

**SALIENT FEATURES
IN INVESTIGATION, PROSECUTION
AND TRIAL OF CASES UNDER
POCSO ACT - 2012.**

A paper

by

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THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

(Act 32/2012)

The Act is a central legislation, which has come into effect from 14.11.2012 as per the Gazette Notification of the Ministry of Women and Child development Government of India dated 09.11.201.

INTRODUCTION

Being a signatory to the convention on the rights of children adopted by the UNO, our country has brought this legislation into force. The act in question aims at ensuring the physical, emotional, intellectual and social development of the child. Hence state is expected to take all measures to prevent–

- (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) the exploitative use of children in

prostitution or other unlawful sexual practices;

- (c) the exploitative use of children in pornographic performances and materials;

Being a special penal legislation providing for special provisions for children as per Articles 15(3) of the Constitution of India, the intention of the special legislature will have to be kept in mind while applying the provisions of this act. For effective implementation of the provisions of this act, a coordinated effort is required by the Investigation Agency, Prosecuting Agency and the Criminal Courts dealing with the matter. The act differs substantially from the criminal cases arising out of violation of various provisions of Indian Penal Code. Some of the salient features of this act are in respect

- (a) Reporting of cases and registration of the cases and the obligation of the police to report to the Special Court and the child welfare committee.
- (b) Recording the statements of the victim by the investigating officer and the precautions to be taken by the investigating officer.
- (c) Not allowing the advocates of the accused by the magistrate at the time of recording the statement of witnesses u/s 164 of Cr.P.C.

- (d) Provision for audio-video recording of the victim during the investigation.
- (e) Provision for establishment of Special Courts to be presided over by a sessions judge and prosecuting the case by a public prosecutor and the jurisdiction of the Special Court to try even the offence punishable u/s 67-B of The Information Technology Act 2000.
- (f) Mode of recording the evidence of abused child and time schedule to record such evidence and the steps to be taken for creating comfortable atmosphere to the child.
- (g) Power to take the assistance or guidance of experts or persons having knowledge about the child welfare.
- (h) Provision for awarding adequate compensation and interim compensation to the abused child.
- (i) Mandatory presumption in respect of the offences u/ss 3, 5, 7 and 9 of this Act the moment case is prosecuted.
- (j) Provision for alternative punishment to the accused and punishment for false reporting or lodging false complaints.
- (k) Obligation of government in creating awareness about the act and monitoring the implementation of the Act and imparting training to the concerned.
- (l) Power of Special Court to decide as to whether the

accused alleged of the offence is a child or not and effect of such an order.

Investigation is a critical component in any criminal case. Any criminal case dealing with sexual offence, more particularly against child, needs effective investigation at the hands of the police. Similarly effective prosecution is a *sine-qua-non* to take the case to its logical end. Judge dealing with a case like needs to be sensitive. This act has provided for several measures to safeguard the interest of the abused child. Several provisions in this act are based on the guidelines given by the Hon'ble Supreme Court in *Sakshi's Case reported in AIR 2004 SC page 3566 and Gurmit sing's cas reported in AIR 1996 SC paged 1393.*

Various kinds of offences have been defined in section 3, 5, 7, 9, 11, 13, 14, 15 and 17 of the Act. Punishments have also been contemplated for the offences defined and they include punishment for abetment and attempt to commit an offence.

INVESTIGATION-

Investigation in a criminal case commences with the lodging of the First Information to the police and registration of a case by the police and lodging of FIR. Sections 154 and 156 of Cr.PC deal with the same.

Section 9 of this act starts with a non-obstante clause providing for lodging the First Information either to the local police or to the Special Juvenile Police unit. Sub-section (5) of section 19 mandates the police to provide immediate care and protection either by taking the child abused to a shelter home or to the nearest hospital, if the child is in urgent need of the same. It is obligatory on the part of the police receiving the First Information to report the matter within a maximum time limit of 24 hours not only to the special court but also the child welfare committee. While reporting, it is expected to report about the need of care and protection to the child and steps taken in this regard.

Section 20 mandates the media, or hotel or lodge or hospital or club or studio or company to inform the police about coming across any material or object which is sexually exploitative of the child and non-reporting of the same is punishable u/s 21 of the Act. Furnishing false information or lodging false complaint is punishable u/s 22 of the act. The identity of the child sexually abused can not be disclosed in any manner and violation of the same is punishable u/s 23 of the Act.

