

GLARING MISUSES OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES (POCSO) ACT - CONTEMPORARY JUDICIAL PERSPECTIVES FROM INDIA

Dr. Sonali Kusum

Assistant Professor (Law) TISS, Mumbai

Abstract :

The POCSO Act intends to protect child from “penetrative sexual assault” , “aggravated penetrative sexual assault”, “non-penetrative sexual assault”, “aggravated non-penetrative sexual assault, among other offenses. But in the recent past , the cases are being filed by levelling false allegations of sexual assault under the POCSO Act for ulterior motives and not being genuine cases. Such cases under POCSO Act are increasing as the punishment is stringent in the same. The provisions under the POCSO Act on the definition of child , age of consent determination taking after the same definition of child is being misused as consent of girl and male child to be together under love -affection relationship is charged as criminal under the Act thereby criminal actions and sentencing has ensued. This is misused in many cases by parents of such children themselves . The provision on mandatory reporting to police is also misused by capriciously tampering with facts of case , misguiding law enforcement agencies for vested interest . The judiciary has observed the trend of fake cases and such minuses of POCSO Act and sought to correct the same by laying down the recommendations, yet this need to be given effect through law.

I. Introduction:

The misuse of POCSO Act and consequent fake or flase cases have been increasing at an alarming rate. This is endorsed by several High Courts and even the apex Court namely the Supreme Court (SC) of India. The Chief Justice of India, during the National Stakeholders Consultation on Child Protection, has recommended for re-examining the consensual sex involving adolescents, reducing the age of consent so as to avoid criminalizing romantic relationships under the POCSO Act.

The misuse of POCSO cases have been in varied forms and in varied contexts. The misuse in POCSO Cases involves “ invoking the special provisions of POCSO Act by filing false or fake cases, fabricating facts of the case by mentioning a lower age below eighteen years or by contending the adolescents are from different religion of the concerned individuals , by alleging force or duress or lack of consent. In recent times, there has been a growing trend of filing POCSO cases, particularly against the male child or adolescents in voluntary, consensual romantic sexual relationships among male and female adolescents. In such cases, the parents of girl child allege kidnapping, conspiracy, and use of physical or criminal force against the male. Though in such cases, the girls have testified against their family and confirmed the voluntary and consensual nature of the relationship, even against their parents will. One of the ulterior intents behind filing such fake cases is safeguarding the honour of family in cases

where such a relationship involves adolescents of two different religions by terming it as a case of love jihad.

It is important to bear in mind that the exact age is difficult to determine in all cases as there is a lack of birth certificate or school leaving certificate, or matriculation certificate in all cases. Besides, the bone ossification test is also not fully accurate, and subject to vary. Hence, this issue gains even more significance in the Indian context.

Another form of fake case is one parent filing fake case against the other parent in a family or divorce dispute to secure the custody of child. The courts have lamented against the same. The intent behind the false case is to seek revenge and to retaliate against the disputing party in a family dispute.

In yet another issue, the fake case involves cases of consensual marriage among different religious sections of society where a male is above 18 years, and the girls is around 16 years or below 18. As under customary practices, girls above 15 years are held to attain puberty hence, marriage is permissible. However, considering the special law as POCSO, this prevails over such customary practices and negation of POCSO Act.

II. Legal Developments- The Protection of Children from Sexual Offences (POCSO) Act :

The Constitution of India, 1950, under part IVth, directive principles of state policy, prescribes “children to be protected from sexual exploitation.” In accordance with this directive, the Protection of Children Against Sexual Offences (POCSO) Act, 2012 was brought forth. The Government of India (GOI) enacted the POCSO Act, 2012, the Rules, 2012 were notified for effective implementation¹. The main objective of POCSO Act is a gender-neutral law redressing child sexual abuse against both male and female child, (wherein child is defined as person below the age of 18 years) from offenses of sexual assault, sexual harassment, pornography and provides for Special Courts for speedy trial of such offenses and for related matters. Some of the contesting provisions of the POCSO Act are precisely discussed as following:

i. Age of consent:

Under Section 2 (d) of POCSO Act, "child" is defined as any person below the age of eighteen years. In the definition of aggravated sexual act, there is a legal presumption of “taking advantage of a child’s mental or physical disability, commits sexual assault on the child”. This makes it clear that the age of consent is deemed as 18 and above and any consent below 18 years is deemed as taken undue advantage of the same.

ii. Mandatory reporting of FIR:

¹ THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012, ACT NO. 32 OF 2012 [19th June, 2012 available at https://www.indiacode.nic.in/handle/123456789/2079?view_type=browse&sam_handle=123456789/1362 (last visited on 11. 03. 2023).

