

HC Verdict, POCSO and Protecting Children from Sexual Abuse

February 4, 2021

The Bombay High Court had acquitted a man of sexual assault charges under the Prevention of Children from Sexual Offences (POCSO) Act for groping a child, and instead convicted him under the Indian Penal Code (IPC) for a lesser offence. Justice Pushpa V Ganediwala said the allegation was not serious enough for the greater punishment prescribed under the law. The ruling drew criticism for its restricted interpretation of the offence and spotlights the concept of mandatory minimum sentencing in legislation, including POCSO.

In news: Supreme Court stays Bombay HC order on 'skin-to-skin' contact for sexual assault under POCSO Act

Placing it in syllabus: Society

Dimensions

- Ruling of the Bombay High Court
- Provisions of POCSO
- Recent Amendments
- Criticisms of the Ruling

Content

Ruling of the Bombay High Court:

- On January 12, The Nagpur Bench of the Bombay High Court reversed the decision of a sessions court which had convicted 39-year-old Bandu Ragde under Section 8 of the POCSO Act, and sentenced him to three years in jail
- The court had acquitted a man of sexual assault charges under **Section 8** the **Prevention of Children**

from **Sexual Offences (POCSO) Act** for groping a child, and instead convicted him under the Indian Penal Code (IPC) for a lesser offence.

- **Section 8 of the POCSO Act provides for a sentence of rigorous imprisonment of three to five years.**
- The high court convicted him under **Section 354 of the IPC**, which **deals with assault or use of criminal force to any woman with an intent to outrage her modesty**, and sentenced him to one year in jail.
- The High Court ruling **held that groping a child over her clothes without direct “skin to skin” physical contact does not constitute the offence** under the POCSO Act.
- The court said that since the convict groped the prosecutrix over her clothes, this **indirect contact would not constitute sexual assault.**
- The court reasoned that **since the offence under POCSO carried a higher punishment, a conviction would require a higher standard of proof**, and allegations that were more serious.

Provisions of POCSO:

- **The Protection of Children from Sexual Offences Act (POCSO Act) 2012** was established to protect the children against offences like sexual abuse, sexual harassment and pornography.
- It tries to **safeguard the interest of the child at every stage of the judicial process** by incorporating child-friendly mechanisms for reporting, recording evidence, investigation and speedy trial of the offences through designated Special Courts
- The Act defines a **child as any person below 18 years of age.**
- It also makes provisions for **avoiding the re-victimisation of the child** at the hands of the judicial system.

- The Act defines different forms of sexual abuse which includes penetrative and non-penetrative assault. It also involves sexual harassment, pornography, etc.
- Under certain specific circumstances POCSO states a sexual assault is to be considered “aggravated if the abused child is mentally ill or when the abuse is committed by a member of the armed forces or security forces or a public servant or a person in a position of trust or authority of the child, like a family member, police officer, teacher, or doctor or a person-management or staff of a hospital – whether Government or private.”
- The Act also **makes it mandatory to report such cases**. It makes it the legal duty of a person aware of the offence to report the sexual abuse.
- In case he **fails to do so, the person can be punished with six months’ imprisonment** or fine.
- The Act further states that the **evidence of the child should be recorded within a period of thirty days**.
- The Special Court taking cognizance of the matter should be able to complete the trial within the period of one year from the date of taking cognizance of the abuse.
- It provides that the Special Court **proceedings should be recorded in camera** and the trial **should take place in the presence of parents or any other person in whom the child has trust or confidence**.
- The Act **provides for punishment against false complaints or untrue information**. It describes strict action against the offender according to the gravity of the offence.
- It prescribes rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and also fine as punishment for aggravated penetrative sexual assault.
- It also prescribes **punishment to the people who traffic children for sexual purposes**.

What is a mandatory minimum sentence?

- **Section 8 of the POCSO Act carries a sentence of rigorous imprisonment** of three to five years.
- However, **imposing the minimum sentence is mandatory.**
- Where a statute has prescribed a minimum sentence, **courts do not have the discretion to pass lighter sentences** irrespective of any specific circumstances that the case or the convict might present.
- **Minimum sentences have been prescribed for all sexual offences under the POCSO Act** barring the offence of sexual harassment.
- In a 2001 ruling, the Supreme Court held that where the mandate of the law is clear and unambiguous, the court has no option but to pass the sentence upon conviction as provided under the statute.
- “The mitigating circumstances in a case, if established, would authorise the court to pass such sentence of imprisonment or fine which may be deemed to be reasonable but not less than the minimum prescribed under an enactment,” the court said in *State of J&K v Vinay Nanda*.

Rationale behind Mandatory Minimum Sentence:

- A mandatory sentence is prescribed to underline the seriousness of the offence, and is often **claimed to act as a deterrent to crime.**
- In 2013, criminal law reforms introduced in the aftermath of the 2012 Delhi gangrape prescribed mandatory minimum sentences for criminal use of force and outraging the modesty of a woman, among other charges.
- Mandatory minimum sentences are also prescribed in some cases **to remove the scope for arbitrariness by judges using their discretion.**
- For example, the punishment for a crime under IPC Section 124A (Sedition) is “imprisonment for life, to

which fine may be added, or...imprisonment which may extend to three years, to which fine may be added, or...fine”, which leaves room for vast discretion with judges.