Recording the statement of the child is covered u/s 24 of the Act. As far as practicable the statement of the victim is to be recorded by a woman police officer, who is not below the rank of Sub-Inspector that too without uniform. Statement of the victim has to be recorded in the presence of the parent or representative of the child. As far as possible statement of the victim is to be recorded through audio-video. A copy of the final report is to be given to the child, parents or the representative of the child.

As per section 27 of the Act, medical examination of the child has to be conducted by a woman doctor in accordance with section 164-A of Cr.P.C. that too in the presence of the parent or any other person in whom child reposes trust or confidence. Whether a First Information report is registered for the offences under this Act or not, medical examination of the child is a requirement and the same has to be done in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

Section 53-A of Cr.PC mandates that the police can subject the accused to undergo medical examination by a medical practitioner of a government hospital if there are reasonable grounds for believing that the examination of

the person will afford evidence as to the commission of such offence. Such report must be submitted to the police and it should form a part of the final report.

Proviso to section 157 of Cr.P.C. mandates that the statement of the victim of rape should be recorded at residence of the victim or in any place of the choice of the victim as far as possible, by a woman officer in the presence of the parents of the victim. While recording the statement of the child, the police officer should not be in uniform and take all steps to protect the child from the public media. The recording of the statement should be as spoken by the child. The police officer or magistrate recording the statement of the child may take the assistance of a translator or a interpreter having requisite qualification and experience. If the child has mental or physical disability the assistance of the special educator or an expert in the field having necessary qualification may be taken.

Section 173 (1A) f Cr.P.C. mandates the police investigating the offence of rape against the minor child to conclude within three months from the date the registration of the FIR.

Recording statements of witnesses under section 164(1) of Cr.P.C. by the Judicial Magistrate will have a

more probative value even if such witnesses were to resile from their statement made before the Magistrate u/s 164 (1) Cr.P.C. Normally, such witness will hesitate to depose before the court contrary to the statement made before the Magistrate u/s 164(1) of Cr.P.C.

It is preferable that the charge-sheet in a rape case be vetted by the Superintendent of Police of the District in which the offence has taken place. This helps the senior police officer in the District to know about the manner in which the investigation has been conducted and make sure that the investigating officer will be accountable for serious lapses, if any. It is also preferable that a special wing in the District Crime Branch be earmarked for investigation of serious offences against woman and child as is done by the C.O.D. wing of the state in dowry death cases.

PROSECUTION:

EFFECTIVE PROSECUTION

Effective prosecution of a criminal case before the criminal court is a *sine-qua-non* for inspiring confidence in the minds of the public. Normally the accused will engage an experienced and competent advocate to defend him/her.

Therefore, the prosecution must discharge its duty through an able and competent public prosecutor to prosecute a case in which a child is sexually abused or a woman is raped, before the Sessions Court/Special Court. Such public prosecutor must be sensitive enough to know the intricacies of a Trial in a case of rape or sexual abuse of a child and the legal position in regard to the relevancy of statements of the witness and the relevant provisions of law and leading decisions dealing with cases.

In this regard, the Department of Prosecution has to sensitize all its prosecutors about the cases relating to various types of offences against women and children. As sufficient amount is granted under the 13th and 14th Finance Commission by the central government for training prosecutors, the department of prosecution in association with the respective judicial academies can arrange training programmes and workshops for prosecutors on various aspects pertaining to offences against women and children and including medical and forensic evidence. It is also preferable to include the representatives of Non-Governmental Organizations actively involved in the protection of women and children, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development. They will play a vital role in assisting the

child both during the trial and pre trial state. The public prosecutor who is in-charge of prosecuting the case must be thorough with the nitty gritty of a trial of a case of this magnitude. In a case where the allegation is of rape or having sexually abused the child, the accused will normally raise the following pleas.

- i. Inordinate delay in lodging the FIR by the victim to the police and the delay in lodging the FIR by the police to the court.**
- ii. Absence of proper medical evidence to connect the allegations of rape.**
- iii. Admissibility of the evidence a child witness.**
- iv. Non-Corroboation of the version of the prosecutrix by an independent witness.**

Since the offence of a rape or abusing child sexually is a grave offence, Hon'ble Supreme Court has held that any delay in lodging the FIR by the victim or the parents of the victim to the police should not be blown out of proportion to doubt the veracity of the victim in a rape case. (See State of Punjab Vs. Gurmit Singh's case AIR 1996 SC P 3093).