Under section 19 of the POCSO Act, any person (including the child) having apprehension that an offense of nature is likely to be committed or having knowledge that such an offense has been committed, such person is bound by the statute to report the offense to Special Juvenile Police Unit; or to the local police. Consequently, there is a duty imposed on the police make an entry number and record in writing; and the same to be read over to such a person or child. This has to be entered in a book to be kept by the Police Unit. The subsequent provision, Section 21 of the POCSO Act provides criminal sanction against failure to report the matter with imprisonment extending to six months or with fine or with both.

iii. POCSO Law Overrides Personal or Family Law :

Section 42A overrides personal and customary laws, to the extent that the latter will prevail over personal and customary laws in matters where personal or family law contest with the POCSO Act.

III. Contemporray Judicial Directives Against Misuse of POCSO Law:

In view of this aforementioned, some of these are discussed briefly through a catena of cases as following :

a. POCSO Case filed in Marriage performed under Personal – Customary Law

Kerala High Court, Khaledur Rahman v. State of Kerala, 2022²-

In this case, there was a nikah performed as per the muslim personal or family law (Shariat), and the marriage was registered under West Bengal Act XXVI of 1961. The Kerala High Court has held that POCSO Act is a special law and hence overrides Muslims personal law. POCSO Act is applicable to Muslims as well as Hindus. Section 42A of POCSO Act overrides Personal laws and customary laws. As per the mandate of the POCSO Act, it prohibits and penalizes any physical or sexual relationships with a child, even under the guise or aegis of marriage. Further, this is read with the Prohibition of Child Marriage Act which also similarly prohibits the same. It must be noted that, this case was reported as case involving a rapist who subsequently married the victim under the personal law.³

b. POCSO Case Filed Under Family Pressure & Girl Contends No Rape

Allahabad High Court, Afzal vs State Of U.P. And Another, 2022⁴

In this case, the girl victim (16) denies the allegation of rape but states that the statements were given under the duress or emotional pressure of family. The medical report states no external, no internal injury, no alive or dead spermatozoa found. Hence, the charge of rape may be ruled out. It was found during the adjudication this may be false implication in charges of rape of the accused male with intention to defame.

² 2022 SCC OnLine Ker 5833.

³ Muslim marriage is not excluded from POCSO Act: Kerala HC dismisses bail plea of rapist who married victim under Sharia., Nov. 20, 2022, <https://organiser.org/2022/11/20/99310/bharat/muslim-marriage-is-not-excluded-from-pocso-act-kerala-hc-dismisses-bail-plea-of-rapist-who-married-victim-under-sharia/> (last visited on 21. 07. 2023)

⁴ CRIMINAL REVISION No. - 11 of 2021

- c. Age of Victim Girl Fabricated to be Child Under POCSO Act & Allegation of Love Jihad:

Allahabad High Court, *Aashif Khan, Aasib Khan vs State Of U.P. And Others*, 2023,

During the trial, it was found that the victim girl is major girl aged about 19 years following bone - ossification test. It was contended that the girl 's age was below 18 years and subject to forcible religious conversion by filing case under the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021' (Anti-Love Jihad Act), and also for sexual offenses against the girl against penetrative sexual assault under section 3, 4 of POCSO Act . The Court granted bail.

Madras High Court, *Sivachidambaram vs The Inspector Of Police*⁵, 2022,

Court found it a specific case where in registration of POCSO case is done by misusing the age of the victim girl .

Allahabad High Court, *Jannat Urvesh vs State Of U.P. And Others*, 2022,⁶

It was observed by the court that , in many cases , the Court is encountering that “ the girl victim does not endorse nor corroborate the facts made out by the prosecution. Rather the girl victim defies the same, and on many occasions, give statements against her own family. In this case, the girl states that residing with co-accused, as a married couple, and a baby girl has also born. The issue of forced religious conversion or love jihad is also not applicable here.

- d. Allegation by Parents against their Daughter Married Without Parent's Consent

Meghalaya High Court, *Olius Mawiong and Anr v State of Meghalaya and Anr*, 2022,⁷ the allegation was made by the mother of the girl victim that the man (husband of the girl) had impregnating a minor girl as an offence under the POCSO. This case was filed with malafide intention as the mother of the girl child was aware that her daughter and her husband (accused) are married and they have been living as husband and wife beyond a year. This was a consensual marital relationship . The Court noted the facts of the cases as “ peculiar’ and the Court quashed the matter .

