

CHAPTER VI

JUDICIAL FINDINGS ON CHILD SEXUAL ABUSE

“I am the child. All the world wait for my coming. All the earth watches with interest to see what I shall become. Civilization hangs in the balance. For what I am, the world of tomorrow would be. I am the child. You hold in your hand my destiny. You determine largely, whether I shall succeed or fail. Give me, I beg you, that I may be a blessing to the world.”

---Mamie Gene Cole¹

It may be stated here that inspite of the enactment of certain legislative provisions, along with certain constitutional provisions, exploitation of children and their sexual abuse are still unabated and position is no doubt very alarming. In these circumstances, there are no other options than judicial interventions to protect the children from sexual abuse and upheld their rights against exploitation. Thus in order to protect them judiciary has raised into occasion with its land marking decisions because judiciary cannot turn a Nelson’s eye, while statutory obligations are not properly discharge by the authorities.

The judiciary has played a pivotal role in realizing this heinous crime against children. Time and again the judiciary has issued various guidelines for ensuring the security and rehabilitation of the children affected by sexual assault. So in order to understand the role of judiciary in protecting the rights of child against sexual abuse the following cases are analyzed.

¹ He was a American poet. These above lines are the part of Masterpiece of Religious Verse which were quoted in the case of MC Mehta v. State of Tamil Nadu 1996 (6) SSC 756 .

6.1. Judicial Findings on Child Sexual Abuse in India by Higher Judiciary:

6.1.1. Tuka Ram and Another V. State of Maharashtra²

This case, which is popularly known as the 'Mathura Rape Case', shook the criminal justice system of India to certain extent. The case goes as follows-

A girl named Mathura of about 16 years was an orphan living with her brother and earned her livelihood by working in households. One day she was missing and hence her brother having doubt on Nunshi, Laxman and Ashok lodged an FIR against them. Based on the complaint the police brought all the three accused along with Mathura to the Police Station and their statements were recorded. After recording, the statement they were asked to go but the appellants' in this case instructed Mathura to remain in the Station and directed others to go out of the station.

The appellant No 1 i.e. Ganpat took Mathura to the toilet and raped her. Thereafter, appellant no. 2 tried to rape her but he did not succeed because he was over drunken however, he fondled with her private parts. Meanwhile the three persons who were waiting outside the Station for Mathura had doubt as she was not coming out and hence they shouted and gathered crowd where after the incident came into light and FIR was lodged against the two.

At the end of the trial the Session Court acquitted the accused on the ground that although it is established that there was sexual intercourse but it was with consent of Mathura which is proved from the medical report. The medical report nowhere stated that Mathura resisted to the act of the accused and tried to escape and hence it simply means that the girl gave consent and hence the intercourse would not amount to rape under Section 375 IPC. Moreover, the report showed that she was habitual to sexual intercourse.

² AIR 1979 SC 185

On appeal the Bombay High Court(Nagpur Bench) reversed the order of the trial court by stating that sexual intercourse was made forcefully without consent of the Victim and hence it amount to rape.

Being convicted by the High Court the convict moved the Supreme Court through special leave petition. The apex court after reviewing all the evidences produced, was of the view that sexual intercourse in the case was a '*peaceful affair*' as there is no sign of injury mark which generally takes place when the victim resist. Hence, the apex court upheld the judgement of the Session Court by acquitting the appellant stating that, the incident does not come under the definition of rape, under Section 375 because in order to constitute rape the act of intercourse should be forceful and without the consent of the girl and the facts of the case proves that Mathura had submitted herself for such intercourse.

Post judgement period:

The judgement delivered in this case was severely criticized all over India for taking 'passive submission' by the victim as her 'consent' for intercourse. As a result of such criticism and public outcry the parliament brought several amendment to the criminal law of the land in the year 1983, among which the most important are-

- Firstly, Section 375 IPC was amended whereby a consent obtained by putting the victim in fear of death or hurt was regarded as rape, which was earlier not available.
- Secondly, Section 114-A of the Evidence Act, 1872 was amended whereby the court shall presume that the victim of sexual abuse had not given her consent i.e. the burden to prove that victim had given consent will be upon the defense once the victim denies that she had not consented for the intercourse.
- Thirdly, Section 327(2) and 327(3) were newly added to the Criminal Procedure Code, 1973. Section 327(2) made it compulsory for the trial court to conduct the trial of rape cases in-camera proceeding. Whereas, Section 327(3) prohibits the publication of the court proceeding except with the permission of the court.