Corroboration is not a rule of evidence but a rule of prudence. There is no legal inhibition for the court to convict the person accused of rape on the uncorroborated version of the prosecutrix if the same inspires the confidence of the court and appears to be absolutely trustworthy.

In regard to the evidentiary value of a child witness, Sec.118 of the Evidence Act states that even a child is also competent to give evidence and the evidence of a child is admissible. The child of tender age can be allowed to testify if he or she has psychological capacity to understand questions and give rational answers thereto. Therefore, the evidence of a child witness is not required to be rejected per se. The only caution to the court is that such evidence of a child must be scrutinized with care and caution. (See AIR 2008 SC P 1842, Golla Elugu Govindu Vs. State of Andhra Pradesh).

Similarly, the evidence given by a dumb witness is also admissible under section 119 of the Evidence Act as such evidence will be deemed to be oral evidence.

Medical evidence indicating the presence of semen of the accused on the body or garment of the victim and rupture of hymen and some scratch marks on the back of the victim or bite marks on the face, lips and breasts of the

victim are good evidence in regard to the allegation of rape or sexual abuse of a child. But the presence of these is not an absolute requirement, more particularly when the victim is a married lady or a girl who is an athlete of the victim or when the victim is unable to resist. Presence of medical evidence further strengthens the case of the prosecution. Loose character of the victim is no more a ground of defence. In view of latest amendment to section 154 of the Evidence Act by deleting sub-section 4.

The word 'child' is defined in section 2 (d) of the Protection of Children from Sexual Offences Act 2012. 'A child means any person below the age of 18 years'. Similarly section 375 of IPC- *Sixthly* has also been amended raising the age from 16 to 18 in regard to the consensual sexual intercourse vide Criminal Law (Amendment) Act 2013 which has come into effect from 02.04.2013.

Prosecutor is expected to assist the Sessions Court/Special Court in framing proper questions to be put to the accused. Under section 313 (5) of Cr.P.C., which has come into effect on 31.12.2009, it is the duty of the prosecutor to assist the court in putting all the incriminating aspects to the accused, lest it would be a ground for the accused in the appeal alleging that incriminating circumstances were not brought to his notice

at the time of examination of the witness under section 313 of Cr.P.C.

Many a times it will be argued that there are several lacunae in the investigation conducted by the prosecution. Just because investigation in a case of rape or sexual abuse of a child is not proper or that the investigating officer was not diligent, it alone cannot be a ground to disregard the testimony of the prosecutrix in a case of rape or sexual abuse of a child. In Gurmit Singh's case reported in AIR 1996 SC 1393, the victim had not said anything about the rape to her friends, but had narrated about the incident only to her mother that too after reaching home. The conduct of the victim was found to be natural and it was held that her evidence was not to be doubted on the ground that she did not complain either to her lady teachers or to her girl friends.

It is in this regard, section 6 of the Evidence Act which deals with res-geste is to be considered in proper perspective. Section 6 is an exception to the rule of admissibility of hearsay evidence. For bringing hearsay evidence within the ambit of Section 6 of the Evidence Act, it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication.

TRIAL:

Rape or sexual abuse of a child is the worst form of violence that can be committed against a woman or a child. Sessions Judges dealing with rape cases are expected to be sensitized about the various intricacies involved in a case of this nature. Tendering evidence by the parties to the allegations is the process by which truth will be known. Hence recording of evidence, oral as well as documentary, is the most vital function of the trial judge and would occupy major portion of the time of the court every day. The judge is not only expected to know about the law dealing with the case of rape or sexual abuse of a child but also with various provisions of the Criminal Procedure Code with regard to the manner in which the trial is to be conducted and the relevant provisions of the Evidence Act.

Section 118 of the Evidence Act provides that all persons shall be competent to testify unless the court considers that they are prevented from the questions put to them, or from giving rational answers of those questions, by tender years, extreme old age, disease, whether of body or mind. Section 135 of the Evidence Act deals with the order of production and examination of witnesses as there is no specific provision in Cr.P.C. regarding the order and production of examination of witnesses in a criminal case.

The Special Court constituted under section 28 of this Act provides for trying offences u/s 67-B of the Information Technology Act. This is a special feature under this Act so as to take up matters pertaining to the publication or transmission or sexually explicit material depicting children in any act or conduct or manner or facilitating abuse of children online.