- e. Need for Reconsideration on Age of Consent under POCSO Act:

Supreme Court of India , Prahlad Vs. State of Haryana 2015,⁸ & Dileep Vs. State of M.P., 2013⁹

The Court identifies that the definition of [Section 2](#) (d) of POCSO Act, 2012, the victim here in this case was a 'child' because she was below the age of 18 years. Any person below 18 years of age under the POCSO Act, 2012 has to be considered as a child and the consent of a child is having no value. But the Court held that “ where the victim under the age of 18 years develops physical relations with her own will out of love and affection cannot be said to have given the consent for doing the same. Thus, a child below 18 years of age is not in a position to give

⁵ CrI.O.P.(MD) No.15999 of 2022.

⁶ CRIMINAL MISC. BAIL APPLICATION No. - 19017 of 2022.

⁷ CrI.Petn. No. 22 of 2022

⁸ (2015) 8 SCC 688.

⁹ (2013) 14 SCC 331.

consent for having sexual intercourse with her own will in terms of love and affection. This causes for reconsideration on age of consent

Bombay High Court, *Ashik Ramjan Ansari vs The State Of Maharashtra And Anr, 2023¹⁰*,

The Court looks into the issue of age of consent, at the time of introduction of the POCSO Act, "age of consent" for unmarried girl was 16 and it was presumed that any one below this age cannot lawfully consent to sexual intercourse. The POCSO Act raised the "age of consent" to 18 years and following the recommendations of Justice J.S.Verma Committee Report 2012 and [Criminal Law \(Amendment\) Act, 2013](#). Accordingly, under the POCSO Act, "whether a consensual relationship or otherwise, as the law presumes that a girl below 18 years is not capable of consenting to sexual intercourse and in such a scenario, even if a girl below 18, consent to sexual intercourse, her consent must be ignored and the other party shall be guilty of committing an offense under the POCSO Act. This provision, though definitely intended to target sexual exploitation of children i.e. a male or a female, however, has created a gray area, as it has definitely resulted in criminalizing consensual adolescence/teenage relationships".

The Court refers to the legal position on the age of consent in foreign countries. In Germany, Italy, Portugal, Hungary age of consent is 14 years.. In London and Wales, the age of consent is 16. Among Asian countries, Bangladesh and Sri Lanka both have set 16 years of age as age of consent. The "United Nations Committee on the Rights of Child (CRC)", in General Comment No.20, with respect to the minimum age of consent for sexual intercourse, has urged "the States to strike a balance between protection of children from sexual exploitation and abuse and in respect for their evolving autonomy". It has recommended as under: "States parties should take into account the need to balance protection and evolving capacities and define an acceptable minimum age, when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity."

f. False Case Filed by Parents of Child to Retaliate over Family Dispute

Ankit v. State of Rajasthan, 2022¹¹,

The case was found to be completely frivolous and vague as the FIR was filed by the father of the girl to falsely implicate the petitioner as there was a prior property dispute – hostility between the two families of the petitioner and the girl. There was no medical nor forensic report to justify the same. The statement of the girl also did not endorse the same.

False cases filed under POCSO Act by Parents in Custody – Family Disputes

Kerala High Court, *Suhara vs Muhammed Jaleel, 2019, ¹²*

The court issues directions to the Family Court that "mere registration of a crime under the provisions of the POCSO Act against the parent is no assurance of the truth of that allegation of sexual abuse is true. The High Court directs the Family Court, to follow a very

¹⁰ CRIMINAL APPEAL NO.1184 OF 2019.

¹¹ Special Leave to Appeal (Crl.) No(s). 3931/2022.

¹² 2019 SCC Online Ker 1237. Mat.Appeal.No.182 of 2019,O.P.NO.608/2015.

cautious approach by necessarily application of its mind before registration of crime is proved. The Court alerts the family courts to observe that “there is a growing tendency in the recent years to foist false crimes against the biological father alleging sexual abuse of own child misusing the provisions of the POCSO Act when serious fight for custody of ward is pending resolution before the Family Courts’. The same ratio is upheld in *X vs. State of Kerala, 2023*.¹³

Delhi High Court , *Manish Srivastava vs State Nct Of Delhi, 2022*,¹⁴ reiterated the ratio laid down in *Suhara and Ors. v Muhammed Jaleel*, where the Court mentions of “the growing tendency in the recent years to foist false crimes against the biological father alleging sexual abuse of own child misusing the provisions of the POCSO Act when the serious fight for custody of ward is pending resolution before the Family Courts."

