108/13 decided on 29.10.13.

[182] SC No. 211/13 decided on 04.07.14.

[183] 2003 (III) AD (Delhi) 213.

[184] S.C. No. 110/13 decided on 31.10.2013.

[185] 2010 (2) JCC 1337.

[186] AIR 1982 SC 1296

Special Court judges have failed to consider recent case laws on age-determination or appreciate the underlying principle of ensuring the extension of safeguards to children.

## 4.2 Inappropriate appreciation of testimony of children

The Director of the Department of Public Prosecution laid emphasis on the quality of the testimony of the child – "Most victims are under pressure of relatives and some of them are bold enough to come out with all the facts and only in these cases convictions are possible. We have to acclimatize them with the court. Judges asks questions like "What did the accused do?". They will say "*Wohgalatkaamkiya*", but this is not enough. When they are unable to depose anything about the act then we have to go by medical test. Some parents and victims just don't want to go for medical examination."

> "Defence says why they haven't told mother, why have they taken so long. Judges and PP need to understand this. There is always delayed FIR. Earlier even I used to feel why don't they disclose. Now I know better. Children don't share facts sequentially. These are taken to be a weakness. Adults are more aware of their surroundings, what to say and what the consequences will be. Children are not aware."
> Advocate

In *State v. Avinash Gupta*[187], a 14.5 year old girl was sexually assaulted by her step-father. Even though the victim testified against the accused, the veracity of her statement was question based on a prejudiced notion of how victims and perpetrators should conduct themselves. The fact that the girl proceeded to attend her course at a beauty parlour after the incident was held against her – "It is difficult to understand why the victim had not contacted her mother after the said incident when her mother was having mobile phone or she should have gone to her mother after such harrowing incident but instead of going to her mother she went to beauty parlour as usual. The said conduct of the victim after the aforesaid incident, cannot be said to be natural conduct and further shrouds doubt on her testimony." According to the testimony of the victim, the accused had made a scene in public on being confronted about the incident and had even stated loudly in the presence of others what he had done. According to the Special Court, "No father or step father would state to the public at large that he had kissed his own daughter or pressed her chest or asked her to shake his penis. [The victim] has not stated this fact in any of her previous statements. The said conduct of the accused is not probable by any stretch of imagination. The aforesaid statement

[187] SC No. 135/13 decided on 30.9.2015.

of the victim casts serious doubt on her entire testimony." Discrepancies between the statement of the victim and her mother relating to the sequence of events after the assault leading up to the filing of the FIR were also held against her. The judge observed that the presumption under Section 29, POCSO Act had been rebutted by the accused by referring to the evidence by the prosecution.

In the equally disturbing case of *State v SurajTiwari,*[188]a 8 year old girl testified against her father who had been charged under Section 6, POCSO Act. This was a case in which the mother had arrived at the scene of the abuse and witnessed it. The judge failed to appreciate the complexities in incest cases and observed that there was no explanation for the delay of three days in filing the FIR. He observed, "[t]he fact remains that the complainant did not lodge the complaint against the accused immediately after coming to know the incident despite having opportunity to do so." Despite the very clear deposition of the child in her examination-in-chief and cross-examination, the judge concludes she is unreliable based on one statement – "Itna hi baatbolnahaijitnamainebatayahai."
Her deposition is reproduced below:

> "My father used to beat me. My father is present today. At this stage witness pointed out towards accused Suraj present today in the court. My father also used to beat my mother. It was on 14th but I do not remember the month I was drinking water on the tap near my house (*Nal* tap). My Papa called me and asked me to remove my pant (bole apni pant uttar). I removed my pant. I was wearing blue color pant at that time. My Papa also removed his pant and he asked me to bend. (At this stage she bowed down) and asked me to kiss his urinating part (*usneapnesusukarne wale konikala or bole isekissikar*). I refused. My father touched his urinating part (*susu*) on my back (*tattikarnewalijagah*) and he started shaking his body (the witness started shaking her body in the manner as done at the time of sexual intercourse). He also beaten me. He was saying do not tell to your mummy otherwise he will kill me. He slapped me I also cried. At that time my mother was not at home. She had gone to take receipt of kalash (*matki)*. I told the said fact to my mummy. Thereafter my father also beat my mother. My mother called the police and police took me for my medical examination.

In her cross-examination she stated:

> "My mother and father and used to quarrel daily. My father used to beat my mother daily. My mother did not beat my father. My father did not allowed my mother to go anywhere. My father did not allow my mother go on work. He always remained at home and did not go for work. My mother used to go for work at 12 noon and used to come in the evening. My mother used to go to Mandi where she used to sell fruits and vegetables. I and my brother used to go with my mother. When this incident happened with me I used to go to school. On that day I did not go to school as it was two days holiday. My mother had gone to take receipt of Kalash at 12 PM and she came back in the afternoon. On that day I went to school

[188] SC No. 97/13 decided on 14.09.2015

> and came back at 12 noon. My mother had gone to take receipt of kalash prior to my came at home. I do not know when my mother gone from the house as when I came my mother was not at home. My brother had not gone to school at that day. When I came back from the school my father was at home. He was sitting and not doing anything. My brother was playing. I immediately after coming back from school to my house went to drink water. There were many persons. My father has done the same incident five times earlier also. I had not told the said facts to my mother of the earlier incident as I thought if I tell to my mother my father will beat my mother (main mummy kobataungi to papa mummy komarenge). I have no pain. *Itna hi baatbolnahaijitnamainebatayahai.*My mother had told me that I have to say this much only in the court. My mother had also seen what my father was doing with me and thereafter my father beat my mother. (Mummy ne dekhliyathajo papa karrahe the). My mother had arrived when my father was doing wrong act with me. My father was wearing black color pant at that time. My mother had told me to state the facts of wrong act of my father to police and uncle in court. My father had given so much beating that she had blood from her eyes. Police did not inquire from my brother. My mother had raised cry when my father beaten my mother and many people came there and all people gave beatings to my father. My father had given danda blow on my mother due to which she has blood from her eyes.

The statements underlined above made the judge jump to the conclusion that the child was tutored by her mother. There is surely a distinction between preparing a child from court and tutoring a child that has been completely glossed over in this case.