6.1.2. Vishal Jeet v Union of India³

This case is the result of a PIL filed by a social activist for the interest of children of the prostitutes and society as a whole. The petitioner made the court aware of the following points:

- ✓ The evil of ‘devadasi’ system and ‘jogin’ system is flourishing in many parts of the country and hence the court should take steps to eradicate the same by appointing committee to inquire upon those police officers under whose jurisdiction this evil practice is going on.
- ✓ The problem of prostitution is rising to the peak leading to offences like trafficking.
- ✓ The condition of the children of the prostitutes are worst as they are deprived from the basic rights as like adequate education, food, shelter, clothing, health facilities, recreational facilities and so on as they have to either go for begging, rag picking or surrendering themselves to sexual abuse in the form of prostitute.

The court have dealt with some seminal questions relating to sexual exploitation of children on the basis of the points put forth by the petitioner. The court observed that, *“the matter of child sexual abuse is of great importance warranting a comprehensive and searching analysis and requiring a humanistic rather than a purely legalistic approach from different angles, because it is highly deplorable and heart rending to note that many poverty stricken children and girls in the prime age of youth are taken to the flesh market for flesh trade which is being carried on utter violation of all canons of morality, decency and dignity of mankind”*.

The court also opined that Article 39(f) of the Constitution of India is a directive to the States that they should direct its policy towards securing the childhood and youth from being exploited in any form and most specifically from sexual abuse of children

³ AIR 1990 S.C. 1412

because this problem is not only a social one but also a socio-economic problem and, therefore, the measures to be taken in that regard should be more preventive rather than punitive.

The SC considering the importance of the issue issued the following directions to the State Governments and administration of the Union Territories:

- The law enforcing authorities should take appropriate & speedy action under the existing laws in eradicating child prostitution and other kind of sexual exploitation.
- The respective governments should take appropriate steps in order to provide adequate rehabilitative homes for the child victims.
- Every State and Union territories should set up Advisory Committee within their respective zones. The committee should consist of members from various section of the society such as relevant Government officials, sociologists, criminologists, women, child welfare personals, non-governmental organization etc. The primary object of such committee is to give suggestions in order to eradicate problems of child sexual abuse such as child prostitution, '*devdasi*' & '*jogin*' systems.
- The respective government should make necessary arrangements for proper implementation of the suggestions put forth by the Advisory Committee.
- The Central Government should set up another committee to take welfare measures for protection, treatment, development and rehabilitation of victims of child sexual abuse.

6.1.3. Gaurav Jain V. Union of India & Others⁴

Gurav Jain, an Advocate by profession filed a PIL to the Supreme Court for the interest of children of the prostitutes. The claim made in the PIL was for separate school and hostels for the children of the prostitutes so that they are not deprived of their future.

⁴ AIR 1990 SC 292

The court after hearing the PIL, rejected the plea of setting up separate schools and hostels for those children's, states that the children of the prostitutes are basically unwanted and hence even after their birth they do not get adequate care from their mother. Hence, the court opined that, it would be better if they could be segregated from their mother and are brought up with other children of the society in the same school and hostel environment so that they will mix up with the society and the society will accept them in near future.

The court raising concern over the issue and appointed a committee consisting of seven members to investigate the issue and prepare a detail report within a period of two months to be placed before the hon'ble Court which shall include suggestion to irradiate the problem faced by the children living in the red light areas, the manner in which they can be segregated, the kind of help that can be provided to the children's and so on to overcome their hardship.

After examination of the report submitted by the committee and hearing the petitioner the court issued several directions. They are-

- The Government as well as NGO's are duty bound to look into the matter of prostitution and the condition of children of '*fallen women*' so that they could live with dignity.
- The abused children who are recovered from the red light areas should be given all the opportunities and facilities such as education, shelter homes, financial support, and so on so that they would not fall prey to the red light areas once again.
- The Social Welfare Department of the Government were directed to take suitable rehabilitation program for the girls who are involved in the practice of *Devdasis*, *Venkatasins* and *Jogins* so that these evil practices are totally eradicated from the society.
- The Ministry of Welfare and Human Resource, Government of India was directed to establish Juvenile homes, launch suitable scheme and appoint Dept. of Women

and Child as the Nodal agency to carry out the process of rescue and rehabilitation of child prostitutes.

