

A case of selective interpretation of POCSO & denial of justice.

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Dave Pelzer once said, "Childhood should be carefree, playing in the sun; not living a nightmare in the darkness of the soul", and yet today child sexual abuse is at an all-time high/ is at a critical juncture across the globe. If we talk about India, many studies both from governmental and non-governmental sources show a grim picture of the society. According to the latest report by the National Crime Records Bureau (NCRB) on September 16th this year, a total of 47,221 cases filed under the Protection of Child from Sexual Offences Act, 2012 ("**POCSO**") were reported in 28 states and 8 union territories across the country. Out of these cases, UP reported the maximum- 6,898 cases, followed by Maharashtra, Madhya Pradesh, Tamil Nadu and West Bengal.

The POCSO is a special legislation enacted to curb sexual offences against children. and provides for various categories of offences along with the punishments in Chapter II

In **Sonu Kushwaha v. State of Uttar Pradesh**, a recent controversial judgement rendered by the Allahabad High Court observed that Oral sex does not fall in the category of

aggravated sexual assault or sexual assault as per the provisions of the POCSO Act, thereby reducing the imprisonment term of a man from 10 years to 7 years, convicted of sexually assaulting a 10-year-old boy. Previously, the Special Sessions Court convicted him under Section 377 (unnatural offences) and Section 506 (punishment for criminal intimidation) of the Indian Penal Code, 1860 ("**IPC**") and Section 6 of the POCSO Act.

The crime dates back to March 2016, when the father of a 10-year-old boy in Jhansi had alleged that the accused, one Sonu Khushwaha, took his son to a nearby temple, gave him Rs 20 and asked him to perform oral sex on him.

The Additional Sessions Court charged the accused under the same IPC sections, i.e, under Section 377 and 506, and Section 5 and 6 of the POCSO Act. The latter deal with aggravated penetrative sexual assault. It had sentenced the accused to 10 years of imprisonment, the minimum under Section 6 which may extend to life imprisonment.

The accused challenged the judgement in the Allahabad High Court, following which Justice Ojha noted, "it is clear that the offence committed by the appellant neither falls under Section 5/6 of the POCSO Act..."

Justice Anil Kumar Ojha in his order observed, "It is clear that offence committed by appellant neither falls under Section 5/6 of POCSO Act nor Section 9(M) of POCSO, because there is penetrative sexual assault in the present case as the appellant has put his penis into the mouth of the victim. Putting a penis into the mouth doesn't fall in the category of aggravated sexual assault or sexual assault. It comes into the category of penetrative sexual assault which is punishable under section 4 of the POCSO Act".

Now, NCPCR (National Commission for Protection of Child Rights) has asked the UP Government to file an appeal against

the Allahabad High Court's contentious judgement. The commission has stressed that as per Section 44 of the POCSO Act, NCPCR is the 'monitoring body' regarding the interpretation of the POCSO Act, and thus, the letter calls upon the state government to file an appeal against the order.

INVOLVED SECTIONS:

SECTION 3: A person is said to commit penetrative sexual assault if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child do so with him or any other person.

SECTION 4: Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than seven years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of the natural life of that person and shall also be liable to fine.

SECTION 5/6: Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of the natural life of that person and shall also be liable to fine, or with death.

SECTION 9(m): Whoever commits sexual assault on a child below 12 years of age shall come under the offence of "aggravated sexual assault".

An interpretative blunder by the lordships?

Justice Ojha's interpretation of the POCSO Act warrants an appeal since he has failed to classify the offence correctly and that, the observation is inconsistent with the spirit and

the object of POCSO. He legibly missed out on Section 5 (m) of the Pocso Act which might create the bone of contention shortly and set a dangerous precedent.

According to **Section 5(m)** of the POCSO Act, any penetrative sexual assault upon a child below the age of 12 years is 'aggravated penetrative sexual assault'. 'Aggravated' offences under the POCSO Act lead to more severe punishments.

Justice Ojha does not at any point in his judgement throw light on how does Section 5(m) not apply here, despite noting the survivor's age and there being no dispute that he was under 12 years of age.

The Way Forward:

The judgement needs to be rectified immediately through a review or an appeal. This can be done by the High Court itself without any review petition filed, using the power vested in them under Article 226 of the Indian Constitution.

In the case of **Pottakalathil Ramakrishnan v. Tahsildar**, the Kerela High Court re-affirmed that a High Court can review its own judgement without the requirement of an appeal.

The High Court quoted the case of Shivdev Singh where the apex court held that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. The very same proposition was held in **M.M. Thomas v. State of Kerala**.

Alternatively, the State of Uttar Pradesh can file an appeal or a review or even functionaries like the Attorney General or the NCPCR (National Commission for Protection of Child Rights) could take the issue to the Supreme Court.

Lately, we've seen that the Supreme Court set aside the

controversial order passed by the Bombay High Court in its infamous 'skin-to-skin' judgement which held that " 'skin-to-skin' contact is necessary for the offence of sexual assault under Protection of Children from Sexual Offences(POCSO) Act".

The Supreme Court while reversing the judgement observed that 'sexual intent' and not 'skin-to-skin' contact is the essence in POCSO assault cases. Furthermore, it added that "the construction of a rule should give effect to the rule rather than destroying it", and "any narrow and pedantic interpretation of the provision, which would defeat the object of the provision, cannot be accepted".

RECENT RULINGS IN THE POCSO CASES :

Recently, A special POCSO court in Bihar tried and convicted a person with life term imprisonment within one day which pertained to the rape of an 8-year-old girl. Interestingly, the court examined ten witnesses, heard the case, convicted and awarded a 'life imprisonment sentence' to him, all in one day.

A press note by the Directorate of Prosecution, Home Department of the Bihar government, said: "This is perhaps the first case in which punishment has been given in a single day of trial. Before it, in Datia (MP) district, a court had delivered a verdict after three days of trial on 8 August 2018. Bihar has now made a national record by conducting a trial in a single day by giving a life sentence to the convict till his last breath."

A little while back, an Uttar Pradesh Court (Behraich Court) on 23 November awarded the death penalty to a man after finding him guilty of raping his own 14-year-old daughter for 2 consecutive years. Importantly, the Additional Sessions Judge completed the trial in the case in 7 days.

The Court noted that “The act was contrary to all the norms established by law, religion and humanity, and is going to destroy the institution of the family which makes the case fall under the category of ‘rarest of the rare’, the act being bestial and barbaric”.

A few days back, the Bombay High Court upheld the death penalty awarded to a 30-year old man for raping and killing a 3-year old.

The Bench noted that the act committed by the convict was “gruesome, barbaric and revolts human conscience”, and falls under the category of ‘rarest of rare’.

CONCLUSION :

These recent cases show that it is quite difficult to picture the layman perspective and judicial interpretation of the law going hand in hand.

As far as the POCSO Act is concerned, it is evident from the judgements of different High Courts that there is a difference in interpretation and understanding of the law and lacks uniformity which in turn denigrates the right to fair justice and creates a blot in our criminal justice system.

The court must exercise due diligence in these sensitive and grave cases and refrain from giving vague observation as it might go as a precedent that can create a chilling effect among the different sections of the society as well as the judiciary.

On a concluding note, quoting Bob Ney, “In my view, there is nothing more vicious and outrageous than the abuse, exploitation and harm of the most vulnerable members of our society, and I firmly believe that our nation’s law and resources need to reflect the seriousness of these terrible

crimes”.

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