In *State v GauravGoswami*[189]*,* the victim aged 11 years testified against her father the accused, her mother corroborated her testimony. However, inconsistencies were found in the statement provided under Section 164 and Section 161 Cr.P.C. he observed that

> has a very strong memory particularly regarding an incident which caused mental trauma to him or her. In the instant case, the victim who was about 11 years of age has stated different versions in a short span of time. She did not allege before the doctor that the accused had placed his hand on her chest and offered Rs.10, rather she alleged that the accused undressed her trousers while she was sleeping. In her statement under Section 164 CrPC, she stated that after putting hand on her chest, the accused offered Rs.10 and asked her to sleep with him. When she was already sleeping with him, there was no occasion for the accused to ask her to sleep with him. She alleged that the accused was trying to lift her frock which she never deposed before the court. Similarly, in her statement under Section 161 CrPC, she stated that she was sleeping on the net when her father i.e. the accused came to her offered her Rs.10 and put his hand on her chest. Again this fact is missing before the court where she deposed that she was sleeping with her father."

[189] SC No. 51/2014 decided on 06.06.15.

The court observed a child of that age will have "strong memory" but failed to consider the ordeal the victim underwent due to the incident and the minor contradictions that could have occurred in her statements provided at different intervals. Even more astonishing is the point where the court pointed out the father was an alcoholic and on the night of the incident he was under influence and could not have committed the act in such a condition and acquitted the accused.

**Undone by procedural and investigation lapses and insensitivity?**

The case of *State v. Dashrath Sharma*[190] evinces investigation failures, lack of sensitivity, class bias, and the misconceptions around medical examination that all came together to result in an acquittal. This case started from a phone call to the police control room informing that a person was being beaten up badly. In the police records, this was shown as an intimation that "one boy was doing *galatkam* with girl aged about 8 years." When the police reached the spot, the mother of a one-year-girl who lived on the streets with her family told them that at around 6.30pm she heard her daughter scream. She saw that a man aged 40-45 years, another beggar who resided at the same pavement was carrying her daughter on his lap with his finger on her vagina. She snatched her daughter and raised an alarm after which the public came there and started beating the accused. Based on her statement, an FIR was registered under Section 6/10 of the POCSO Act and Section 376(2)(i), IPC. She did not give consent for internal examination of the child out of fear.

**Procedural lapses**

The defence argued that the lack of clarity about the details of the PCR call shook the foundation of the prosecution's case. The absence of the name of the accused in the FIR, "inordinate and unexplained delay" in sending the FIR to the concerned Illaqa Magistrate and the absence of record to show when the copy of the FIR was supplied to the complainant was held against the prosecution as it showed that the FIR was registered after due deliberation and consultation. The prosecution claimed that intimation of arrest was given to the wife of the accused but none of the witnesses who deposed could explain how it was done. Non-compliance with Section 41D, CrPC which entitles the accused to meet a lawyer during interrogation was raised to challenge the disclosure statement of the accused and Section 25, IEA was also pressed into service. The prosecution on the other hand argued that these lapses were trivial and not fatal to the case. The judge concluded that there was no evidence to show that the FIR had indeed been sent to the Illaqa Magistrate as per Section 157, CrPC. He distinguished the purpose of reporting under Section 19(6), POCSO Act from that under Section 157, CrPC. While the former concerned the protection of rights of children, the latter protects the rights of the accused. He also noted that there was an unexplained 14-hours delay in informing the Special Court. Reliance was

[190] SC No. 09/14 decided on 22.09.2014.

placed on *Bijoy Singh v. State of Bihar*[191] in which the Supreme Court held that:

> The delay in sending the copy of the FIR may by itself not render the whole of the case of the prosecution as doubtful but shall put the Court on guard to find out as to whether the version as stated in the Court was the same version as earlier reported in the FIR or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime…. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the Court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not. Insisting upon the accused to seek an explanation of the delay is not the requirement of law. It is always for the prosecution to explain such a delay and if reasonable, plausible and sufficient explanation is tendered, no adverse inference can be drawn against it.

Since the prosecution failed to offer an explanation of the delay the judge scrutinized the prosecution's case in minute detail. He noted that there was no proof of the police handing a copy of the FIR to the complainant. The prosecution had also failed to produce the PCR form to prove the nature of information that was given to the police, the Judge drew a presumption under Section 114(g), IEA to conclude that the document would not support the claim even if it were produced. Non-compliance with Sections 41B and 41D, CrPC also shook the prosecution's case and the judge concluded that no reliance could be placed on the disclosure statement.

**Scrutiny of the testimony**

The police and prosecution had failed the victim completely. The case now rested on the testimony of the complainant-mother. In her deposition, the mother stated that the accused was sitting and her daughter was at the penis of the accused. She stated that he was wearing a lungi without underwear and not pant-shirt. She stated hat she had not stated this to the police and nor was the lungi seized by them. She also stated that she had been sleeping on the blanket of the accused and he came and asked her who had laid his blanket. She told him it was already laid on the ground and told him she would give it back to him and proceeded to sleep on her own blanket. In her police statement, she had stated that she was laying down at her place. These were considered substantial improvements that made her statement unreliable. The judge notes "Thus, by saying that she was laying at the blanket of accused, PW2 intended to set up a new case during her deposition which is not permissible in a criminal matter." In her cross-examination by the prosecution, she clarified that the incident had taken place outside the park and her *theiya* was inside the park at about 5-10 paces from the site of the incident. The sum of the examination and cross-examination was that the penis of the accused and his finger were both at the vagina of the victim.

[191] AIR 2002 SC 1949.

The mother admitted that she, her husband, and others had beaten the accused and a separate case had been registered against them for having caused grievous injury to the accused. The judge scrutinized her statement in minute details. He noted that she had not clarified in her examination-in-chief "whether accused picked up her daughter as soon as she stated to sleep or after some time. But, in her cross-examination she did clarify that she had been sleeping and woke up when she heard her daughter cry. The IO stated that during the investigation it was not revealed that the accused used to play with the victim earlier. What is pertinent is not whether this was "not revealed", but whether this question was even put to the parents. The judge goes with the IO's statement and concludes that the accused was a stranger to the victim and "it is a tendency in most of the children of tender age that they start crying as and when any unknown person take them in his lap."