A Special Court dealing with child who is sexually abused, will take cognizance of the offence as there is no procedure for committal to it for trial under section 209 of Cr.P.C. section 33 of the Act deals with the manner in which the evidence of the sexually abused child must be recorded. It is the duty of the Special Court to permit frequent breaks to the child during the trial and to create and a child-friendly atmosphere by allowing a family member or a guardian or a friend or relative in whom the child has trust or confidence, to be present in the court. It is expected of the Special Court to avoid aggressive questioning or character assassination of the child by the counsel for the accused. It must ensure that the dignity of the child is maintained at any cost. The identity of the child should not be disclosed at any time during the course of investigation or trial unless the Special Court may permit such disclosure of identity that too on reasons being recorded.

Whenever any question arises as to the age of the accused, the special court will have to determine the age of the accused by recording reasons in writing and such finding will not become invalid by any subsequent proof that the age of a person as determined by the Special Court under sub section 2 of section 34 was not the correct age of the person.

It is mandatory for the Special court to record the entire evidence of child within a period of 30 days from the date of taking cognizance of the offence and the entire trial is to be concluded within a period of 1 year from the date of taking cognizance of offence, under section 35 (1) and (2) of the Act. As per section 36 the special court should ensure that the child is not exposed in any way to the accused at the time of recording the evidence except ensuring that the accused is in a position to hear the statement of the child and could communicate with the accused. The entire trial under this Act will have to be held *in-camera*. The Special Court has the power to record the evidence of child in any place other than the court after forming a prior opinion to that effect as per section 284 of Cr.P.C. The Special Court has the power to take the assistance of a translator or an interpreter having such qualifications and experience and if the child has any mental or physical disability, the special court may taken

the assistance the special educator or any person familiar with the manner of communication of the child, as per section 38 of the act.

The sexually abused child has the right to take the assistance of a legal counsel of her choice and if the family members are the guardian of the child are unable to afford a legal counsel, it is the duty of the court to provide a competent lawyer from the panel of Legal Services Authority.

The judge is expected to properly prepare before commencing the recording of evidence in open Court. Proper charge has to be framed before the Trial commences since charge is the foundation of a criminal trial. Before framing of charge, the learned judge is expected to look into as to whether the Investigating Agency has produced all the documents that are referred to in the charge sheet. The learned judge is expected to make sure that all the material objects referred to in the final report are placed before the Court. If there are valuables kept in the treasury box, then they are to be secured at the earliest. If the valuables are already returned to the interim custody of the party or parties, the respective witnesses should be intimated well in advance to produce the valuables given to their interim custody for purpose of identification of the same by the witnesses.

Administration of oath as per the Oaths Act is sine qua non before the witness is asked to tender evidence. When the witness steps into the witness box to give the evidence, the first duty of the judge is to administer oath in accordance with the Oaths Act, 1969. When the witness gives evidence in a language not understood by the Court or parties, an interpreter who knows the language of both, has to be appointed by the Court for purposes of interpreting to the witness, questions put and evidence given by witness. The form of oath to be administered to the witness and the interpreter is found incorporated in the schedule to the Oaths Act.

ADMINISTRING OATH TO A CHILD WITNESS

- (i) A child under the age of 12 years should not be administered oath if the Court is of the opinion that it does not understand the meaning of oath or affirmation even if the child witness understands the duty to speak the truth (vide section 4(1) of the Oaths Act). To know whether the child witness understands the implications of oath, the Judge has first to put questions to the child whether he/she understands what is meant by oath and further ask what the consequences would be of not speaking the truth after taking oath. For example, if the child

answer that it would invite god's wrath or it is a sin to lie or that it knows it is wrong to tell a lie, the Court can conclude that the child understands the implications of oath and proceed to administer the oath to the child witness. Even otherwise if the court is satisfied that the child understands that it has a duty to speak the truth, its evidence can be recorded.

- (ii) The judge should make a brief record of the preliminary steps taken as stated above and his opinion as to why oath is or is not administered, in the deposition sheet. The Judge should thereafter proceed to record the evidence of the child. The obligation of the child witness to speak the truth is not in any way minimized. The manner in which the child witness gives evidence should be carefully observed by the Judge to find out whether it is tutored and make a record of the same. The likelihood of the Child witness being tutored is a factor that the Judge has to take into consideration in appreciating its evidence. It is the duty of the Court to observe the child witness carefully and if the Court feels that the manner in which the deposition is given is parrot like repetition of

whatsoever is tutored, the Court should make a note of such demeanour. The Court should carefully observe if any one accompanying it tries to make signs or gestures to influence the witness and take immediate steps to prevent the same. The Court should make a record of the same in the deposition, which it can be taken into account while assessing the evidence of the child witness. Once the Court is satisfied that the child is speaking the truth, it can rest its decision entirely on such evidence even if the child is a sole witness. The evidence of a single child witness is enough to sustain a conviction in a criminal case if it is trustworthy and inspires confidence as a truthful witness even when there is no witness to corroborate it.