6.1.4. State of Punjab V. Gurmit Singh and others⁵

In this present case a girl aged below 16 years was kidnapped while she was returning back from school after appearing in examination on 30th March, 1984 at about 12.30 p.m. The team of kidnappers consist of 4 persons namely, Gurmit Singh, Jagjit Singh, Ranjit Singh and their driver who remain unidentified. She was taken to a far away place in a kotha where she was forcefully made to drink liquor and was threatened to be killed if she shouts or alarms. Thereafter all the three except the driver who left the place committed repeated rape on the girl one by one but she remained quiet in fear. However, the next day morning she was dropped in the same place from where she was picked up. The matter was reported to the police by the victim along with her father.

The trial court of Ludhiana acquitted all the three accused from both the charge i.e. kidnapping and rape on the ground that the statement of the victim cannot be believed to be true because she failed to describe the vehicle in which she was kidnapped. Moreover, it is doubtful as to why she did not make any alarm while she was picked up and was inside the car passing through a busy bus stop. Again, there was a delay in lodging the FIR which created further doubt on the allegation.

When the matter reached the Supreme Court as appeal by the State, the court considering all the evidences and arguments convicted the all the three accused under Section 376 IPC for committing rape observing the following –

- ✓ The ground on which the trial court disbelieved the statement of the victim are not reasonable because the victim is a rural girl and hence it is not impossible that she could not describe the car with its model and type.

⁵ AIR 1996 SC 1393

- ✓ Secondly, simply because the girl did not shout or raised alarm it cannot be doubted that her statement is false because in her statement it is clearly asserted that after she was pulled inside the car she was threatened by the accused to kill her if she shout or make any alarm.
- ✓ Thirdly, the reason for delay in filling the FIR was explained to the court and hence it cannot be a good ground to disbelieve the incident.

Apart from the above observation, the Hon'ble Court laid down a few specific guidelines that need to be followed by the trial court while hearing a case of sexual offence. The guidelines are-

- a) Mere delay in lodging FIR cannot be a ground for disbelieving the statement of the victim if the ground for such delay is justified.
- b) Victims' testimony in cases of sexual assault is of most importance and the court could convict the accused solely on the victims' testimony if it is beyond reasonable doubt.
- c) Corroboration of victims' statement is not compulsory in all cases to convict the accused.
- d) In-camera, proceeding should be adopted in cases of sexual offences.
- e) Depending on availability, if possible the trial should be by a lady judge so that the victim feel comfortable.
- f) The court should not describe victim as a girl of 'loose character' even if it is establish that the victim is habitual to sex.
- g) It is the duty of the trial court to see that the victim is not harassed or humiliated during Cross-examination.

6.1.5. Sakshi v Union of India⁶

A Delhi based NGO named ‘Sakshi’ who basically works in the field of ‘women rights’ filed a PIL in the year 1997 before the hon’ble Supreme Court of India whereby the various shortcomings of the Criminal Law(Amendment) Act, 1983 was pointed out.

The petitioner criticized the definition of ‘Rape’ under the Criminal Law(Amendment) Act, 1983 stating the the current definition is very limited and it includes only forcible penile/vaginal penetration.

The petitioner argued that the cases of sexual abuse in the form of rape are increasing in a alarming rate and more particularly sexual abuse of minor girl is at its peak. All these abuses are taking place in various manner apart from the penile vaginal penetration like anal penetration and oral penetration not only by penis but also finger or any other object. Although there is a possibility to book all these offences under Section 345 IPC and 377 IPC the object with which the Section 376(2)(f) was inserted will be defeated.

With these above arguments, the petitioner prayed the court to interpret Section 375 taking into consideration the current scenario and give a wider meaning so that the various types of sexual penetration come within its ambit and the offender are punished under Section 376 IPC in order to give justice to the child victim of abuse.

The court in its verdict upheld the existing definition of rape and refuse to include the new form of penetration as highlighted by the petitioner on the ground that widening the scope requires amendment and hence the court urged the Parliament to change the law by stating that-

“The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlights

⁶ 1999 8 SCC 591.

by the petitioner and make appropriate legislation with all the promptness which it deserves.”

