

A Critical Analysis Of Scope Of Bail Under POCSO Act

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Abstract

As the world rapidly deteriorates, so too are instances of sexual abuse and small-scale rapes against people. The scope of sexual abuse in the current situation has expanded to include minor children under the age of eighteen, in addition to being restricted and prevented to adults of any age or gender. Since the IPC considers sexual abuse and rape of minors to be crimes, the "POCSO (Protection of Children from Sexual Offences) Act" was passed in 2012 because previous laws had not been sufficient in identifying and combating other sexual offenses.

Sections 5 and 6 of the POCSO law, which deals with serious penetrative sexual assaults, generally have limited circumstances under which bail may be granted. This is especially true if the investigations are still underway and the accused is not supported by any evidence. The court would consider many factors, such as the severity of the offense, the victim's age, the evidence that could be obtained, the likelihood that the accused would tamper with the evidence or influence the witness, and the likelihood that the accused would flee if released on bond.

Although it is gender neutral, there have been certain negative aspects that haven't been seen in a while, which is why the latest POCSO revisions are crucial. S.42 of the POCSO Act and S.376 of the IPC (Now section 64 in Bharatiya Nyaya Sanhita, 2023) were modified by the Ordinance. Furthermore, this study has attempted to investigate the genesis and evolution of events subsequent to the implementation of the POCSO Act.

This research also attempted to look at the POCSO Act's effects and breadth on Indian society, offering helpful recommendations for its correction. The POCSO Act's provisions pertaining to bail was another goal of the research. Critical analysis was also done on the administrative hazards, judiciary shortcomings, and justice delivery issues. To do this, we must investigate whether India's criminal codes are enough to handle cases of sexual offenses and rapes against kids, especially in the wake of self-governing legislation like the POCSO Act, 2012. The main focus of this study is on the implications of the findings and debates for future research, as well as on recommendations for consistent, effective implementation tactics and an analysis of some contentious elements of the aforementioned legislation.

Keywords: Bail, Sexual Offence, Rape, Minors, POCSO Act

Introduction

The main prevalent stigmas associated with a civilization are those of child abuse and violence. It is possible to physically or emotionally abuse children. The many forms of child abuse include physical harm, sexual abuse, forced work, abandonment or careless behavior, blaming, and forced begging. Child abuse can happen at home, at school, at an orphanage, on the streets, at work, or in a jail. Any form of violence has a profound impact on children's entire development. Child abuse causes actual or prospective harm to children's survival, growth, and sense of self. Neglect and abuse of children is a growing social problem.¹ According to National Crime Records Bureau (NCRB), every day, 109 children in India experience some form of sexual abuse. Every year, there is a noticeable rise in offenses against minors, according to the same report. Compared to other crimes, heinous crimes against children are consistently underreported. This is primarily because, even when the kids confide in someone, the information is usually disclosed out of concern for their social standing and family reputation. The basic human rights of children are violated when they are abused.

According to World Health Organization (WHO) research, child sexual abuse (CSA) is defined as a child's involvement in sexual activities that they do not fully understand, cannot consent to voluntarily, are not developmentally ready and cannot consent to, or that are against the law. The criteria of child sexual abuse (CSA) include fondling, requesting a kid to touch or be touched sexually, having sexual relations with them, including enticing them with child pornography or prostitution, and using them as lures on the internet². Child sexual harassment is a complex problem that negatively impacts a child's behavioral patterns, psychological health, and sense of physical safety. A 2018 survey stated that 110 kids were reported to have experienced sexual harassment per day. According to the NORB poll, there was a 22% increase from 2017 and during the shutdown; the prevalence of pornography in India has climbed even further. In the three weeks of the shutdown, traffic to pornographic websites has increased by 95%. The use of pornographic material has increased by 20% since previously. Harassment and abuse of children occur when adults or younger people injure or leave youngsters.

Sexual harassment has the potential to cause serious harm to children and even death. Global issues of gender aggression are one area of sexual assault and rape that is only now beginning to receive attention in India.