(ii) In the case of *Rameshwar S/o Kalyan Singh v. The State of Rajasthan* **AIR 1952 SUPREME COURT 54** (SAIYID FAZL ALI AND VIVIAN BOSE, JJ.) it is observed as follows:

(A)Oaths Act (10 of 1873), S.5, S.13 – Evidence Act (1 of 1872), S.118 – OATH – EVIDENCE – Evidence of a child – Omission to certify understanding duty to speak truth – Effect on admissibility of evidence.

A Judge who recorded the statement of a girl of seven or eight years certified that she did not understand the sanctity of an oath and accordingly he did not administer one to her. He, however, did not certify that the child understood the duty of speaking the truth. The question was whether this omission rendered her evidence inadmissible.

Held, (1) An omission to administer, an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in S.118, Evidence Act. The Oaths Act does not deal with competency and under S.13 of that Act omission to take oath does not affect the admissibility of the evidence. It therefore follows that the irregularity in question cannot affect the admissibility of the evidence of the girl: A.I.R. (33) 1946 P.C. 3, Rel. on.

2. It is, however, desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state

why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.

COURT'S DUTY TOWARDS THE WITNESS:

The witness who is characterized as “Eyes and ears of the Court” should be treated with utmost courtesy and should be offered a seat in the witness box. The witness should be protected from bullying or browbeating counsel, as the composure of the witness may be affected by such high handed methods. The court has a duty to see that the questions put to the witness are intelligible to the witness and should relate to fact, the answer for which is expected from him. When complex questions tend to confuse the witness, the court should ensure that such confusing questions are not put to the witness. Lady witnesses should be invariably offered seats in the witness box and counsel should not be allowed to stand close to the witness which may have an intimidating effect on her. Inferences from facts should not be allowed to be put to the witness as it is essentially in the realm of appreciation of evidence. Questions to elicit the recitals of the documents already admitted in evidence should not be allowed to be put to the witness as the recitals can be ready by anybody including the Court.

Some useful tips to be kept in mind while recording evidence are found in the report of the Committee on Induction Training Module for Civil Judges prepared by the Committee consisting of Hon'ble Dr. Justice Sri. V.S. Malimath are reproduced below:

SOME USEFUL TIPS IN RECORDING EVIDENCE:

While recording evidence a Judge will be confronted with several complex situations for which no solution/guidance will be available from the law books. He cannot postpone the process of recording of evidence to find a solution. Hence the judge has to keep his reflexes geared up to face such situations boldly and effectively. The following are some of the useful tips for the Judge to bear in mind:-

- 1) The judge is bound to receive all the evidence tendered unless the object is to impede or obstruct the ends of justice. Failure to hear material witness amounts to denial of fair trial.
- 2) The Court has discretion to direct the exclusion of witnesses from the court room while the testimony of other witnesses is being given.
- 3) The court has inherent power to regulate its business or to make any order for the ends of

justice. Therefore, the Court should order the witness who has to give evidence should be present when the deposition of other witnesses is being recorded.

- 4) It is a fair course to keep witnesses of both the sides out of Court hall and only the parties remaining present in the Court during recording of evidence of witnesses.
- 5) The cross examiner must not be allowed to bully or take unfair advantage of the witness.
- 6) The court has power to ask any question to a witness at any time in the interest of justice.
- 7) It must be remembered that witnesses attend the Court to discharge sacred duty of rendering aid to justice. They are, therefore, entitled to be treated with respect and it is for the judge to see that they feel confident and relaxed in the court hall. **AIR 1981 SC page 1036 (Ram Chander v. The State of Haryana)** wherein it is observed:-

“To be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest”

- 8) That the counsel for the parties is mainly interested in conducting the trial to secure

success for his client is understandable. But the obligation of the presiding judge is to conduct the proceedings for achieving the dual objectives - search for truth and rendering a just decision expeditiously. However sensitive the subject matter of the trial may be, the court room is no place for play of passions, emotions and display of surcharged enthusiasm.