The Supreme Court of India also asked the Law Commission of India to consider certain important issues regarding sexual abuse of children submitted by the petitioner and the feasibility of amendment to 375⁷ IPC. Moreover, it is an important case in the development of child sexual abuse law from the point that through this Public Interest Litigation the apex court had also laid down various guidelines for holding the trial of child sexual abuse cases by the trial courts. The guidelines issued by the honorable court are as follows:

- A screen or some such arrangement should be made where the victim or witnesses do not see the body or face of the accused.
- The questions put in cross examination on behalf of the accused, insofar as they relate directly to the incident should be given in writing to the presiding officer of the court, who may put them to the victim or witnesses in a language which is clear and not embarrassing.
- The victim of the child abuse or rape, while giving testimony in the court, should be allowed sufficient breaks as and when required.

After this case the effect of the judgement was seen in the following manner-

⁷ Section 375 IPC. (before amendment of 2013). Definition of Rape: A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

- Firstly, the Law Commission of India in its 172nd report suggested that the term ‘Rape’ should be replaced by ‘sexual assault’ so that the offence become gender neutral and also have a wide application to include all forms of sexual offences including the traditional penile vaginal penetration.
- Secondly, amendment was brought to the Indian Evidence Act in the year 2002 whereby Section 155(4) was omitted which stated that “*if a man is prosecuted for rape or attempt to ravish, it may be shown that the prosecutrix was of generally immoral character*” because many times it is seen that the defence layer discredit the victim testimony on the ground that the victim is of bad character and had past history of involving in such type of activities.

6.1.6. State of Rajasthan V. Om Prakash⁸

This is an criminal appeal case whereby the State have challenged the decision of the high court passed in favor of the accused by acquitting the accused by giving him the benefit of doubt.

The fact of the case as was established in the trial court was that the accused was the neighbor of the prosecutrix and the incident of rape took place on 20th March, 1989 at the house of the accused when the victim girl child who was about 8 years of age went to his house to take some butter milk. The mother of the child victim was the only eye witness who saw the accused lying above her child without any cloth on a cot penetrating his penis into her vagina. The accused flew away when her mother saw the same and started shouting. By the time, the child went unconscious.

On the basis of these facts being provided the trial court convicted the accused but the high court reverted the decision of the trial court and acquitted the accused on the grounds that the PW-11 namely, Dr. Arsh Chand Jain who primarily examined the victim in the general hospital stated that there was no injury on the external parts of the victim

⁸ 2002 (5) SCC 745

body and secondly, non-examination of other independent witness to corroborate the evidence against the accused.

The Supreme Court reversed the decision of the High Court from acquittal to conviction by stating that the conviction for offence under section 376 i.e. rape can be based on the sole testimony of the victim of rape.

The apex court referred to the case of **State of Maharashtra V. Chandraprakash Kewal Chand Jain**⁹ where, the Supreme Court held that, *“it must not be overlooked that a women or a girl subjected to sexual assault is not an accompish to the crime but is a victim of another person’s lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accompish”*.

The Court opined that, *“the testimony of the victim in cases of sexual abuse is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule such cases amounts to adding insult to injury”*.

6.1.7. Guriya Swayam Sevi Sansthan V. Union of India¹⁰

This case came before the court as a writ petition which was filed in the interest of the public by an NGO namely Guriya Swayam Sevi Sansthan mostly working in the field of protection from human trafficking, forced labour and commercial sexual exploitation of minor in Uttar Pradesh. The petitioner was represented by Advocate Raj Kumar when they prayed for a relief in the form of Writ of Mandamus, so that Rule 7(4)¹¹ of the

⁹ 1990 1 SCC 550

¹⁰ 2015 SCC Online ALL 1492

¹¹ POCSO Rules 2012- Rule 7(4)- the compensation awarded by the special court is to be paid by the State Government from the Victim Compensation Fund or the Scheme or the fund established by it for the purpose of compensating and rehabilitating victims under Section 357-A of the Code of Criminal

POCSO Rules 2012 can be enforced under victim compensation fund constituted under Section 357-A of Cr.P.C.

The respondent in reply filed a affidavit stating that the state government had already notified a compensation fund for the victims on 06th February 2015 and accordingly order was issued to all the District Magistrate, S.S.P and S.P's for implementation of Rule 7(4).

However, when the court took up the matter for hearing on 4th May 2015, the Court pointed out that there was a clear defect in defining the offences that were covered under the Victim Compensation Fund.

The reason stated by the court was that only offences under Section 4, 6 and 14 of the POCSO Act was covered under the scheme and offences like sexual assault, aggravated sexual assault and sexual harassment under section 7 and 11 respectively were not within the purview of the Compensation Fund/Scheme.

Hence, the court directed the State Govt. of Uttar Pradesh to rectify the mistakes at the earliest and inform the court regarding the remedies steps, which have been taken to rectify to mistake.

