



ISSN 2582 - 211X

LEX RESEARCH HUB JOURNAL

On Law & Multidisciplinary Issues

Email - journal@lexresearchhub.com

VOLUME II, ISSUE III
APR - JUNE, 2021

<https://journal.lexresearchhub.com>

**Lex Research Hub
Publications**

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A CRITICAL ANALYSIS ON POCSO ACT

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ABSTRACT

This paper discusses the requirement of the implementation and amendment of Protection of Children from Sexual Offences, 2012 and 2019 respectively. As the increasing incidents of sexual offences against children led the lawmakers think about a separate statute which deals with such incidents, as the Indian Penal Code, did not specifically deals with sexual offences against children, particularly boys. It basically recognizes limited forms of sexual violence against girls, and acknowledges all sexual acts other than rape as amounting to “outraging the modest of women” and which has a maximum punishment of a term of two years and/or fine. Hence, to protect children from sexual abuses, IPC is quite insufficient. Not only that but how along with the act the judgments provided in various case laws provided a way to justice to several aggrieved, who came to the court with the hope of justice. This paper also provided the analysis given by various jurists regarding the recent judgment provided by the Bombay High Court, and how such judgment was absurd.

Keywords - *POCSO, Sexual abuses, child abuse*

INTRODUCTION

“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and that they can grow up in peace” – KOFI ANNAN

With the increasing cases of sexual abuse, rape or trafficking of children which is being reported across the country and a public protest raging on the streets like a hot molten lava which is continuously flowing out, from a bursting volcano. The child victims who are traumatized by those heinous incidents feels dejected and horrified along with their family members who found themselves confused, helpless and are unable to cope up with their situation.

Children at this age need constant care and protection as they are innocent beings and are totally unaware of this evil society. They need their parents or guardians to safeguard them from this evil world. But still society never loses any chance of being cruel and inhumane that robs them of their innocence and mental peace. It leads to rise in the problem of child sexual abuse in recent years.

Millions of children are victims of such abuse every year. Child Sex abuse, in one form or another, has existed in almost every society throughout history. However this is generally not accepted or considered. The reason for the same could be such abuse is shrouded in secrecy and its acknowledgment causes dishonor and shame. The denial of its presence however brings the child more close to such abuse. There are various sections under IPC and other statutes in India for sexual offences. But that's not sufficient.

The continuously increasing incidents of sexual offences against children led the lawmakers think about a separate statute which deals with such incidents, as the Indian Penal Code, did not specifically deals with sexual offences against children, particularly boys. It basically recognizes limited forms of sexual violence against girls, and acknowledges all sexual acts other than rape as amounting to “outraging the modest of women” and which has a maximum punishment of a term of two years and/or fine. Hence, to protect children from sexual abuses, IPC¹ is quite insufficient.

IMPLEMENTATION OF STATUTE “POCSO”

Prayas, an NGO in association with Save the Children and UNICEF in 2007 conducted a survey which revealed that 53.22% of children have faced one or another kind of sexual abuse. This survey was sponsored by Ministry of Women and Child Development². This shows that provisions given under IPC are not sufficient to handle such offences and there is a need of some special provisions or act to look after it.

Therefore, in 2012 the Protection of Children from Sexual Offences was implemented to overcome such issues.

It was formed to protect children from offenses of sexual abuse, sexual harassment and pornography and to provide them a child-friendly system for the trial of these offences.

According to this act, "child" means any person below the age of 18 years.

Again in 2019, The Protection of Children from Sexual Offences, or POCSO, (Amendment) Bill, 2019, was implemented to provide for stringent punishment to those engaging in sexual crimes

¹ Indian Penal Code, 1860

² Ministry under Gov. of India.

against children, death penalty in cases of aggravated sexual assault, besides levying fines and imprisonment, to curb child pornography.

SALIENT FEATURES AND OBJECTIVES

1. A person below 18 years of age is a child and providing protection to a child from any kind of sexual offences is mandatory.
2. Stringent punishment as per the gravity of the act. From simple to rigorous imprisonment and even introduction of death penalty.
3. An offence is an aggravated form, when committed by a person in position of trust or authority of child, such as police, public servant etc.
4. Punishments:-
 - Penetrative Sexual assault³- 10 years or which may extend to imprisonment for life.
 - Aggravated Penetrative Sexual Assault⁴- 20 years or may lead to death penalty.
 - Storage of pornographic material- imprisonment between 3-5 year, or fine or both.

The above provisions are updated as per amendment made in POCSO, 2012 and POCSO, 2019 was implemented. The Amendment Bill was passed keeping in mind the following objectives:-

- To provide a deterrent form of penal provision in order to stop the rampant sexual abuse of children.
- Introduction of Death penalty in aggravated sexual offence to provide more stringent punishment.
- To protect the interests of children and ensure their safety especially to those who are vulnerable in times of distress.
- To provide more clarity regarding different aspects of child abuse and their punishment.
- To make provisions more gender neutral.
- To establish Special Courts for the trial of such offences.