- 9) Some times an advocate may put complex questions in order to confuse the witness and to somehow get a favourable answer. If an answer unfavourable to his client comes from the witness, he may resort to bullying the witness to secure a favourable answer. In such a situation the Judge should be firm and record the actual answer given by the witness.

Section 280 of Cr.P.C. provides to record the demeanour of witness. This demeanour of witnesses will be of more relevance in a serious offence of rape as the victim will be in a state of shock due to the trauma caused at the time of the offence.

The witness may be little hesitant while speaking about the heinous crime that was committed on her. Some defence counsel adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. In such an evidence, the victim is required to repeat again

and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility, but to test her story for inconsistencies with a view to attempt to twist the interpretation of the events given by her so as to make them appear inconsistent with her allegations. The Court, therefore, should not sit as a silent spectator while the victim of the crime is being cross-examined by the defence. Court is expected to effectively control the recording of evidence in the Court. While, every latitude should be given to the defence to test the veracity of the prosecutrix and the credibility of her version through cross examination, the court must also ensure that cross examination is not made a means of harassment or causing humiliation to the victim of crime. (See Para 16, 21, and 22 of Gurmit Singh's case).

DAY TO DAY TRIAL U/S 309 OF CR.P.C.

As per first proviso to Sec. 376 mandates, the Session Court dealing with the case of rape punishable under Sec. 376 and 376 (A) to (D) of IPC must complete the proceedings within a period of two months from the date of commencement of examination of the witness. The Hon'ble Apex Court in Akil @ Javed Vs. State NCT Delhi (Crl. A. 1735) 09 dated 6.12.2012 has again held that trial in all criminal cases should be held on day-to-day basis

and if there is any deviation from the mandatory provision to Sec. 309 of Cr.P.C., it would be a serious lapse and would be dealt on the administrative side by the High Court. Therefore, it is mandatory that the trial should be held on a day to day basis.

Examination of JMFC as a witness for the Special Court JMFC who has recorded the statement of the victim U/s 164 of Cr.P.C should not be summoned as a witness since such a statement is a public document as per Section 80 of Evidence Act. Hence it doesnot require any formal evidence (Ref paragraph - 5 of **1981 (2) SCC 224 Madi Ganga Vs. State of Orissa** and paragraph 12 of **2003 Crl.LJ 3252 Guruvindapalli Anna Rao & Others Vs. State of Andhra Pradesh**).

Section 33 of POCSO Act mandates that the Special Court shall create a child friendly atmosphere while recording the evidence and such evidence is to be recorded in camera without giving room for continuous examination. Section 36 of the Act mandates that Court has to take steps to see that the child would not see the accused at the time of testifying.

EXAMINATION OF THE ACCUSED

Section 313 of Cr.P.C. provides for examination of the accused after the conclusion of the evidence on behalf

of the prosecution. This provides an opportunity for the accused to explain the incriminating circumstances put to him under Sec. 313 of Cr.P.C. The Court can also take the assistance of the Special Public Prosecutor and the learned advocate appearing for the accused while preparing the questions to be put to the accused under Sec. 313 of Cr.P.C. The Court should make all effort to bring out the incriminating aspects in the prosecution case to put to the accused and seek his explanation. It is true that the accused can keep silent when he is examined, but if the accused make statement supporting prosecution case in his examination, such statement can be used against him. (See AIR 2012 SC 1357 – Ramnaresh Vs. State of Chhattisgarh).

MEDICAL & FORENSIC EVIDENCE

Discovery of spermatozoa in the private part of the victim is not a must to consider it as penetration. Even slight penetration of penis into vagina without rupturing the hymen can constitute rape. (See decisions reported in 1994 (5) SCC P 728 – Narayanamma Vs. State of Karnataka and 1992 (3) SCC P 204 Madan Gopal Kakkad Vs. Naval Dubey). In case of children who are incapable of offering any resistance external mark of violence may not be found. Absence of marks of external injury by itself

does not negate the prosecution case (See Modi's medical jurisprudence 22nd Edition P 502 & 509).

PRESUMPTION

Section 29 of the Act which provides for presumption as to certain offences u/s 3, 5, 9 of this Act is material in the realm of assessment of evidence as the accused is expected to effectively rebut this presumption in case main ingredients are established by the prosecution.