The state government has positively responded to the order of the court and all the six(6) sections namely, Section 4,6,7,9,11 and 14 were brought within the purview of the U.P Victim Compensation Scheme, 2014.

6.1.8. Manju Tejbal Vishwakarma & Anr. V. The Union Territory of Daman and Diu¹²

The petitioner challenged a case under POCSO Act which was pending before the special court at Daman with a prayer to quash the proceeding of the said case. As per the

Procedure or any other laws for the time being in force, or where such fund or scheme does not exist, by the State Government.

¹² 2017 SCC Online Bom 8895

petitioner, the allegation made against them by the victim in the FIR and statement recorded under Section 161 and 164 Cr.P.C respectively that the accused had bad eye on her by stating that, “*he always use to see her with bad intention*” cannot be a ground to invoke Section 11 of the POCSO Act that is sexual harassment of a child.

However, the court held that as per the definition of the offence under Section 11 “*if a person with sexual intent repeatedly or constantly follows or watches or contacts a child directly or through any other means, then he can be said to have committed an offences defined under Section 11 of the POCSO Act. The question whether the act was with sexual intent or not is a question of fact*”.

Thus, the court disposed of the petition without any relief to the petitioner.

6.1.9. Premkumar H.M Swamy V. State of Karnataka¹³

This case was a criminal appeal filed before the hon’ble Supreme Court of India challenging the decision of the High Court where the accused in this case the petitioner was convicted for the offence of rape. The petitioner challenged on the ground that the victim girl as referred in this case and the petitioner were in love relationship and since the family of the girl were against their relationship, she ran away from her home with the petitioner where they had cohabited together resulting into sexual intercourse for over a period of 7 days. Hence, the petitioner submitted that, the accused committed sexual intercourse with the girl only with her consent and not forcefully which is evident from the statement of the victim girl itself that was recorded under section 164 of Cr.P.C and hence the act cannot be brought under the definition of rape.

However, the court rejected this above argument and held that consent by a girl of 14 years age is no consent in the eye of law because of her immaturity and tender age. Thus, even if a girl of 14 years gives consent for sexual intercourse with a person for

¹³ 2017 SCC Online Kar 2447 Decided on October 9, 2017

whatever reasons it may be it is covered under the definition of rape. Accordingly, the single judge bench of the Apex Court rejected the petition made by the appellant.

6.1.10. Independent Thought V. Union of India¹⁴

The petitioner ‘Independent Thought’ is a Society working in the area of child rights since 2009, who filed a writ petition challenging Exception 2 of Section 375 IPC. The petitioner stated that this Exception is arbitrary and violative of child rights which lead to violation off Article 14,15 & 21 of the Indian Constitution and also the POCSO Act, 2012.

Thus, the issue before the Court was, “Whether sexual intercourse by husband with his wife aged 15 to 18 years would amount to Marital Rape? ”

The court observed that sexual intercourse with a girl below 18 years amount to sexual abuse irrespective of the fact that whether she is married or unmarried. Further, court was of the view that, Exception 2 is unnecessary and unreasonable, because section 375 directly states that; question of consent comes only when the victim is above 18 years which means that sexual intercourse with a girl below 18 years will amount to rape irrespective of her consent, but the exception states that; if the girl is married and the intercourse is committed by her husband, it would not amount to rape or marital rape even if she is below 18 but above 15 years of age.

The exception is contrary to the object of POCSO Act as well as Article 14, 15 & 21 of the Constitution. It is because only on the ground that a girl is married at the age of 15 she ceases to be a child is not reasonable enough. A child although married at the age of 15 years still remain to be a child biologically as well as, as per the definition of child under POCSO Act and International Convention on the Rights of Child. Thus, the court held that Exception 2 of section 375 IPC amount to marital rape of a girl child. Hence the court proposed the Government to take steps for amending the Exception 2 so that the age is increased to 18 years.

¹⁴ 2017 SCC Online SC 1222 Decided on October 11, 2017

6.1.11. Alakh Alok Srivastava V. Union of India¹⁵

This was a PIL filed by advocate Alakh Alok Srivastava after the horrific incident of rape of an 8 month old girl child by her own cousin of 28 years age. In this case the petitioner pleaded for expeditious and child friendly hearing of cases registered under POCSO Act with stricter punishment, specially where the victim child is below 12 years of age. The petitioner also placed a chart which consist of data regarding the status of the number of cases that were pending before various courts all over India in various states. He pleaded that the POCSO Act is a sensitive legislation and hence the apex court need to intervene and issue guidelines for the trial courts including the investigative machinery so that they consider the cases registered under POCSO Act with utmost care and give speedy justice.