Criticisms of mandatory sentencing

- Studies have shown that **mandatory sentencing in laws lead to fewer convictions**, because when judges perceive that the punishment for the offence is harsh, they might prefer to acquit the accused instead.
- After conviction, a separate hearing is conducted to award sentence, in which aspects such as the accused being a first-time offender with potential for reformation or being the sole breadwinner of the family, or the accused's age and social background, or the seriousness of the offence, etc., are considered.
- The **absence of the opportunity to consider such factors, and instead prescribe a mandatory sentence, pushes judges in some cases towards acquitting the accused.**
- A 2016 report on the 'Study on the Working of Special Courts under the POCSO Act in Delhi' by the **Centre for Child Law** at the **National Law School of India University**, Bengaluru, has highlighted the reluctance of courts in convicting under sections that carry a mandatory minimum sentence.

Recent Amendments to POCSO Act 2012:

- The POCSO Act was amended in 2019 through **POCSO (Amendment) Act, 2019.**
- It added a number of provisions to safeguard children from offences of sexual assault and sexual harassment.

Some of the important changes are as follows:

- It was amended to **make the offences against children gender-neutral.**

- The **definition of 'Sexual Assault' has been extended** to incorporate administration of hormones or chemical substances to children to attain early sexual maturity for the purpose of penetrative sexual assault.
- It clearly **defines child pornography and makes it punishable.**
- It defines child pornography as any visual depiction of sexually explicit conduct involving a child including photograph, video, digital or computer generated image indistinguishable from an actual child.
- The **amendments also penalize the transmitting of pornographic material to children** and propose to synchronise it with the Information Technology Act.
- The Act seeks to **enhance punishment for sexual offences against children, with a provision of death penalty.**
- According to the amendment act, those committing penetrative sexual assaults on a child below 16 years of age would be punished with imprisonment up to 20 years, which might extend to life imprisonment as well as fine.
- **In case of aggravated penetrative sexual assault, the act increases the minimum punishment from ten years to 20 years, and the maximum punishment to death penalty.**
- To curb child pornography, the Act provides that those who use a child for pornographic purposes should be punished with imprisonment up to five years and fine.
- However, in the event of a second or subsequent conviction, the punishment would be up to seven years and fine.

National Commission for Protection of Child Rights (NCPCR)

- It is a **statutory body** established by an Act of Parliament, the **Commission for Protection of Child Rights (CPCR) Act, 2005**.
- The Commission works **under the aegis of the Ministry of Women and Child Development, GoI**. The Commission began operations on 5th March, 2007.
- The Commission is mandated under **section 13 of CPCR Act, 2005** "to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and the UN Convention on the Rights of the Child."
- As defined by the commission, a child includes a person up to the age of 18 years.
- NCPCR is **mandated to monitor the implementation of POCSO Act, 2012**

The Functions of the National Commission for Protection of Child Rights as laid out in the Commissions for Protection of Child Rights (CPCR) Act, 2005 are as follow:

- Examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;
- Present to be central government, annually and at such other intervals, as the commission may deem fit, reports upon working of those safeguards;
- Inquire into violation of child rights and recommend initiation of proceedings in such cases;
- Examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures;
- Look into the matters relating to the children in need

of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles children without family and children of prisoners and recommend appropriate remedial measures;

- Study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;
- Undertake and promote research in the field of child rights;
- Spread child rights literacy among various section of society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminar and other available means;
- Inspect or cause to be inspected any juveniles custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organization; Where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;
- Inquire into complaints and take *suo motu* notice of matter relating to :
 - Deprivation and violation of child rights;
 - Non implementation of laws providing for protection and development of children;
 - Non compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and provide relief to such children;
 - Or take up the issues rising out of such matters with appropriate authorities.

Criticisms of the HC Ruling:

- The High Court conclusion that mere touching or pressing of a clothed body of a child did not amount to sexual assault, has been criticized by many organizations.
- **Attorney General K.K. Venugopal** said that in future, because of the order, **an accused could claim innocence under POCSO by arguing that the child he assaulted was clothed** and there was no “direct physical skin-to-skin contact” between them.
- Thus, the High Court decision **would set a “very dangerous precedent” and cripple the intention of POCSO** to punish sexual offenders.
- The NCPCR had earlier asked the Maharashtra government to urgently appeal the High Court judgment.
- Meanwhile, several organisations, including the **Youth Bar Association of India**, represented by advocate Manju Jetley, also moved the Supreme Court against the HC judgment.
- The petition said that the HC verdict contained **several observations** about the victim child’s modesty, which **were both “derogatory and defamatory”**. The **child was even named in the judgment**.
- The ruling also drew criticism **for its restricted interpretation of the offence** and spotlights the concept of mandatory minimum sentencing in legislation.

Mould your thought: The Bombay High Court verdict that mere touching or pressing of a clothed body of a child did not amount to sexual assault sets a very dangerous precedent. Elaborate. **Approach to the answer:**

- Introduction
- Discuss the High court ruling and its reasoning
- Write the criticism of the judgement
- Conclusion