³ Section 3 of POCSO

⁴ Section 5 of POCSO

- To established child friendly trial.

JUDICIARY LAYS FOUNDATION

Sexual abuse not simply means rape or molestation but it can be more than that, it can be subtle or physically violent or it can also be without touching the child, it can be oral as well as by facial expressions and body language. Showing pornographic material to a child also comes under sexual abuse. Not only girls but boys are also considered as victim of such abuse. And in most cases offenders are not strangers but someone whom child knows like a neighbor or a close relative. There are several cases which prove the above facts. This crime needs serious legislation and that's why apart from the statute, there are several pronouncements and decree which provide us landmark precedents to deal with such cases.

In the year 1996 in the judgment of *State of Punjab vs Gurmit Singh*⁵, Supreme court has acknowledged its existence by observing that, “crime against children in general and sexual abuse in particular, is rising. It's an irony that in a country where we are celebrating children's rights, we show little or no concern for his/her honour, respect and right. It's a sad reflection on the attitude and mentality of the society towards the children by violating human dignity and creating victims of sexual abuse, especially when the victims are children.”

In the landmark case of *Madan Gopal Kakkad vs Nawal Dubey*⁶, where a Medical Practitioner used to sexually assault and molest young girls. This was not only disregard of the universal moral code of his professional values and ethics, but also in violation of the law of this Country. This was one of the obnoxious incidents. In this case the apex court convicted the accused u/s 376 I.P.C. and sentenced him to rigorous imprisonment for 7 years and fine of Rs 25000/-. The court ordered the offender to pay the penalty amount to the victim. The court in this case pronounced ‘Justice Demands, the Court Awards’. The court with deep concern opined out that, “though all sexual abuses on female children are not reported and not comes to light, yet there is an alarming rate of increase in sexual offences committed against children. This is probably due to the reasons that children are unaware of the good touch and bad touch or act of rape and that's why, are not able

⁵ AIR 1996 SC 1393

⁶ (1992) 3 SCC 20

to resist and hence, become easy prey for lusty brutes who display the deceitful and insidious art of luring female children. Therefore such offenders who are part of civilized society should be mercilessly punished in the severest forms of punishments. We feel that judges who bear the Sword of Justice should not hesitate to use that sword with the utmost severity, to the full and to the end if the gravity of the offences so demand.”

Another path breaking judgment of the case Sakshi V/S Union of India⁷, in which Supreme Court directed law commission to review the laws regarding rape and to amend them accordingly. As before this case, act like kissing, touching badly, inserting fingers in private parts etc do not falls into the ambit of sexual abuse, but after this case, there are several changes made against such offences. Apart from this, the court also provides various directions regarding cross examination of the child victim so that it would be comfortable for the victims to reveal the whole incidents.

In the case, State of Punjab vs Gurmit Singh⁸, wherein it was directed that the evidence provided by the victim during trials must be recorded in camera while protecting the anonymity of the victim and preferably conducted by a lady judicial officer.

‘Protection of Children from Sexual Offences Act, 2012’ and its amendment in 2019 is recently enacted law which is an outcome of the directions provided by the Judiciary, which prescribes laws regarding establishment of Special Courts and victim and child friendly procedures for trial and investigation of these cases as well. It can be said that the laws behind child sexual abuses is both substantive and procedural and is the outcome of Judiciary’s efforts, persuasion and initiatives along with the statutes.

RECENT CASE AND ITS ANALYSIS

The one with the controversial judgement

In the fresh and recent case ‘State of Maharashtra v/s Satheesh’ of 2021, the single-judge bench (Justice PV Ganediwala) of the Bombay high court recently delivered one of the most controversial judgments in an appeal regarding sexual assault of a 12 years old girl. In this case the accused-

⁷ (CrI) No33,1997

⁸ 1996 AIR 1393,1996 SCC (2) 384

appellant took a 12 year old girl to his house by giving a guava and the then pressed her breast and tried to remove her salwar but the girl's mother reached the spot and rescued her and lodged an FIR and later filed a case in Trial court where the accused was convicted under POCSO Act and IPC. The accused later on appealed in the High Court of Maharashtra, where the court acquitted the accused on the consideration that whether pressing the breast without removing the top of a child falls into the purview of the definition of sexual offence given under Sec 7 of POCSO.

As Sec 7 of POCSO act defines sexual assault as touching the private parts of the child or making the child touch the private parts of the accused with sexual intent without penetration.