The court opined that *“The POCSO Act has been legislated keeping in view the fundamental concept under Article 15 of the Constitution that empowers the State to make special provisions for children and also Article 39(f) which provides that the State shall in particular direct its policy towards securing that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. The Statement of Objects and Reasons of the Act indicate the focus for reduction of child abuse and protection of children from the offences of sexual assault, sexual harassment and pornography, etc.”*

The apex court in order to clarify the intention of the legislature behind enacting the POCSO Act, Chief Justice Dipak Mishra issued a few guidelines to the high court’s in respect of trial of cases relating to sexual assault of children through a three judges bench. The directives issued were:

- The High court should monitor that the cases relating to child sexual abuse should be decided in a fast tracked manner by following the provisions of the POCSO Act

¹⁵ 2018 SCC Online SC 212, Decided on March 12, 2018

by the special court established under the POCSO Act and if such court are not established than some other court shall be assigned with such duty.

- The High courts shall ensure that the presiding officer of the special courts established or designated under POCSO Act are specially sensitized.
- The High court's shall order the trial courts not to grant adjournment in POCSO cases during trial, unless very necessary.
- The chief Justice of every High court is entrusted with the duty to constitute a three judges committee to regulate and monitor the trials of sexual assault cases of children and if three judges are not available in the High Court the committee may be constituted by a single Judge.
- The Director General of Police(DGP) of every state shall constitute a special task force to monitor the investigation of a case related to POCSO Act as well as to ensure production of witness on the given date by the trial court.
- The High Courts shall take necessary steps to maintain child friendly atmosphere in the Special Courts as provided under the POCSO Act.

6.1.12. Niranjan Pramanik V. State of West Bengal¹⁶

As per the fact of this case the victim girl child was taken by the appellant to her music tuition class and on the way to the tuition the girl was dragged to the roadside bush where she was asexually assaulted. The accused was caught by the public and was handed over to the police. The PW1 i.e the victim herself during examination stated that she was forcefully taken to the bush by gagging her mouth where the accused removed her cloths including underpants and pushed his finger into her vagina.

The trial court convicted the appellant under Section 8 of POCSO Act which prescribes punishment for 'sexual assault'. The appellant appealed before the Calcutta high court against conviction order passed by the trial court, contending that the medical

¹⁶ 2018 SCC online Cal 4377

evidence does not state the fact of vaginal injury which is a must in case of forceful insertion of finger as stated by the child victim.

The appellate court upheld the order of the trial court and dismissed the appeal petition on the ground that medical examination is not the sole evidence; it is used to corroborate the charge. The statement of the victim girl resembles with that of the other witness and moreover in order to constitute sexual assault under Section 7¹⁷ penetration is not necessary and in the present case it has been proved that the accused/appellant touched the vagina hence he is guilty of the offence. The court held that the definition of sexual assault provided under Section 7 is wide enough to cover mere touching of sexual organs like vagina, anus, penis or breast would be covered under the section and be punished under Section 8¹⁸.

6.1.13. Re – Alarming Rise in the number of Reported Child Rape Incidents¹⁹

The Supreme Court taking note of rising number of cases relating to child rape and their poor disposal rate all over the country, the court sue motu instituted a writ petition on 12/08/2019. The court noted that it is a serious serious concern that even after enactment of POCSO Act which was enacted with the object of ensuring speedy justice by special court through special procedures the cases relating to child sexual abuse are increasing and the disposal rate is not satisfactory.

The court appointed senior Advocate V. Giri as the Amicus Curie the Court issued a list of direction. They are-

¹⁷ Section 7, POCSO Act 2012- Sexual assault 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.

¹⁸ Section 8, POCSO Act 2012- Punishment for sexual assault 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.