The judge was of the view that her deposition made it extremely doubtful that even the finger of the accused was at the vagina of the victim. It is also not clear on what basis he concluded that "… the victim cannot be at the penis of accused, if the finger of the accused was at her vagina." Her testimony was also tested against the statement of the IO as per which the accused was wearing pant-shirt and not a lungi and found unreliable on this point. As per the IO's statement the mother had said the accused was standing while in court she said he was sitting with the child on his lap. The mother stated that she did not say the accused was wearing a lungi or that his penis was on the vagina of the child to the police because people told her that her daughter would be medically examined and could die during the examination.

**Insensitive examination**

The insensitivity of the cross-examination is evident from the mother's response to a question that reeked of contempt for the poor: "during her cross-examination, she admitted that she had given birth to five children, thus she knew very well that no one can die by medical examination." The failure on the part of the prosecution to produce the two people who has scared her about the medical examination was also held against her. The judge concludes that the mother "deliberately twisted" facts.

In a display of blatant class bias, in response to the mother's statement during cross-examination that the child had irritation during urination, the judge stated that:

> "…there is nothing on record which may even suggest that the said irritation was due to the alleged incident. Further, it is also pertinent to state that complainant is a rag-picker/beggar and used to live at pavement. *It means that she and her daughter were not residing at a hygienic place. It is pertinent to state that unhygienic condition is one of the common causes of irritation in urine.* Thus, in the absence of any cogent evidence, no adverse inference can be drawn that the irritation was due to the alleged incident."

## 4.3 Hostile Witnesses

Several of the respondents expressed frustration over the huge proportion of cases in which victims turned hostile. One respondent shared:

> Most of the children between 12-18 years turn hostile. Police puts so much effort. The entire government machinery has been used in a case. I've seen that the police accompany the child for medical, 164 and don't eat the whole day. It is frustrating when the child turns hostile. Children turn hostile because they are handed over to their families by the CWC. There should be some other way to protect such witnesses – especially in incest case. If the accused is a neighbor, there is tremendous pressure to compromise the case. People don't understand it is not a wrong it is a sin – the latter cannot be forgiven. You are doing it against society. The problem is with the time it takes to complete the case. If it is dragged, parties will compromise or turn hostile. They will say there is no point as justice has not been done. There is no justice if you compromise. Procedure is long drawn. How can we expect a 4-year-old to remember what happened to her when she was 2 years old? Cases should be finished within one year. Children should not be called repeatedly. In one case, a girl had come from Madhya Pradesh to testify. She was appearing for her boards and was tired of coming to court. Her evidence was not recorded and the case was adjourned. This is the third time she has come. This is affecting in the way of getting justice as this child is now frustrated and willing to turn hostile. She doesn't want to come next time."

Some respondents were of the view that penal actions should be taken against witnesses who turn hostile – "They have used the government machinery and then compromise the matter and they must be punished for this." One respondent emphasized positive measures to prevent children from turning hostile. Police protection must be extended to them. They should be examined on the day they are summoned as it can be demoralizing if the hearing is postponed. An advocate who was interviewed emphasized on the need for coordination between prosecutors, police and judges as the pressures to compromise commence right after a FIR was filed. She felt that the "prosecutor should meet the child and express belief in what the child has said and that would empower the kids."

Several respondents were of the view that children need to be separated from the family in cases in which the alleged perpetrator is a family member. A solution suggested by one respondent is a good shelter home where children can be kept till the trial is over. However, this was not supported by some others who felt that detention of a child merely because the IO requests for it would constitute unlawful detention. The recording of evidence could be delayed by three to four months and the child cannot be detained until then. Such a decision should be taken on a case-to-case basis keeping in mind the principle of best interest. Besides, considering the pathetic condition of the Children's Homes, children would prefer to return to their homes than remain in this setting.

"The victims either turn hostile or there are false cases. Even landlord and tenant cases – get escalated to sexual assault. Children are used as tools to settle scores."

- Additional Public Prosecutor

Conviction is possible even if the witnesses turn hostile. The Supreme Court, in the case of *Bhajju @ Karan Singh v. State of Madhya Pradesh,*[192] held:

> It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution, to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence…

Further, in *Gura Singh v. State of Rajasthan*[193], the Supreme Court specifically stated that the evidence given by a witness who later turns hostile cannot be discarded:

> There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration… In *Rabindra Kumar Dey v. State of Orissa* (AIR 1977 SC 170), it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.

However, all cases in which the victim turned hostile resulted in an acquittal except two cases. In *State v. Dinesh Sharma*[194]*,* a 14-year-old girl had allegedly been sexually assaulted by her father. During her examination-in-chief, she turned hostile and claimed that she had levied a false allegation at the behest of the IO. During her examination, she stated that she called the police because her father had verbally abused her mother. The IO she spoke to had asked her to make a false allegation against her father. Her statement was scrutinized carefully,

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(2001) 2 SCC 504 at page 509

194 SC No. 155/2013 decided on 03.02.2014.

particularly the fact that her father routinely abused her mother and there was nothing exceptional about it for her to call the police. It was concluded that her statement that she had made a false statement was not trustworthy and reliance was placed on *Khachour Dipu v. State of Gujarat*[195], in which the Supreme Court reiterated that the evidence of a hostile witness "cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful security thereof." The presumption was invoked and it was concluded that the accused had failed to establish that he did not have the sexual intent and proceeded to convict the defendant. The second decision is *State v. Parhlad,*[196]in which the defendant was sentenced to the period already undergone during the trial.

## 4.4 Need for clarity on the applicability of probation to cases in which a minimum sentence has been prescribed

In *State v. Mohan Dass*[197], it was held that no provision in POCSO Act bars or restricts the application of Probation of Offenders Act and that before convicting the offender, one has to look at the social milieu and personal circumstances. The Special Court concluded that that the Probation of Offenders Act would apply and sentenced the accused to two years rigorous imprisonment and then for two years of probation for having committed aggravated sexual assault. However, some judges have rejected the plea for probation. In *State* v *Bhagwat Singh*[198], reliance was placed on Supreme Court decisions in which it has been held that probation cannot be applied where minimum sentence has been stipulated in the Act, In *State* v *Manish*[199]the Special Court noted that if probation is allowed the object of the legislature in providing minimum sentence will be defeated. There is a need for clarity on this point.

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

Commenting on the outcomes in cases related to romantic relationships, on conditions of anonymity, a person working within the child protection system stated – "These cases are being acquitted and why not – here the girl is an equal accused and boy is an equal victim." A defence lawyer who was interviewed shared the strategy in these cases – "In these cases we ask the victim to turn hostile. We tell what all

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[196](2013) 4 SCC 322.

