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POCSO ACT:

EVOLUTION OF JURISPRUDENCE THROUGH JUDGMENTS

Prevention of Children from Sexual Offences (POCSO) Act came into effect in 2012 as a comprehensive measure to prevent and protect minors from any form of physical or non-physical sexual abuse, child pornography and sexual assault. The Act recognizes a child as someone under the age of 18. The statute has a broad-spectrum definition of what constitutes a sexual offence against every 'child' i.e. males, females and non-binaries [Section 2(d), Protection of Children from Sexual Offences Act, 2012]. It expands the definition of sexual assault to cover both non-penetrative and aggravated penetrative sexual assault (Sections 3–10) and is also inclusive of penalties for those in positions of trust, such as public workers, educational personnel, and police officers.

The POCSO Act also established measures to make the criminal justice system more child-friendly and to prevent re-traumatization. This includes everything from how the statement of the child should be recorded, to the medical examination, to the designation of special child-friendly courts. The Act was hailed by child rights activists and academicians as it provided for a child-friendly mechanism to try such cases.

In order to ensure that law in a specific domain does not become stagnant, it is significant that the developments are brought by the decisions of the judiciary. This newsletter examines some of these developments through judgments in the past few years.

PRACTICE AREAS

Corporate & Commercial, Estate Planning, Trusts and Private Client, Dispute Resolution, Employment & Labour, Environment, Real Estate and Construction, White Collar Crimes, Start Ups, Non Governmental Sector, Insurance & Pension, Trademarks, Brands & Designs, Renewable Energy Practice, Insolvency And Bankruptcy Practice, Antitrust/Competition, Taxation Advisory, Media & Entertainment, Aviation, Education, Immigration, Cyber Laws, Medico-legal etc.

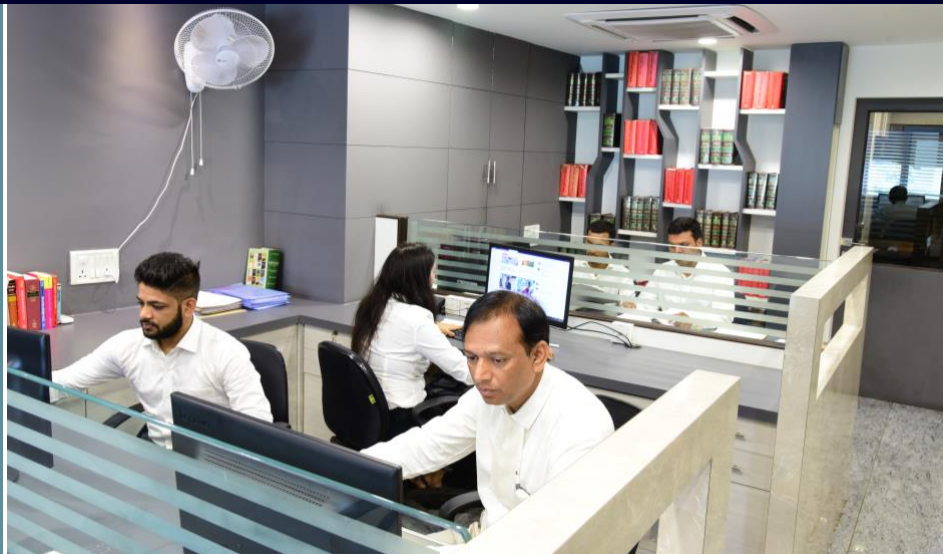


SKIN TO SKIN CONTACT

Attorney General for India v. Satish and Another (2021)

The Bombay High Court's Nagpur Bench had ruled in the case of Satish Ragde v. State of Maharashtra (2021) that grabbing a child's breasts without making "skin-to-skin contact" constituted molestation under the POCSO Act, 2021. The comment was given by a single bench led by Justice Pushpa Ganediwala. The Attorney General of India, the National Commission for Women, and the State of Maharashtra filed appeals against the High Court's controversial decision, which were heard by a bench consisting of Justices Uday Umesh Lalit, S Ravindra Bhat, and Bela M Trivedi, in the present case of Attorney General for India versus Satish and another (2021). The issue at hand was how should Section 7 of the POCSO Act, 2012 be interpreted so as to provide a fair and reasonable solution to the cases falling under its ambit. The present judgment observed that Section 7 covers both direct and indirect touch thereby highlighting that the logic in the High Court's opinion quite insensitively trivializes indeed legitimizes a whole spectrum of undesirable behavior which undermines a child's dignity and autonomy, through unwelcome intrusions.

Setting aside the Bombay High Court's judgment, the Apex Court observed that the matter at hand would be an appropriate situation for using the "mischief rule" of statutory interpretation. It emphasizes that courts must constantly interpret the law in order to prevent harm and promote the remedy. In this view, the top court's judgment observed that the High Court's interpretation not only restricts the implementation of the legislation but also seeks to pervert its objective.



CONFIDENTIALITY OF THE IDENTITY OF THE VICTIM

Nipun Saxena v. Union of India [WP (Civil) No. 565 of 2012]

When an infraction is committed under Section 23 of the POCSO Act, the publisher or owner of the media, studio, or photography facility is held jointly and severally accountable for his employee's act/omission, observed the Supreme Court of India in a recent case of *Nipun Saxena v. Union of India* (2019). The Apex Court released a set of guidelines in relation to the aforementioned provision which are provided hereunder:

No one may broadcast the victim's name in print, electronic, or social media, or even in a distant way divulge any details that might lead to the victim's identification and should make her identity known to the general public.

In cases where the victim is deceased or mentally ill, the victim's name or identity should not be revealed, even with the consent of the next of kin, unless circumstances justifying the disclosure of her identity exist, which must be decided by the competent authority, which in the present case is the Sessions Judge.