¹⁹ Suo Motu Writ Petition(Criminal) No.01/2019 Dated 13-08-2019

- 1) The State Government is directed to set up exclusive POCSO Special Court in each district where there are more than 100 POCSO cases.
- 2) The Central government should launch a central scheme to be funded by Central government for expenditures to involve in setting up of the special court with proper child friendly environment, appointment of presiding officer, Special Public Prosecutor, Support persons and other court staff.
- 3) Special Care shall be taken while appointing support persons and Special Public Prosecutors. It shall be seen that the person is oriented towards child rights and are sensitive to the child needs before appointment as support person.
- 4) The Suggestions of the Amicus Curiae as stated below should be implemented by the Ministry of Women and Child Development through appropriate agencies-
 - Initiative should be taken to spread awareness among the public regarding CSA and helpline numbers. For doing the same a short video clip can be screened in cinema halls and television channels.
 - The State government and the Directors of the forensic science laboratory are directed to ensure that the existing laboratories will function speedily and in an effective manner.

6.1.14. Subrata Biswas V. State²⁰

A girl around 13 years lodged an FIR stating that she was raped by her step father twice within a period of four weeks. Charges were framed under Section 354²¹ of IPC which deals with assault or act to outrage the modesty of a women and under section 5 & 6 of the POCSO Act.

²⁰ 2019 SCC online Cal 1815

²¹ S. 354 of IPC- Assault or criminal force to woman with intent to outrage her modesty- Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

The accused was convicted with rigorous imprisonment by the trial court hence, he preferred an appeal challenging the decision of the trial court on the following grounds-

- ✓ Firstly, the statement of the victim regarding outraging the modesty was unreliable as no other witness confirmed the same.
- ✓ Secondly, there is no forensic evidence, which stated the connection between the seized incriminating articles like the used condom, sanitary napkin, etc. with that of the incident.

Although the learned counsel appearing for the state submitted that, the case should be presumed against the appellant in exercise of the power conferred by Section 29²² of the POCSO Act but the court denied by saying that the evidence against the appellant is inconsistent and insufficient to presume against the appellant as per Section 29. The appellant court thereby set aside the sentence passed by the trial court and was released from custody.

6.1.15. Satish V. State Of Maharashtra²³

In this case the appellant namely; Satish had filed an appeal before the Bombay High Court against the order of the Additional Session Judge Nagpur whereby he was convicted under Section 354, 363 & 342 of IPC and Section 8 of POCSO Act.

The issue raised by the appellant was that “*Whether the pressing of breast and attempt to remove salwar would fall within the definition of ‘sexual assault’ as defined under Section 7 and punishable under section 8 of the POCSO Act?*”

²² Section 29, POCSO Act 2012- 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.

²³ 2021 SCC online Bom 72

The Bombay high court held that pressing of breast of a child of 12 years and attempt to remove cloth cannot be considered as act amounting to 'sexual assault' because in the instant case the prosecution had not established that her cloth was removed and hence there is no scope of skin to skin direct physical contact with sexual intention. However, the court was of the view that these act would definitely amount to an offence under Section 354 of IPC, i.e. Criminal force to women and girl with the intention to outrage her modesty for which the punishment prescribed is minimum of 1 year and maximum of 5 years imprisonment along with fine.

6.2. Discussion:

When the legislature and executive fails in discharging their duty leading to insecurity and violation of peoples right, it is always the judiciary who come forward with a helping hand playing the role of a mentor to the other organs of the Government so that no person is deprived from justice. The same happened in the cases of CSA when due to drawback in law and lack of effective implementation from the initial stage the cases of CSA remain unchecked resulting into high increase of such cases. Left with no other option, the judiciary which is regarded as the guardian of the constitution and protector of peoples right, started judicial intervention to protect the children from the evil of sexual abuse.

The apex court in the case of *Vishal Jeet* acknowledged the problem of CSA as a serious violation of human rights which are against the canons of morality, decency and dignity of mankind. The '*devdasi*' and '*jogini*' system were declared as curse upon the Indian society. The court restated the object of Article 39(f) of the Constitution and issued several directions to the State Government and the Union Territories in order to take appropriate steps under the existing laws for eradicating child prostitution and all other kind of sexual exploitation upon a child.

The Supreme Court in the landmark case of *Gurav Jain*, raised its concern over the issue of sexual abuse of the children in the red right areas. The court firmly admitted the necessity of protection and prevention of children from sexual abuse for the shake of protecting the inherent dignity of life, which cannot be abused at any cost. The court directed the government and NGO's to look into the matter related to sexual abuse of children.

In the case of *State of Punjab V. Gurmit Singh*, the apex court criticized the judgement and attitude of the trial courts while deciding the cases of kidnapping and rape. The court laid down several specific guidelines for the trial courts, which need to be followed while hearing a case of sexual offence specially against a child and also stated that it is the responsibility of the court to look upon that the victim is not harassed during trial.