The POCSO Act works to safeguard children's interests throughout the judicial system by implementing kid-friendly procedures for all reporting, recording of evidence, and investigative needs. The POCSO Act provides for medical examinations of female children by female doctors in front of their parents or any other trusted adult³. Following the POCSO's approval, sexual offenses against children were added to three sections of the IPC: S. 376 for rape (Now section 64 in BNSS, Section 354 (Now section 74 in BNSS) for outraging women's modesty, and S. 377 for unnatural sexual practices (Recently in 2023 parliament has replaced section 377 of IPC by the Act of BNS, 2023).

According to the POCSO Act, bail must be granted based on the established criteria, which include the type and gravity of the offenses as well as the likelihood that the accused individual really committed the crime, as well as Section 439 CrPC (Now section 480 in BNSS). The likelihood that the accused may commit another crime, influence witnesses and tamper with evidence, or pose a flight risk are all important factors to consider when determining whether to grant bail.⁴

Accused individuals charged under the POCSO Act would not be eligible for bail on the sole basis that the deadline for gathering child testimony and conducting the trial was overlooked. By examining the case *Hanumantha Mogaveera vs. State of Karnataka*⁵, it was possible to determine why the POCSO Act's time limits were imposed.

¹ Debarati Halder, "Child Sexual Abuse and Protection Laws in India", (Sage Publication, 2018)

² Vikas Choudhry, Radhika Dayal, "Child sexual abuse in India", Plus One Journal, Oct 9, 2018

³ Sharadha K, "The other side of sexual abuse: More boys victims", Indian Express, October 12, 2013.

⁴ S. Goel, Is the POCSO Act Bailable? IJLM & H, 2021

⁵ CP No.3000/2020

Research Methodology

We intended to use the doctrinal research paper approach for this study report. The task is completed by creating the required and suitable research instrument to gather information from diverse legal sources. For this purpose, a variety of books, papers, reports, case laws, journals, and websites have been consulted.

According to Asha B. (2017)⁶, millions of children from all socioeconomic backgrounds continue to suffer from abuse as it is a common occurrence. In India, a kid may experience cyber bullying, child labor, child trafficking, early marriage, sexual harassment, and internet pornography. The enduring impacts of harassment, abuse, and exploitation on children's lives are well-documented.

POCSO Act offenses are subject to Section 439 CrPC (Now section 480 in BNSS, 2023) and established guidelines for bail consideration, which take into account the kind and seriousness of the offenses as well as the probability that the accused committed the crime. The potential for the accused to commit new crimes, influence witnesses, tamper with evidence, or pose a flight risk are all pertinent considerations when determining whether to grant bail.⁷

The investigation of Delhi's juvenile crime rate and the reasons behind the delayed reporting are the two main goals of Kaur's (2019)⁸ study. The POCSO Act and reported rape instances are highlighted in terms of relevance. The victims in this research are the single, mostly adolescent population with very low rates of literacy and society. Juvenile offenders commit rape at a somewhat high rate.

Results and conversation

POCSO Act and its Scope

Gender neutral: The POCSO Act acknowledges that boys may also fall victim to sexual assault. Children are those who are younger than eighteen.

The categories of sexual assaults were expanded to include both non-penetrative and aggravated penetrative sexual assaults (Sec. 3 to 10). This expanded the scope of reporting sexual offenses and rapes against children. It included penalizing those who held positions of trust and power, such as governmental employees, faculty members at educational institutions, police officers, etc. Identify child sexual harassment: It includes touching, stalking, forcing kids to expose themselves or other kids, and so forth. Strict penalties: It specifically establishes penalties for exposing kids to or using them as resources for child sex abuse.

Constitutional Provisions

The Indian Constitution's Article 15(3), 39(e), 39(f), and 45 will help people understand the law and the relevant provisions to deal with cases of child abuse and small-scale rapes.

Article 15(3) states that the state may only create special provisions for children in order to safeguard their interests, without favoring any other individual. Indian children continue to lack self-respect and esteem in spite of this Act, both at home and in public.

As stated in Art. 39(f), children are given the opportunity and resources to develop in a more positive manner, in circumstances of freedom and self-worth, and their early years are protected from abuse as well as from material and moral neglect.

Every kid will get free education according to the terms of Article 45. They will become aware of the sexual exploitation and abuse that they are subjected to.