[196] SC No. 113/13 decided on 31.07.2014.

[197] SC No. 73/13 decided on 25.01.2014

[198] SC No.109/2013, Decided on 21.08.2015,.

[199] SC No. 60/13, Decided on 05.06.2014

questions judge and PP can ask and we prepare the victim to answer. We ask them victim to blame the police saying that they went and filed an FIR and that they threatened us."

One respondent was of the firm view that sexual encounters during adolescence should not be criminalized. As he put it, "The female child has to be protected, but if she is having a love affair with a 19-year-old boy, can you penalize him for 7 years and make a criminal out of him?" One advocate was of the view that the girl's opinion must be considered before such cases are filed. According to her, in these cases turning hostile in court is the only option available to the girls because these cases cannot be compounded. Another Advocate took a stricter view of the law. According to her, "Girls have not developed the maturity to understand what it means to consent. They equate sex with marriage, often give in to the pressure from their boyfriends and think that once they have sex the boy will not leave them. This should be a crime and the judges should not acquit."

While commenting on cases in which the judge encourages the parties to marry, one respondent shared that victims seldom have a say in this as it is their parents who are convinced by the judge to enter into such compromises. In one case, "the victim was deaf and even if she was in a relationship with the accused, the fact is that she had been raped. However, the judge managed to convince her mother to get her married to the accused. In another case, the matter came to us through the CWC when the girl had been married off to the accused as advised by the POCSO Court and then ended up being a victim of domestic violence because the accused was unhappy about the girl dragging him to court on a rape charge."

The judgment analysis reveals the variety of approaches adopted by Special Courts to sidestep the challenges posed by the age of consent and absolute prohibition of any form of sexual activity involving a child under the POCSO Act. While majority of these cases have resulted in acquittals, the reasoning adopted by some Special Courts is a cause of concern. For instance, what would the implications be of applying the IPC notion of 'assault' to the POCSO Act? Would there be a danger of its extension in cases other than romantic relationships? Is knowledge that the victim was a child an ingredient of the offences under the POCSO Act? Will the prosecution have to establish this without reasonable doubt for the case to succeed?

These cases also highlight the dangerous trend of parties resorting to marriage in order to evade punishment. The unintended consequence of the criminalization of all forms of sexual contact with a child under POCSO Act appears to be a spike in the number of child marriages.

## 4.6 Gaps in the award of compensation

During the course of the study, it was evident that award and receipt of compensation is plagued with confusion. The two private advocates who were interviewed shared that they had filed several compensation applications and realized that a different procedure was applied in every case. While in some cases the family was told that they would receive the cheque from the IO, in other cases they were

redirected by the DLSA to the Special Court. In some cases, the Special Court asked them to approach the DLSA instead. One of them also managed to secure compensation orders from the JJB in two cases. The amount, however, was not disbursed by the DLSA because it had not received the order copy from the JJB. He spoke of several cases in which the delay in transmission of orders from the Special Court to the DLSA for disbursal of compensation took over two months.

The prevailing confusion is partly due to the pre-existing model as per which the State and District Legal Services Authority are vested with the responsibility of determining the quantum of compensation. Section 357A of the CrPC led to the introduction of State Victim Compensation Scheme (State VCS) that outlined the process for applying for and receiving compensation. According to the Delhi Victim Compensation Scheme, 2011 compensation can be paid to victims and their dependent(s) "who have suffered loss or injury or require rehabilitation as a result of the crime…" Victims or their dependents are eligible to receive compensation under the VCS provided they have not been compensated for their loss or injury under any other Central Government or NCT Scheme.[200] The applications are routed through the IO. The DLSA will not, however, entertain any application by a victim or her/his dependents under Section 357(4), three years after the date of occurrence of the crime.[201] As per the Scheme, the DLSA can inquire into a claim of compensation when a recommendation has been made by a trial court or an application has been made by or on behalf of a victim.[202] Based on this inquiry it can decide on the quantum of compensation provided that it is within the limits specified within the VCS. For instance, as per the Schedule to the Delhi VCS, a victim of rape can receive compensation of an amount ranging from Rs 2 lakhs to 3 lakhs. The Delhi VCS, 2011 does not separately provide for rape of children. Recently, the VCS has undergone revision and the compensation amount for rape has been enhanced to Rs 5 lakhs.[203] The revised Scheme is awaiting approval from the Home Department.

The DLSA can order "immediate first-aid facility or medical benefits or any other interim relief, as deemed appropriate, to be made available free of cost, to alleviate the suffering of the victim on the certificate of a police officer, not below the rank of the officer-in-charge of the police station, or a Magistrate of the area concerned."[204]

In August 2014, the Delhi High Court expressed concern about the failure of the Delhi government in establishing a Victims Compensation Fund, even though the scheme had been notified.[205] It directed the establishment of a Single Window Disbursement System and stated that when the Fund is created, it must be placed at the disposal of the DSLSA. The order also required the Government to

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[200] Clause 4, Delhi Victim Compensation Scheme, 2011.
[201] Clause 11, Delhi Victim Compensation Scheme, 2011.
[202] Clause 5, Delhi Victim Compensation Scheme, 2011.
[203] Anon, "Delhi govt approves 'Victim Compensation Scheme', *The Hindu*, 16 September 2015, http://www.thehindu.com/news/cities/Delhi/delhi-govt-approves-victim-compensation-scheme/article7657297.ece
[204] Clause 8, Delhi Victim Compensation Scheme, 2011.
[205] Order passed by the Delhi High Court in *Court on its own motion v. Union of India,* W.P. (C) 7927/2012 on 13.08.2014.

transfer funds periodically to the DSLSA under the Victim Compensation Account. This Account should be operated by the Member-Secretary, DSLSA and a Senior Accounts Officer. The DSLSA must ensure that the compensation is disbursed within 24 hours, by electronic clearance, to the victim's/guardian's bank account.

After the enactment of the POCSO Act, judges of the Special Court have been expressly empowered to determine and direct the payment of compensation to the child under Section 33(8), POCSO Act. The State Government must pay the compensation to the victim within 30 days from the date of the order of the Special Court. The court, in some cases, may also order for a part of the sum to be paid within a shorter period, in order to provide immediate relief to the victim. The child/family can also apply for compensation under any other relevant laws or schemes.