The apex court view in the case of *Sakshi* is note worthy because in this case the court urged the Parliament of India to bring amendment to the existing law of rape considering the increase in the number of child sexual abuse and rape cases. The court stated that appropriate legislative provision is the need of the hour for the cause of justice and larger interest of the society. Apart from these observations, the court issued certain important guidelines for the trial courts keeping in view the vulnerability of the child victim.

The impact of this judgement can be witnessed in the 172nd report of the Law Commission of India, wherein; the Commission recommended for replacing the term 'rape' with 'sexual assault' to make the offence gender neutral as per the observation of the Court. Further, section 155(4) of the Evidence Act also got amended immediately to validate the judgment.

The Supreme Court criticized the judgement of the Rajasthan High Court on the point that, testimony of a victim of sexual assault cannot be ignored solely on the basis that there is no other evidence to corroborate. The court reaffirmed that, it is undesirable to test the evidence of a victim of sexual abuse with suspicion.

In the case of *Guriya Swayam Sevi Sansthan* the court pointed out that the offence like sexual assault & sexual harassment were not within the purview of the Victim Compensation Scheme and hence the Government of U.P. was instructed to rectify the mistakes. Based on this direction the State Govt. of U.P., brought both these offences under the purview of the U.P. Victim Compensation Scheme, 2014.

The apex court interestingly gave wide interpretation to section 11 of POCSO Act in the case of *Manju Tejbal Vishwakarma & Another* so that, no culprit can escape punishment by playing with the words of law. Further, the court clearly stated that consent is immaterial if the victim of sexual assault is below 18 years of age.

The very important issue of marital rape of minor was addressed in the case of *Independent Thought* where the court accepted that Exception 2 of section 375 IPC is violative to child rights because it allows sexual abuse of child in the wake of child marriage.

In the landmark, case of *Alakh Alok Srivastava* the apex court acknowledge the number of pending cases under POCSO Act all over India as a severe problem which need immediate attention of the High Courts. The court interpreting the object of the POCSO Act stated that it was enacted to reduce the number of cases related to sexual abuse of children. The court framed some guidelines for the High Court, so that the cases pending before the trial court can be efficiently monitored by the respective high court for speedy disposal in a child friendly manner. The court also firmly established its view towards the role that the police need to play, while investigating the cases of CSA for helping the court in trial of the matter.

The judiciary in majority of the cases gave wide interpretation to the terms and offences under various statutes for the benefit of the victim which is evident from the list of above cases including the case of *Niranjan Pramanik* where the definition of sexual assault was widely interpreted to cover the act of touching of sexual organ of a child.

The case *Re-Alarming Rise in the number of Reported Child Rape incidents* is the best example of judicial activism of the Supreme Court for prostitution of children from

sexual abuse. The apex court *suo motu* acknowledge the rising number of cases relating to child rape and their poor disposal rate all over the country. It was noted that the primary reason for pendency of cases was poor disposal rate of cases which is also a result of non-availability of Special Court, non-active role of the investigating officer, Public Prosecutor and so on, ultimately leading to the failure of the object of POCSO Act. Once again a list of guidelines were issued to the State Govt., Central Govt. & Directors of State forensic science laboratory for doing the needful in order to give speedy justice to the victim.

Among the various cases analyzed in this chapter it was found that the court played proactive role in all aspects such as ; wider interpretation of laws, finding lacuna in the existing laws, directing the subordinate judiciary through guidelines, recognizing the role of NGO's, Police, Public Prosecutor & support persons in cases of CSA, giving direction to the government and commissions for implementation of the law etc.

However, in two cases namely; *Satish* and *Mathura rape case* it was found that the apex court gave very narrow interpretation to the statutory provisions as a result of which the offenders who were punished by the inferior courts were acquitted, which is not at all encouraging.

Nevertheless, it is because of the judicial interventions prior to 2008 that, the Govt. was bound to recognize the vulnerability of children and realize the lack of special laws to deal with the cases of CSA, specially for boys which resulted in enactment of a gender neutral law for the first time by the name Protection of Children against Sexual Offences Act in the year 2012 to protect children against sexual abuse and exploitation. Apart from it the government had amended many provision of procedural laws and other special laws from time to time to meet the need of the hour as per the advice or direction of the judiciary. However, it is worth mentioning that all the directions, guidelines and suggestions made by the judiciary are yet to be followed and implemented in actual sense due to which the cases of CSA are alarmingly increasing.