Bail under POCSO Act

The primary goal of POCSO's enactment was to protect the rights of minors who had been sexually assaulted. Yes, each and every accused individual has the right to a fair and impartial trial and the opportunity to

⁶ Bajpai Asha, "Child Rights in India - Law, Policy and Practice", OUP India, 2017

⁷ India Legal Drive, Allahabad High Court grants bail to POCSO accused, February 15, 2023

⁸ Suminder Kaur, "Recent trends in child rape crisis in Delhi, Forensic Science International", Nov 2019

request bail. On the other hand, no one can be granted default bail simply because an investigation takes longer than expected to complete or because S.35 of the POCSO is not adhered to. In some situations, such as when there is insufficient proof, when the offense is significant, when the punishment is harsh, etc., bail may be granted.

However, the accused should not be allowed to ask for release just because the investigation could not be completed in a timely manner. Default bails under POCSO cannot be automatically granted as they are under CrPC (Now BNSS). The court must have the authority to consider the circumstances underlying the investigation's delays and determine whether to grant default bail in this case.⁹

When granting bail, the court must take into account a number of factors, including (i) the nature of the charges, the severity of the punishment in the event of a conviction, and the supporting evidence; (ii) any reasonable fear of witness tampering or threats against the complainants; and (iii) the court's prima facie satisfaction with the accusation.

Loopholes

The POCSO Act eliminates the possibility of consent from those who are less than 18 years old. It meant that 17-year-old boys and girls who had a 19-year-old sexual relationship would be responsible for booking their partners in accordance with the POCSO Act's provisions. It doesn't explain clearly what happens when two kids who are less than 18 engage in any kind of sexual activity.

The victim's other challenge is proving their age. The POCSO Act is silent on the proofs that should be considered for establishing a child's age, thus courts have interpreted Rule 12 of the JJ Act to apply to minors as well. It only accepts birth certificates, children's school certificates, and matriculation certificates. The POCSO Act needs to include a suitable clause specifying which document minors must use to prove their age and whether or not they should be given the benefit of the doubt in the event that the ossification tests are unable to offer an accurate assessment¹⁰.

The minor victims are entitled to temporary financial support to cover their immediate needs. All parties involved, however, must understand that interim compensation should not be narrowly construed to just cover their medical needs. It includes all of the children's requirements that are necessary for their recovery and resettlement.

In accordance with Sec.33 (2) of the POCSO Act, Public Prosecutors are required to consult Special Courts before posing questions to children during the main examination, cross-examination, or re-examination of the children. In between questions, the kids must also be given periodic breaks.

JUDICIAL APPROACH

In the Ravi Kumar v. Union Territory of J&K¹¹ case, the High Court upheld the POCSO Act and granted bail to the accused, ruling that the victim's refusal to appear in court was sufficient grounds for granting bail. This is a case where the victims are refusing to testify in court; it is not one where the prosecution claims that the accused actions are causing proceedings to drag out. The victim's actions are sufficient to grant the petitioner's request for a reduction in bond.

Nishu vs. Commissioner of Police Delhi¹².

In one instance, a female kid who was repeatedly sexually assaulted by a group of persons filed the petitions; according to reports, the POCSO clause has not yet been invoked against the defendants. AG vs. Satish¹³ for India In this instance, the Court decided that, in accordance with the POCSO Act of 2021, grabbing a

⁹ S. Goel, Is the POCSO Actailable? IJLM & H, 2021

¹⁰ Manuraj, Expanding the scope of POCSO, The Hindu, May 25, 2021

¹¹ Bail App No. 47/2023

¹² 2014 (85) ACC 962.

¹³ AG for India vs Satish CRIMINAL APPEAL NO.1411 OF 2021

juvenile girl's breast without establishing "skin-to-skin contact" constituted molestation. The contentious rulings made by the High Court were appealed by the State of Maharashtra, the AG of India, and the NCW. It is evident from the State vs. Aas Mohammed¹⁴ case that the court is in favor of legalizing child marriage rather than punishing the accused for committing sexual offenses, which is completely at odds with POCSO. The case of Suraj Paithankar vs. State of Maharashtra¹⁵ established that the POCSO Act's provisions will take precedence over the SC/ST Act. This means that in cases where the POCSO Act is alleged to have been violated, the accused can use the POCSO Act's bail procedures in conjunction with the SC/ST Act's provisions.