A Special Court is not bound by the limits placed under the VCS and can order any amount it deems fit. The court may consider the slabs stipulated under the State Victim Compensation Scheme (SVCS). However, the Delhi VCS does not refer to the offences under the POCSO Act and is confined to rape. The Delhi VCS is also not instructive on compensation of male children as rape under the IPC does not bring within its purview the rape of male children. According to one respondent, Special Courts appear to be at a loss while determining compensation for male children. Judges should therefore exercise their discretion while ordering compensation in such States. In fact, application of slabs like these is inappropriate considering how distinct child sexual abuse is from other offences:

- It is likely, in several cases, that the injury is more mental/psychological, or sometimes even less tangible, than physical - 'It [sexual assault] is often not accompanied with the kind of 'violent' criminal activity envisaged in the criminal law. Consequently, in contrast to the three primary categories of loss and injury available in the schemes, the typical effects of sexual abuse suffered by victims are not visible physical injuries or the kind of psychiatric injury that might result from a shocking, violent and unexpected event. Instead, they are best described as interpersonal, social, behavioural, or vocational.'[206]
- Sexual abuse is usually committed over an extended period of time and involves different forms of coercion or manipulation. Also, child victims are not victims of an indirect act arising out of negligence, but of intentional direct harm.[207]
- Child sexual abuse does not neatly fit into our conception of an offence with a start and end date or a number of incidents – "rather than in the context of an ongoing relationship with the perpetrator, in which multiple offences are likely to be the norm."[208]
- Harms arising from the abuse might not completely manifest themselves, until years after the abuse.[209]

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[206] Christine Forster, "Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions", *U.W. Austl. L.R.*, (2005) 32(2) 264 at 283-84, http://www.austlii.edu.au/au/journals/UWALawRw/2005/8.html.
[207] ibid, p.284.
[208] Christine Forster & Patrick Parkinson, "Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework", (2000) 23(2) *UNSWLawJl* 172.
[209] ibid, p.190.

When awarding compensation, it is advisable that courts

> … evaluate the totality of the child's experience of abuse. Within the totality of that experience, children may be able to remember some incidents more clearly than others, and provide more consistent accounts of some incidents than others. As long as the court is satisfied of the substantial truth of the applicant's claim of victimisation, it is the whole experience of abuse which needs to be evaluated for the purposes of compensation.[210]

Interviews with some actors within the criminal justice system revealed the dangerous misconception that cases are filed by families under the POCSO Act to avail compensation. This is despite the fact that compensation is rarely awarded by Special Courts.

Prosecutors also largely steer clear of filing compensation applications on behalf of victims. They feel it is the duty of the IO to apply for compensation to the DLSA. Private lawyers attempting to file compensation applications have also met with resistance. Special Courts have linked compensation to testimony and mostly consider an application only after the victim has testified. Some Special Courts refuse to entertain interim compensation application until after the evidence has been recorded to ascertain if the child supports the case of the prosecution or turns hostile. In one case, the application for interim compensation was filed immediately after the evidence was recorded. The judge allowed it but ordered the IO to inquire into the family circumstances and present a report after three months. This nullifies the entire purpose of a provision on interim compensation. Mr. Dharmesh Sharma, Member-Secretary, DLSA and a former judge of a Special Court disagrees with this approach. According to him, "when a presumption is there – apparently a case is made out and there is trauma/injury – nothing prevents a court from granting interim compensation." Judges hesitate to award compensation when the child states in court that no sexual offence had been committed or that the accused is not the perpetrator. In both scenarios, nothing prevents judges from ordering compensation if the child has suffered harm. This is also because compensation is payable by the State Government and not the accused and the law does not require it to be tied to the outcome of the trial. Some judges are open to ordering interim compensation, but believe that the final compensation should be awarded by the DLSA.

Mr Surindher Rathi, an Officer on Special Duty at the DSLSA stated that due to the lack of clarity and continued applications for compensation from child victims, the DSLSA has now been assigning panel lawyers to assist victims and families in applying for compensation.[211]

[210] *Supra,* n.9.

[211] Interview with Mr. Rathi dated 18.02.2015

## 4.7 Support Gap

There is a huge support gap because it is sporadic and intermittent and not available to the child throughout the legal process except in some rare cases in which a support person has been appointed by the CWC.NGOs in Delhi providing support services shared the positive impact of support on the child and the family. However, there is very little clarity on the role of the 'Support Person' and the nature/extent of the support they are required to provide. This emerged as a major area of concern, given the significant proportion of cases in which the victims turned hostile. There is an urgent need for guidelines on the role of a support person and an action plan to ensure the availability of Support Persons in the State of Delhi.

Respondents and participants at the Delhi Consultation also emphasized the need to extend financial and physical support to family members of the victim. Families often have to relocate to avoid stigma and this spells loss of employment, gap in education, and emotional trauma.

## 4.8 Challenges related to the structure and jurisdiction of the Special Court

Judges assigned to these 'special' courts are expected to maintain a child friendly atmosphere within court rooms and simultaneously deal with hardened criminals charged under draconian anti-terror laws and the like. Practically, judges find it extremely difficult to switch from one mindset to another. Besides, this also affects the speedy disposal of cases. The absence of a separate court also results in child victims being exposed to police officers, accused persons in handcuffs, etc and this creates an intimidating court atmosphere for children and their families. Except the Karkardooma and Saket Court complexes, there are no waiting rooms or vulnerable witness rooms for children in any of the other courtrooms. Construction of these rooms is, however, underway in some court complexes.

The purpose of Special Courts also deserves scrutiny. As per the POCSO Act, the only objective appears to be the promotion of speedy trial. The Special Courts are not meant to be exclusive or to cater to the developmental needs of children. In order to be 'special', there is need for orientation and training of judges, prosecutors, and court staff to enable them to conduct the trial in a child-sensitive manner.