Gujarat High Court, Bhaya Vija (Vijaybhai) Charan vs State Of Gujarat , 2020,¹⁵

The Court opines that the POCSO cannot be allowed to be misused by parents, and the parents of such children who resort to such tactics cannot be let-off easily without fastening any accountability.

g. POCSO Cases Not To Criminalize Adolescent Romantic Relationships-
Delhi High Court, *Ajay Kumar Vs State Govt Of Nct Of Delhi And Anr, 2022*¹⁶

The court held that “the intention of POCSO was to protect children below the age of 18 years from sexual exploitation.” Further, It was never meant to criminalize consensual romantic relationships between young adults.

Allahabad High Court, *Monu Mohit Kumar vs State Of U.P. And Another, 2023*¹⁷

The Court held thar , the purpose of POCSO Act is to protect children from sexual exploitation, not to criminalize consensual romantic relationship between the parties, which has resulted in marriage. Hence, such proceedings are liable to be quashed by this Court.

Legal Consequence of Filing False POCSO Cases:

- Exemption from Punishment :

Under relevant provisions of Section 22 (2) of POCSO Act, 2012, “no punishment shall be imposed on children if false complaints are made or false information provided by them.”

- Return of Compensation:

Accordingly, in one of the rare cases, the Bombay High Court directed the party making the false complaint was asked to return the compensation received from the Maharashtra State Government under Victim Compensation Scheme.¹⁸

¹³ 2023 BAIL APPL. NO. 1193 OF 2023.

¹⁴ CRL.M.C. 3124/2022 & CRL.M.A. 13185/2022.

¹⁵ R/CR.MA/14146/2020.

¹⁶ BAIL APPLN. 2729/2022.

¹⁷ APPLICATION U/S 482 No. - 5297 of 2023.

¹⁸ Sahodar , FALSE POCSO | Court Orders Minor Girl To Return Compensation After Two Men Spend 5-Years In Jail, March 6, 2023, <https://sahodar.in/false-pocso-court-orders-minor-girl-to-return-compensation-after-two-men-spend-5-years-in-jail/> (last visited on 21.07. 2023).

- Criminalization of Innocent over False Cases:

As evident in the above cases, there is mere filing of FIR and cases, leading to the judicial custody of young children. These children are both male and female, are expressing love, and affection following voluntary consent in many such cases. There is no malice or illegal act, rather, the technical barrier of age of consent under POCSO holds as bar and leads to criminalization of the same.

- The Defeat of Gender Neutral Law:

Several cases have shown that the false POCSO cases are being filed by the parents of girl child against the male child, alleging kidnapping under duress or force. Whereas the main objective of the POCSO Act was to extend protection to children, both male and female. But in actual practice, it appears the contrary.

IV. Conclusion:

In light of the issues and judicial direction, it is pertinent that the POCSO Act needs to be reconsidered. There is a need to examine the age of consent in light of contemporary developments in India and around the world. The best interest of child principle and the evolving capacities of child principle laid down by UNCRC need to be given effect in India. India has ratified UNCRC. Further, the issue of criminalization of romantic relationships among young children is a cause of great concern, as highlighted in several judgments above. The legal impediments are the definition of child, thereby determining the age of consent, further mandatory reporting, and criminal sentencing against failure to report. Hence, under the mandate of such provisions, criminal cases, whether genuine or fake may increase, this needs to be checked. The legislature also needs to deliberate upon the need for necessary amendments, while the judiciary is taking a cautious approach in filtering out fake cases. The POCSO Act being a special, welfare law and gender neutral, must ensure that the child is safeguarded from sexual offenses, and the Act should not become a tool to criminalize young children or adolescents.

References:

Alok P. Kumar, POCSO and Judicial Discomfort, POCSO and Judicial Discomfort, EPW, Vol. 57, Issue No. 13, 26 Mar, 2022.

Anchan V, Janardhana N, Kommu JVS. POCSO Act, 2012: Consensual Sex as a Matter of Tug of War Between Developmental Need and Legal Obligation for the Adolescents in India. *Indian Journal of Psychological Medicine*. 2021;43(2):158-162.

Atreyee Sengupta, A Feminist Interrogation of the POCSO Judgments and Criminal Law in India, EPW, Vol. 56, Issue No. 38, 18 Sep, 2022.

Outlook Webdesk, POCSO Not Meant To Criminalise Consensual Romantic Relationships Between Young Adults: Delhi HC, 14 NOV 2022.