The court specifically declared in the Hanumatha Mogaveera vs. State of Karnataka¹⁶ decision that default bail could not be granted only on the basis of violation with Section 35 provisions. According to this Section, the Court must provide justification for any delays that are deemed unavoidable. As a result, the statutes themselves provide for the possibility of compliance delays in specific circumstances. In Mohiddin vs. State of Karnataka¹⁷, case where counsels for the accused person contend for bail as per evidences of the victim wasn't completed in the mentioned on month and S.35 (1) wasn't duly adhered to. The accused person requested for default bail.

But, it was rejected the bail application and held that although the evidences of the victim child wasn't recorded in a period of one month but only on that ground it can't be said that the whole case of the prosecutions are to be disbelieved or it is to be brushed aside and bail order is to be permitted.

Conclusion and Recommendations

In conclusion, POCSO has undoubtedly been a helpful tool in the significant decline in sexual abuse and rapes committed against kids; yet, there is still more work to be done before this heinous crime against minors is completely eradicated. The legislation still requires the identification of a number of flaws, and the 2019 POCSO Bill revision is a commendable first step in the right direction.

If people are not aware of their rights and there is not a suitable informational campaign, these laws will be useless. People in underdeveloped societies are unaware of the POCSO Act, which prevents them from satisfying the specific demands of the circumstances.

Jail is an aberration, not the rule. The Supreme Court would, if it were feasible, issue bail. Bail will not be granted unless the offenses are serious or there is a risk to the security of the witness in court. The bail was often cancelled in the past, but these tendencies are changing lately. Bail pleas are typically denied in lesser courts such as trial courts, session courts, and magistrate bail courts. However, this is currently changing, with the court endorsing the granting of bail.

It is imperative that the laws be updated and revised to take into account new developments, such as past reports of rapes and sexual crimes against kids. It is recommended that the government draft appropriate guidelines to facilitate the effective and meaningful prosecution of cases not covered by the POCSO.

As a citizen with rights guaranteed by the Indian Constitution as well as by national and international laws, a kid should be worried. The state's infrastructure and child services must be improved and enhanced.

The Conventions on the Rights of the Child and other international instruments that India has ratified are significant because they show the country's commitment to enhancing the lives of children there. As such, public activists can use them to pressure the government to act on important child-related problems. As things stand right now, the POCSO Act's presumptions only come into effect after trials begin, and they have no effect on a judge's decision to grant bail. However, if a bail request is made after the proceedings have started, Section 29 parameters will be crucial in determining whether or not bail is granted.

References

1. Debarati Halder, Child Sexual Abuse and Protection Laws in India, Sage Publications, 2018

¹⁴ State v. Aas Mohammad, SC No. 78/2013

¹⁵ Bail Application No. 817/2020

¹⁶ 2021 SCC OnLine Kar 12300

¹⁷ 2017 CrI. P No. 5923/2017

2. S. Goel, Is the POCSO Act Bailable? IJLM & H, 2021
3. Bajpai Asha, Child Rights in India - Law, Policy and Practice, OUP India, 2017
4. Vikas Choudhry ,Radhika Dayal, Child sexual abuse in India: A systematic review, Plos One Journal, Oct 9, 2018
5. Bajpai Asha, Child Rights in India - Law, Policy and Practice, OUP India, 2017
6. Sharadha Kalyanam, "The other side of sexual abuse: More boys victims", Indian Express, Bangalore, Oct. 12, 2013.
7. Suminder Kaur, Simarpreet Kaur Kajal Varshney, Recent trends in child rape crisis in Delhi (India): A forensic overview, Forensic Science International, Nov 2019
8. Manuraj, Expanding the scope of POCSO, The Hindu, May 25, 2021
9. Rajput, Apeksha, A Critique on Crimes against Children in India, International Journal of Law Management & Humanities, 2021
10. India Legal Drive, Allahabad High Court grants bail to POCSO accused, February 15, 2023
11. A Jain, Child survivor needn't be at bail hearings, <https://theprint.in/india/child-survivor-neednt-be-atbail-hearings-delhi-hc-issues-slew-of-guidelines-for-pocso-cases/1323388/>
12. <https://www.hindustantimes.com/cities/others/hc-issues-guidelines-for-bail-pleas-under-pocso-act-101626288600661.html>
13. <https://www.barandbench.com/news/supreme-court-grants-anticipatory-bail-to-accused-in-pocso-case>