The challenges above have given rise to the question whether Special Courts under the POCSO Act exclusively try only cases under the POCSO Act. According to one respondent, an Advocate who has appeared in six out of the 11 Special Courts in over 50 cases, while disposal rates will improve and judges will acquire expertise in the area if Courts are exclusive, the danger of desensitization is also imminent if these matters are treated in a routine manner. On the other hand, another Advocate was of the view that since cases are already being handled in an insensitive and routine manner, a dedicated court is required so that judges appreciate the rationale of the Act and the

need for speedy justice. One respondent refuted the desensitization argument by citing the examples of Juvenile Justice Boards in support of the view that exclusive handling of cases of juveniles improves sensitivity. However, the Principal Magistrate in a JJB does deal with other matters and does not serve full time on the JJB.

Challenging the argument that exclusive courts will lead to speedy disposal, one respondent stated that distribution of POCSO cases across all courts in a district will ensure better disposal than having only one court dealing with all POCSO cases. This is because the recording of evidence of a child witness in these cases is time-consuming. No other matters can be dealt with on the day on which a child's evidence is scheduled thus affecting the speedy disposal.

Emphasizing the need for exclusive courts, a respondent who serves as a support person for child survivors drew attention to the need for fixed tenures of judges of Special Courts as when judges get transferred the orientation process and sensitization has to start all over again. An expert on child rights was of the view that "we should probably have a court that looks at offences against children not just under POCSO Act. Court needs to understand the difference between adult and child victim of rape. You look at a teenager as an adult woman and ask questions on consent." Designation of additional Special Courts to tackle pendency was considered a better alternative.

## 4.9 Routine production of children before CWCs

While studying the judgments, it was found that in some jurisdictions children were routinely produced before the CWC irrespective of whether this was warranted or not. This reveals a lack of awareness among the police about the role of the CWC and the three situations under Rule 4(3), POCSO Rules in which the child must be produced before the CWC.

## 4.10 CWCs direct the police to facilitate recording of a second statement u/s 164, CrPC

A few respondents shared that some CWCs order the IO to facilitate the recording of a second statement under Section 164, CrPC. This is done when the child shares a fact with the CWC that was not mentioned during the first statement before the Magistrate. A private advocate representing children felt a second statement is useful because the child may not have said anything in the first statement and if she mentions those details during her examination-in-chief, the defence could argue that she is improving upon her earlier statement. An APP who was interviewed on the other hand felt that a second statement would complicate the prosecution as more the number of statements the higher the chances of contradictions and omissions that can then be used against the victim.

The judgment analysis confirmed the APP's apprehension. For instance, in *State v.Krishan Kumar,*[212]the Special Court drew an adverse reference because of two statements recorded by the prosecutrix under Section 164, CrPC. In her first statement she stated that the accused had scolded her. In her second statement, a few days later she stated that she had not mentioned the sexual assault out of fear because she had been asked not to by the family of the accused. The judge observed that the Magistrate had asked several introductory questions to assure herself that the child was not under fear, coercion and undue influence. He was of the opinion that her statement that she was under fear was not believable because she was accompanied throughout by her parents and came to the police station the very next day to record the 164 statement. There was nothing in her statement to indicate that the accused or his family had approached or intimidated her. After her statement was recorded, she was placed in a Children's Home for two days where her parents visited her. The judge believes that 'there was a 'strong possibility' that the parents had tutored her to testify falsely against the accused and that explains the second statement under Section 164, CrPC. The judge also felt that her testimony in his court was rehearsed – "the recitation was in a breathless manner without any pause or blink of eyes during which time she constantly stared at her mother."

Similarly, in *State v. Kailash*[213]*,*the Special Court felt that a second statement u/s 164 CrPC and inconsistencies related to dates, sequence, and incidents in the statements of the prosecutrix and another material witnesses made their testimony unreliable.

This issue, however, points to the need for training of Magistrates on recording the statement of traumatized children. The child should be made comfortable and asked developmentally appropriate questions in order to draw out the relevant information and obviate the need for a second statement.

## 4.11 Lack of clarity as to when a child should be restored by the CWC to her/his family

Some respondents felt that the CWCs should not restore custody to the family until after the examination-in-chief and the cross-examination has been completed. This was because the child invariably turns hostile because of the family pressure and then retracts his/her statement. A private advocate who was interviewed stated – "We request them not to restore till the testimony is over because when the child returns home there is a lot of emotional manipulation happening at home. Mothers are such an agent for men. CWCs have granted restoration because the child wants to go home based on best interest. But is that the safest place for the child?" Voicing a contrary view, another respondent felt that the decision to restore should be based on the child's best interest and should be delinked from the court processes. The evidence may take months to be scheduled and it is not fair to deprive the child of his/her liberty until then. Another stated that "[t]he concept of institutionalization is against the JJ Act and POCSO Act. Child has not committed any crime that the child should not be taken away from the family."

[212] SC No. 63/13 decided on 23.10.2013.
[213] SC No. 196/13 decided on 29.07.2015.

At the same time, there have been instances in which the Special Court has overlooked the order of the CWC and restored the custody of the child to the parents.

The restoration decision has to be taken on a case-to-case basis keeping the best interest of the child in view. As a rule, children should not be detained in a Children's Home or removed from the custody of their parents unless it is in their best interest. Safety, care and protection of the child forms the basis of taking the child into their custody and the reason for the release of the child should also be based on these factors alone. The contamination of evidence cannot be the overriding consideration as there are adverse consequences of depriving the child of parental care, love and protection especially at a time when such care and protection is crucial.

## 4.12 Non-reliance on reports of CWCs

Some respondents were of the view that the Special Courts should consider the reports of the CWC, particularly in incest cases, before arriving at any decision regarding custody. Instances were shared in which the parents approached the Special Court and obtained an order directing the Children's Home to handover the child to them in complete oversight of the order of the CWC. Concerns were, however, raised by some respondents about the poor quality of documentation by the CWC and the dangers of relying on their report in the absence of a standardized process followed by them.

## 4.13 Lack of Sufficient Training

Despite the Act being new and first of its kind, several stakeholders stated that they had never been trained on the POCSO Act prior to taking up a post or even after.Several of them also felt that training is needed not just on the POCSO Act but on several related aspects such as child psychology, child sexual abuse in general, etc. The insensitive manner in which questions are posed to children and developmentally inappropriate nature of questions was highlighted by some respondents. Emphasis was placed on the need to develop protocols and guidelines for questioning children.

Among the APPs, there appears to be an anxiety that a prior conversation with the child could be labelled as an attempt to tutor her/him. The training modules for Public Prosecutors should definitely include components of child development and preparing a child for trial and allay fears related to communicating with children before trial.