In this case the judge held that due to lack of specific details as whether he removed the top of the victim or inserted his hand inside top and pressed her breast, the act would not fall in the definition of 'sexual assault'. And so the court acquitted the convict under POCSO Act.

Therefore, the court acquitted the convict under POCSO Act while acknowledging the act of the accused the use of criminal force with the intent to outrage a woman's modesty defined under Section 354 of the Indian Penal Code.

The controversy:-

The court interpreted the word 'physical contact' held that for an act a 'Skin to Skin' touch is necessary, to fall into the purview of this section. And acquitting the appellant-accused from section 8, POCSO Act for touching the minor girl without removing her clothes and changed the conviction to section 354 IPC for outraging the modesty of a woman. And led the appellant-accused to be sentenced to 1 year R.I. for outraging the woman's modesty instead of 3 years Rigorous Imprisonment.

While taking a narrower approach to interpreting section 7, the purpose of the POCSO Act has been somewhat restricted. Where this Act was enacted for protecting children from sexual offenders, the present judgment provides a more careless attitude. Also, the words 'any other act' in the definition of sexual assault attract the principle of ejusdem generis which means any act of the same nature. This it indicate the wide ambit of this section. This interpretation made by the justice carried much criticism and so subsequently an appeal was filed before the Supreme Court of India challenging this judgment of the Bombay high court.

There are few reasons due to which such decree is being criticized, the differences between Sec 354A and Section 7 & 8 of POCSO is one of the cause.

| | 354A of IPC⁹ | SECTIONS 7 & 8 of POCSO ACT¹⁰ |
|------------|--|---|
| Definition | 1) A man committing any of the following acts— (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) showing pornography against the will of a woman; or (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment. | Whoever with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration, is said to commit sexual assault.(Section 7) |
| Punishment | 2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both. (3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both. | Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. (Section 8) |

⁹ Bare act provisions of IPC,1860

¹⁰ Bare act provision of POCSO, 2012

| | | |
|-----------------|---|--|
| Gender and Age. | The section is gender specific and applies only when the crime is committed against a female. Irrespective of age of the victim the section applies when the case of sexual harassment arises. | The section is gender neutral and applies in case of both male and female. Section applies only when the victim is a minor. |
|-----------------|---|--|

Unstoppable criticism

To the above recent judgment, various jurist including judges and advocates criticizes the decision taken by Bombay High Court. According to Senior Adv. Rebecca John this verdict was “quite bizarre”. As the language used in Section 7 is clear, she stated, “it is ridiculous to interpret the physical contact as skin to skin.” According to her pressing of breast will fall within this section as the section says whoever touches, and attempting to remove salwar shows the intent of the accused.

Adv. Karuna Nundy stated this verdict “deeply troubling”, because “if we say that adults can come and grope children’s private part and it’s not going to be sexual assault.”

“Now, people who sexually assault little boys in this way could go scot-free, as Section 354 of the IPC only applies to women,” she added.

The ‘skin-to-skin’ contact rule would also states that a rapist who rapes a child with a condom could not be punished for sexual assault, she added.

Supreme Court advocate and former judge Bharat Chugh said the judgment ignores the definition of sexual assault under Section 7 of the Act, which he described as “quite clear and unambiguous”.

The fact that the accused touched the child’s breast was clearly proved, he added. The ingredients of Section 7 and 8 of the Act were also clearly satisfied. The observations regarding a ‘skin-to-skin contact being necessary for the purpose of making out a case under Section 8’ do not appear to be legally sound,” he said.

Senior advocate Sanjay Parekh said that the reasoning adopted by the court is “absurd”.

“Ultimately, when we talk of child abuse, there cannot be a more wrong interpretation or absurd interpretation of the law,” he added.

According to attorney general K.K. Venugopal if this judgment is not changed and set out to be a precedent then in future the accused can claim his innocence under section 7 of the Protection of Children from Sexual Offences Act, 2012 by arguing that it is not a sexual assault because there was no direct skin to skin contact. Therefore, stay of the judgment by the apex court was very important as it would have led to a bad precedent.

CONCLUSION

When a victim-approaches a court, there is a hope of justice in their eyes which is reflected in their prayers. Instead the present judgment shadows that hope of justice, but the apex court by staying the acquittal and taking further steps has assured that justice may be delayed but not denied. Such offences are not only against any individual but against society at large. The judgment given by the Bombay High Court is a bad precedent as it would provide a bad example to various other cases in future.

While concluding it is necessary to understand the importance of child’s mental as well as physical health after such abuses. This was the main motive of implementing and amending the statute. There were loopholes in the previous act led to its amendment for the best interest of the child as earlier the laws like IPC were too harsh on them. And along with the enacted laws the state judiciary should also look after their discretion more consciously.