Section 29 of POCSO Act 2012 reads as follows:-
“Section 29-Presumption as to certain offences:- Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

On a Main reading of Section 29, it appears that the moment a charge sheet is filed against the accused for offences punishable u/Sections 3,5,7 and 9 of the Act, the accused is to prove that he has not committed any offence alleged against him. It may be construed that the burden is on the accused to prove his innocence and that prosecution may not lead any evidence. Hence it may be

argued that S.29 is highly arbitrary and unreasonable and violates the provisions of S.14 and 20(3) of the constitution. While dealing with the analogous Section 8-A from the Dowry Prohibition Act – 1961, full bench of the High Court of Karnataka has held that presumption contemplated U/S 8-A could be directed only after that initial burden for offences punishable U/Sections 3 and 4 of the Dowry Prohibition Act – 1961 is effectively discharged. It is further held that a burden cast upon the accused U/S 8-A could be discharged as the basis of the preponderance of probabilities. The full bench decision is reported in **ILR 1993 Kar 3035 Harikumar Vs. State of Karnataka.**

The analogy of the principles enunciated in the case of Hari kumar is aptly applicable even in regard to S.29 of POCSO Act 2012 as the prosecution is extracted to initially prove that the accused committed a penetrative sexual assault as defined in S.3, or aggravated penetrative sexual assault as per S.5 or a sexual assault as per S.7 of POCSO Act-2012. Relying upon a constitution bench decision in the case of **AIR 1957 SC 877 Babulal Mehta Vs. Collector of Customs, (FB)** of Karnataka High Court has held that S-8A lays down a rule of evidence casting burden on the accused only where basic ingredients of Sections 2, 3 and 4 of Dowry Prohibition Act – 1961 are

proved. Paragraph 20 of the decision in Harikumars case is relevant and is extracted below:-

“20- Before parting with this discussion, we may however mention that the prime burden of proof rests on the prosecution to establish the basic facts and ingredients for bringing home to the accused the offence, under Section 3 or Section 4 of the Act and the prosecution will have to establish its case in this connection beyond reasonable doubt. Once that happens, then only the burden will shift on the accused under Section 8A of the Act, to show that he has not given or taken or abetted any giving or taking of any property or valuable security in connection with the marriage of parties or that he has not demanded directly or indirectly from the parents or the relatives of the bride or bridegroom as the case may be, any dowry, meaning thereby such demand if any is not in connection with the marriage of the said parties. The said burden of proof on the accused as contemplated in Section 8A of the Act can be discharged on preponderance of probabilities. In this connection, we may refer to the Decision of the Supreme Court in the case of **Trilok Chand Jain Vs. State of Delhi, AIR 1977 SC 666** wherein the Supreme Court dealing with presumption under Section 4(1) of the Prevention of Corruption.

**BURDEN OF PROOF AND SOME LEADING
DECISIONS OF THE HON'BLE SUPREME COURT**

In criminal case the burden of proof proving the prosecution case is on the prosecution. The standard of proof required is “Proof beyond reasonable doubt” and this standard is higher than the “Standard of preponderance of probability” prescribed for every case. This concept of “Standard of preponderance of probability” will have to be understood in the right perspective.

Hon’ble Supreme Court in State of Uttar Pradesh Vs. Krishna Gopal – AIR 1988 SC 2154 has eloquently explained the concept of “Proof beyond reasonable doubt”.

13).....

.....

..... *“A person has, no doubt, a profound right not to be convicted to an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to “proof” is an exercise particular to each case. Doubts would be called*

reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense."

.....
.....

"The concepts of probability, and the degree of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust commonsense and, ultimately, on the trained institutions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would

make a mockery of administration of criminal justice.”

.....

(emphasis supplied)

12) **Justice Arijith Pasayath**, has explained the concept of “Reasonable Doubt” in the following terms in 2004(13) SCC 308 State of M.P. V/s. Dharkole alias Govind Singh and others:-

“11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case”

It is pertinent to keep in mind the statutory

presumption u/s 29 of the Act while assessing the evidence. In the realm of evidence this statutory presumption through rebuttable one, plays a vital role.

Justice Krishna Iyer's eloquent observations in **AIR 1973 SC 2622** *between Shivajirao Bhabade V/s. State of Maharashtra*, deserve to be read again and again. The relevant paragraph is reproduced:-

"The Judicial instrument has a public accountability. The cherished principle or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every lunch, hesitancy and degree of doubt. The excessive solitude reflected in the attitude that a thousand guilty men may go but once innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community."