### 4.14 Mandatory filing of reports by the police

Some respondents felt that the taking away of discretion from the police to file reports is a problem. Owing to the fear of being booked under Section 166A, IPC police register all complaints involving sexual offences without any preliminary inquiry. Consensual cases are recorded which eventually end in acquittal as the victim turns hostile.

### 4.15 Perception that the law is being abused

Some stakeholders were convinced that the POCSO Act was being used by parents to settle scores over property and other disputes. Almost all respondents felt that younger children rarely lie about abuse while the statements of those above 12 years have to be scrutinized more carefully. There was also a perception voiced by stakeholders that these cases were being filed for getting compensation.

### 4.16 Investigation Lapses

Judgment analysis revealed huge gaps in investigation that ultimately compromised the prosecution's case. Attempts by the police to stage the investigation on site resulted in discrepancies between their statements and that of the victim. This cast a shadow on the fairness of the investigation on the whole and led to acquittals in some cases. The failure of the police to examine public witness, collect documentary proof of age and materials for medical analysis emerged as major lapses for which they were criticized. Very few Special Courts directed departmental action against errant officers for such lapses.

### 4.17 Non-reliance on medical evidence

Considering the sensitive nature of POCSO cases, it becomes incumbent upon judges to look into the material on record fully. Victims of sexual offences are found to turn hostile due to several reasons and this signifies a failure on the part of the state in protecting them and offering a sensitive criminal justice system. The perception that most cases are false makes victims feel that enduring the criminal trial is a futile exercise as they feel that the system is not designed to grant justice in any case.

While cogent testimony of the victim is undoubtedly the most important in terms of evidentiary value, this does not vitiate the importance of medical evidence. For instance, a judge may choose to not seek corroboration from medical evidence if the victim and other witnesses

are found to be reliable and testify clearly and consistently. However, where victims fail to testify, judges keeping in mind the sensitive nature of these cases and the vulnerability of the victims must look into other evidence on record. For instance, in *State v. Khuram,*[214] the prosecutrix was gang-raped. She was rescued by the police from the site of rape and had been medically examined. She turned hostile on the point of identity of the accused. The judge did not even consider the medical evidence and dispensed with the examination of all witnesses because the prosecutrix had turned hostile. According to the judge, "even if the statement of remaining witnesses [is] recorded, it cannot bring home the guilt of the accused."

## 4.18 Gaps in Law

The following gaps in the legal framework emerged in the course of interaction with the respondents:

1. **Plight of a child victim who has to testify before the Special Court *and* Juvenile Justice Board (JJB)**

In cases in which the accused persons include a juvenile as well as an adult, the child victim will have to testify twice, as per the current legal framework. Most respondents agreed that this was not desirable, but felt this was unavoidable because of the existing statutory framework. Those from the legal fraternity felt that the rights of the accused in either forum would be compromised if the statement recorded by one forum is admitted in the other. On the other hand, one felt that the victim often turns hostile in either the court or the JJB due to a compromise struck with some of the accused. This could be avoided if one statement is used by both the court and the JJB and this could option could be explored bearing in mind its implications on the rights of the accused persons to hear the statement of the prosecutrix.

2. **Minimum Sentences**

Some within the legal fraternity were of the view that minimum sentences under the POCSO Act are very high. As an example, one respondent shared that the minimum punishment for sexual assault and aggravated sexual assault is high. "Should a 21 year-old be imprisoned for three years for forcibly kissing a girl? He will become a criminal in jail. No point in packing our jail with adolescents." Another respondent was of the view that probation should be used in cases of statutory rape where the accused is between 18-22 years. One respondent also felt that the Act should provide sentencing discretion to judges.

[214] SC No. 123/14 decided on 2.12.2014.

### 3. Age of Consent

Most respondents drew attention to the problematic aspects of a uniform age of consent. According to a defence lawyer, "Relationships are not that uncommon in teenage years. In these cases we ask the victim to turn hostile. We tell what all questions judges and PPs can ask and ask the victim to blame the police saying that they went and filed an FIR and threatened us." One respondent felt that the proximity clause should be introduced in the POCSO Act.

> "Law should take call of these social realities – we can't just copy paste laws. Child marriage is not an unlawful union. There was a case in which the girl said the boy saved her as her mother wanted to make her a prostitute. Had she not run away with the boy she would have become a prostitute."
>
> "We can't criminalise adolescence. The female child has to be protected, but if she is having a love affair with a 19 year old boy, can you penalize him for 7 years and make a criminal out of him?"
>
> "I feel very strongly about the law criminalizing this. When it is absolutely consensual then who are we convicting? If a girl gets married below 18 it isn't an offence. They have a right on their body and then we are punishing them? How should we rationalize it?"
>
> "Let us keep the age [of consent] this way and see it after two years. We have been pro-accused for so long. We need to be more considerate towards the victims of crime."
>
> - Respondents from the legal fraternity

One respondent lawyer, however, felt that adolescent girls lack the maturity to consent. According to her, "They equate sex with marriage, often give in to the pressure from their boyfriends and think that once they have sex the boy will not leave them. This should be a crime and the judges should not acquit."

### 4. Can a statement u/s 164, CrPC be admitted as examination in chief?

One respondent felt it would be a good move to allow the admission of the statement u/s 164, CrPC as examination-in-chief, particularly in cases of penetrative sexual assault. However, SOPs are required to ensure that these statements are recorded uniformly and in a transparent manner. Usually, statements u/s 164, CrPC are recorded in a narrative form. If it is to be used as examination-in-chief, certain

safeguards should be in place. The questions put to the child should also be on record. The statement should be videographed as well so that the accused has an opportunity to view it and the Special Court Judge can also evaluate the demeanour, questioning and the responses. Protocols should also address how the recording should be stored, retrieved and retained. On the other hand, another respondent was of the view that the right of the accused will be jeopardized if he/she is denied the opportunity of hearing the testimony of the child.

Another respondent suggested that a mobile van accompany the PCR van so that the statements of the victim and witnesses are recorded by the Magistrate on the spot. This will minimize the risk of manipulation and also save time.

# 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 and capable of communicating with children. Compulsory elements of capacity buildings 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 that distinguish it from other offences. An action plan is required for a robust and support system for victims staffed by qualified and trained persons to enable children and their families to navigate through the criminal justice system.