FIRs for offences under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB, or 376-E of the IPC, as well as violations under POCSO, are not to be made public.

If a victim files an appeal under Section 372 CrPC, the victim is not required to reveal his or her identity, and the appeal will be handled according to the law.

All papers in which the victim's identity is exposed should be kept in a sealed cover as much as possible, and these documents should be replaced with similar documents in which the victim's name is deleted from all records that may be scrutinized in the public domain.

All authorities to whom the victim's name is provided by the investigating agency or the Court are likewise obligated to keep the victim's name and identity secret and not to divulge it in any way except in the report, which should be delivered to the investigating agency or the Court in a sealed envelope.

An application by the next of kin to authorize the disclosure of the identity of a dead victim or of a victim of unsound mind under [Section 228-A\(2\)\(c\) IPC](#) should be made only to the Sessions Judge concerned until the Government acts under Section 228-A(1)(c) and lays down criteria as per our directions for identifying such social welfare institutions or organizations.

In the case of juvenile victims under the POCSO Act, 2012, the Special Court can only allow their identity to be revealed if it is in the child's best interests.

SC'S SPLIT VERDICT ON: WHETHER INVESTIGATION OF DISCLOSURE OF VICTIM'S IDENTITY PERMISSIBLE WITHOUT MAGISTRATE'S PERMISSION?

The bench of Indira Banerjee and JK Maheshwari, JJ has given split verdict on the issue as to whether the Special Court is debarred from taking cognizance of an offence under Section 23 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and obliged to discharge the accused under Section 227 CrPC, only because of want of permission of the jurisdictional Magistrate to the police, to investigate into the offence.

The Supreme Court was hearing the appeal against a judgment by the High Court of Karnataka, upholding an order-taking cognizance against the Appellant of offence under Section 23 of POCSO. In October 2017, a news report was published in the Newspaper, regarding the sexual harassment of a 16-year-old girl. The victim's mother lodged a complaint, inter alia, against the appellant i.e. Editor of the said Newspaper for disclosing the identity of the victim under Section 23 of POCSO that deals with the procedure to be followed by the Media while reporting the POCSO related cases. The Appellant filed an application for discharge under Section 227 of the Cr.P.C. on the purported ground that an offence under Section 23 of POCSO being non-cognizable, the police could not have investigated the offence without obtaining an order of the Magistrate under Section 155(2) of the Cr.P.C. The Trial Court dismissed the application of the Appellant, whereupon the Appellant filed a Criminal Petition in the High Court under Section 482 of the Cr.P.C. The High Court dismissed the Criminal Petition, holding that the non-obstante provision of Section 19 of POCSO overrides the provisions of the Cr.P.C., including Section 155 thereof. The High Court refused to quash the proceedings initiated against the Appellant under Section 23 of POCSO.

Banerjee, J was of the opinion that a child against whom offence under Section 23 of POCSO has been committed, by disclosure of her identity, may require special protection, care and even shelter, necessitating expeditious investigation for compliance of sub-sections (5) and (6) of Section 19 of POCSO. "POCSO not only protects children from sexual offences but also protects the interests of children in general, as victims as well as witnesses. The right of a child to dignity not only requires that the child be protected from offences of sexual assault, sexual harassment and pornography but also requires that the dignity of a child be safeguarded. Disclosure of the identity of a child who is a victim of sexual offences or who is in conflict with the law is in fundamental breach of the right of the child to dignity, the right not to be embarrassed."

The procedure of Section 155 (2) is required to be followed in an offence of POCSO Act under Section 23 which is non-cognizable and the Special Court is required to look into the procedure followed in the investigation. As per Section 155 (2), for non-cognizable offence, the order is required to be taken from the Magistrate but in the light of Sections 2(l) and 28 of POCSO Act, the Special Courts are required to be designated to deal with offences under the POCSO Act and they have been authorized under Section 33, conferring a power to such Special Courts to take cognizance. Therefore, Maheshwari, J. was of the opinion that the word used in Section 155(2) be read as "Special Courts" in place of "Magistrate", which may take cognizance of any offence under POCSO Act.

In view of the split verdict in the case at hand, the matter will now be placed before a larger bench. [[Gangadhar Narayan Nayak v. State of Karnataka, 2022 SCC OnLine SC 337, decided on 21.03.2022]



Alakh Alok Srivastava v. Union of India and Others (2018)

The Supreme Court of India laid down guidelines to be followed by Special Courts while trying a case under the POCSO Act, 2012 so that the trial is completed within a period of one year from the date of taking cognizance of the offence, as provided under Section 35 of the aforementioned Act. The guidelines are provided hereunder:



1. The High Courts are responsible for ensuring that cases filed under the POCSO Act are heard and decided by Special Courts and that the presiding officials of such courts are trained in child protection and psychological reaction.
2. If not previously done, the Special Courts should be constituted and given the role of dealing with matters brought under the POCSO Act.
3. The Special Courts should be given instructions to expedite cases by not granting superfluous adjournments and following the procedure outlined in the POCSO Act, allowing the trial to be completed in a time-bound manner or within a certain time period set forth in the Act.
4. The Chief Justices of the High Courts have been asked to form a three-judge committee to control and supervise the progress of the POCSO Act cases. In the event that three judges are not available, the Chief Justices of the respective courts will form a Judge Committee.
5. A Special Task Force will be formed by the Director-General of Police or a State authority of comparable rank to guarantee that the investigation is properly handled and witnesses are presented on the dates set before the trial courts.
6. The High Courts must take appropriate efforts to create a child-friendly environment in Special Courts, keeping in mind the requirements of the POCSO Act, to ensure that the spirit of the Act is upheld.

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