The above caution given by the Hon'ble Supreme Court will have to be kept in mind by the Judge while appreciating the evidence placed on record. In fact the

principles enunciated in Krishna Gopal's case has been reiterated by the Hon'ble Supreme Court in Sucha Singh & another Vs. State of Punjab) case 2003 (3) SCC 647 and State of Madhya Pradesh Vs. Dharkole @ Govind Singh and others – 2005 Cr.L.J. 108 SC = (2004) 13 SCC 308. Apart from this, the Court is expected to keep in mind the salient aspects relating to the punishment to be imposed after convicting the accused for the offence of rape.

PUNISHMENT:

(In this Act minimum punishment is provided for offences punishable under section 4, 6, 8, 10, 12, 14, 15, 17 and 19 of the Act. The discretion of the court in sentencing a accused to a lesser degree is inhibited. Since offences against women and children more especially of rape, outraging the modesty and sexual abuse are grave offences against the state, courts should be slow in taking a lenient view in the matter of imposing sentence of imprisonment and fine)

Choice of appropriate sentence is a serious matter and should not be dealt in a casual and mechanical manner. The judge is expected to consider all relevant facts and circumstances before determining the quantum of sentence even in cases where conviction is based on the plea of guilty.

In State of Madhya Pradesh Vs. Babulal – AIR 2008 SC 582, Hon'ble Supreme Court has held as follows keeping in mind the interest of the victim of the crime in particular and the impact on society in general.

“25. In justice-delivery system, sentencing is indeed a difficult and complex question. Every court must be conscious and mindful of proportion between an offence committed and penalty imposed as also its impact on society in general and the victim of the crime in particular”.

Social impact of the crime, particularly where it relates to offences against women cannot be lost sight of and per se requires exemplary treatment. Any liberal attitude of imposition meagre sentence or too sympathetic view may be counterproductive in the long run and against social interest which needs to be cared for protected and strength by string of deterrence inbuilt in the sentencing the system. (See B.G. Goswami Vs. Delhi Administration – (1974) 3 SCC 85)

When the guilt is proved and the accused is convicted in a case of rape or sexual abuse of a child, normally the accused will make a strong attempt to impress upon the Court about the extenuating or mitigating

circumstances stating that the accused has no prior criminal record and that he is of a tender age and that there was no mens rea. An attempt will also be made that the accused does not have a good health and that there are number of members in his family, who depend upon him and that he has a wife and a small child or children. The prosecuting agency must keep in mind the gravity of the offence, the age of the victim, the serious difficulty to be faced by the victim like the stigma in the society. Tender age of the accused, the poor financial background of the accused, the number of persons who are dependent upon on him for their livelihood are not of much inconsequence.

Whenever, special reasons are sought to be urged on behalf of the accused seeking sentence lesser than the minimum sentence, the prosecution will have to see as to whether the accused is really entitled to a punishment lesser than the minimum sentence. Especially in a gang rape and murder of the victim, the prosecution will be entitled to seek death penalty as it would be a rarest of the rare cases. Seeking punishment lesser than the minimum prescribed under Sec. 376 of IPC is an exception to the general rule and it can be invoked in exceptional circumstances only moreso, where the conditions incorporated in the exception clause itself exist.

It is specifically held in State of Rajasthan Vs. Vinod Kumar - AIR 2012 SC 2301 as follows:

“exception clause is always required to be strictly interpreted even if there is any hardship to any individual. Exception is provided with the object of taking it out of the scope of the basic law and what is included in it and what legislature desired to be excluded. Hence, the power under the proviso to the main Section is not to be used indiscriminately in a routine or casual manner.”

Sec. 42 of this Special Act provides that where an act or omission constitute an offence punishable under this Act and also under any other law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree.

COMPENSATION TO THE VICTIM:

The Special Court has got power to direct the accused who is convicted of having committed offence/s under this Act to pay compensation under Sub-Section 8 of Sec. 33 in regard to the physical or mental trauma caused to the child or for immediate rehabilitation also. Therefore, in suitable cases, the Special Court can award

higher compensation than the one found in the scheme formulated by the State Governments u/s. 357-A of Cr.P.C.

Rule 7 (1) of the Protection of Children from Sexual Offence Rules, 2012 even provides the Special court to award interim compensation also meet the immediate needs of the child for relief or rehabilitation of the child at any stage after the registration of FIR.

COURTESY

Article on '**Recording Evidence**' prepared by the committee headed by **Hon'ble Dr. Justice V.S.Malimath**, while formulating a training module to the newly recruited Civil Judges for Karnataka Judicial Academy.