The Hon'ble Delhi High Court and the Delhi 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 from the course of the Study as well as interactions with judges, CWCs, and other stakeholders during the course of training programs conducted by the team in different States as well as their participation in meetings, workshop on the issue.

## 5.1 Recommendations for the Hon'ble Delhi High Court

Based on the foregoing chapters, it is recommended that the Hon'ble Delhi High Court, in consultation with the Delhi Government consider the following measures:

1. Designation of additional Special Courts to deal with cases under the POCSO Act, 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 criminals, the police and other such persons. Toilets should also be located in the vicinity of the courtroom. 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. Issuance of a guidance note to Special Courts on the award of interim and final compensation in cases under the POCSO Act clarifying the role of various authorities in the awarding and disbursement of compensation amount.

4. Issuance of a guidance note to Special Courts on core minimum measures that should be taken to ensure compliance with the child-friendly procedures under the POCSO Act.
5. 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.
6. Instruction to the Delhi 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.
7. Instruction to the Delhi Judicial Academy to include components of age determination, dealing with hostile witnesses, and medical evidence in the training modules for judges and prosecutors.
8. Allocation of funds to enable prior courtroom orientation for children and their families. The funds should also enable the creation of a court-complex and specific pictorial brochures explaining the courtroom structure, people present in the courtroom, sequence of events and the procedures that will be followed during deposition.
9. 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.
10. Reconsideration of the appointment of Legal Aid Lawyers as Support Persons to play the role of an intermediary in court. A cadre of trained para-legal volunteers could be created in their place to support child victims during the entire course of the investigation and trial and the CWCs could also draw from the pool for the appointment of Support Persons.
11. Investment in an intimation mechanism that will alert victims and their families at least 24 hours in advance if the hearing is postponed.
12. Urgently request the Delhi 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.
13. Consider the establishment of a mechanism to collect feedback from child victims sensitively and anonymously of their experience of testifying before the Special Court and suggestions for improvement.
14. Consider 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. Extend requisite support to the Delhi Commission for Protection of Child Rights to enable it to monitor the implementation of the POCSO Act as per Rule 6, POCSO Rules.

## 5.2 Recommendations for the Delhi Government

Based on the foregoing chapters, it is recommended that the Delhi Government consider the following measures:

1. Appointment of Special Public Prosecutors (SPP) who will exclusively deal with the POCSO cases and other offences against children.
2. Periodic trainings of prosecutors and Legal Aid Lawyers on age and developmentally appropriate techniques of interviewing children and appreciating their testimony.
3. Joint trainings of police and prosecutors on age and developmentally appropriate techniques of interviewing children, lapses that should be avoided, and the manner of investigation and prosecution in sexual offences.
4. Periodic training of Chairperson and Members of Child Welfare Committees on their role under the POCSO Act and Rules.
5. Allocation of sufficient funds to facilitate the 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 criminals, the police personnel in uniform and other such persons. 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.
6. Development of an Action Plan to address the support gap and to facilitate greater coordination between support persons, lawyers, prosecutors, and 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 a FIR is lodged till the completion of trial.
7. Creation of a trained cadre of Support Persons with the assistance of Delhi Legal Services Authority and District Child Protection Units under the Juvenile Justice (Care and Protection of Children) Act, 2015.
8. Allocation of funds to enable Child Welfare Committees to provide remuneration and travel expenses to Support Persons appointed in POCSO cases.
9. Ensure that compensation ordered by the Special Court is paid within 24 hours.
10. Instruction to the Department of Public Prosecution to issue a guidance note for prosecutors to enable them to conduct the prosecution in a child-sensitive manner. The note should also address the need for cooperation between the prosecutor, lawyer of the victim, and the Support Person.
11. Direction to District Child Protection Unit 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.
12. 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.
13. Facilitating the establishment of community level support groups to create awareness about child sexual abuse, the legal framework, and support services available among all children, particularly children out of school, children with disabilities, children living on the street, and children living in residential institutions.
14. 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. To also use the media to promote positive attitudes towards children.

15. Developing safe, well-publicized, confidential and accessible support mechanisms for children to report sexual abuse with specific attention to reporting mechanisms within residential institutions.
16. Developing guidelines for reporting by professionals such as doctors and others in contact with child victims.
17. Ensuring regular inspections of Child Care Homes.
18. Commissioning research on evidence-based treatment programs for persons at risk of sexually abusing children and on root causes of sexual violence against children.
19. Organize periodic consultations with police, prosecutors, doctors, CWCs, JJBs, and support persons to understand the problems they face in the implementation or application of the POCSO Act, identify training needs, document good practices, and identify measures that should be taken to support them in the discharge of their obligations.

## 5.3 Recommendations for Special Courts

**20.** Take into account the developmental needs of the child before scheduling testimony. Judges should verify if the child is hungry, sleepy, or needs to use the toilet before commencing with the testimony.
**21.** Care should be taken to ensure that the child is not kept waiting on the day of the testimony.
22. Complete the examination-in-chief on the same day. Breaks should be allowed if necessary.
23. Do not allow the defence or the prosecution to question the child directly.
24. Admit the statement of a child with disability recorded under Section 164(5A)(a) as examination-in-chief.
25. Do not delay or deprives child victim in need of interim compensation by linking the decision toaward to their testimony.
26. Proactively consider compensation application and not hesitate from exercising their *suo motu* powers in this regard.
27. Direct the DLSA to file a compliance report within 30 days of the award of compensation.
28. In the absence of a waiting room, allow the child to be seated in the judges' chamber.
29. Examine the child in the chamber or any other room in the court complex, if the courtroom intimidates the child.
30. Apply the rulings of the apex court in *Jarnail Singh v. State of Haryana* and *Ashwani Kumar* on the point of age determination.
31. Apply the techniques suggested in Annexure A of this report, while questioning children.

**Areas of further research**

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

- Compendium of case laws relevant to POCSO trials
- Experience of child victims in the police station
- Experience of child victims in the courtroom
- Quality and nature of support available to child victims of sexual abuse

- Rehabilitation needs of child victims of sexual abuse
- Restorative Justice Processes in cases of child sexual abuse.
- Research on evidence-based treatment programs for persons at risk of sexually abusing children.
- Research on criminal liability of children in consensual sexual relationships

# Annexure A

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

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

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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 Corner house 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 peeis? 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?"