

# NATIONAL JUDICIAL ACADEMY



## **Workshop to Access Nature of Difficulties Faced by POCSO Courts** [P-945]

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**Rapporteur** : Ms.Priyamvada Shukla

5<sup>th</sup> year, B.A.LL.B(Hons)

Department of Legal Studies and Research, Barkatullah University,  
Bhopal

## **Introduction**

The National Judicial Academy organized a “Workshop to Access Nature of Difficulties Faced by POCSO Courts” from 24<sup>th</sup>-27<sup>th</sup> September, 2015. This workshop proved to be an eye opener to realize the present situation of the POCSO courts. The aim of the workshop was to access the nature of difficulties faced by POCSO courts and to come up with ideas to overcome these issues in a better way.

Thirty three Hon’ble judges of various POCSO courts participated in the workshop. The Resource Persons in the workshop included Mr. Asheem Srivastava, Ms. Nisha Menon, Hon’ble Justice Indira Banerjee, Professor S.P.Shrivastava, Dr. Aruna Broota, Justice Hema. K, Justice Gita Mittal, Hon’ble Justice Roshan Dalvi, Dr. Manju Mehta, they contributed by sharing their valuable experience and knowledge.

The four day workshop was divided into total fifteen sessions, six sessions for each day, which included Library Session and Computer Skills Training.

### **DAY-1 SESSION 1 (9:00 AM- 10:00 AM)**

#### **POCSO Act and its Implementation status**

Prof (Dr.)Geeta Oberoi, Director In charge of National judicial Academy gave a warm welcome to resource persons and all of the participating judges of POCSO courts. She introduced the resource persons for today’s session and deliberated on the objective of the workshop. She asked the Hon’ble participating judges to introduce themselves by stating their Name, Place, High Court, Number of POCSO cases pending in their respective courts, Duration of their assignment as POCSO judge. Following judges participated in the workshop.

S.no.	High Court	Name of Participants
1.	Allahabad	Mr. Devendra Kumar Garg
2.	Allahabad	Mr. Ashok Kumar Singh VII
3.	Andhra Pradesh	Ms. T. Rajani
4.	Andhra Pradesh	Ms. C. Sumalatha
5.	Bombay	Ms. Vandana Tendulkar
6.	Bombay	Mr. S.D. Jagtap
7.	Calcutta	Mr. Nirvan Khesong
8.	Chattisgarh	Mr. Yogesh Pareek
9.	Chattisgarh	Ms. Girijadevi Meravi
10.	Delhi	Mr. Vinod Yadav
11.	Delhi	Mr. Raghubir Singh
12.	Gauhati	Mr. Robin Phukan
13.	Gauhati	Ms. Malasri Nandi
14.	Gujarat	Mr. Mool Chand Tyagi
15.	Gujarat	Mr. Ketan Kumar J. Dasondi
16.	Himachal Pradesh	Mr. Virender Singh
17.	Jharkhand	Mr. Suresh Chandra Jaiswal
18.	Karnataka	Mr. Vijaykumar M. Pawale
19.	Kerala	Mr. Nisar Ahammed K.T.
20.	Kerala	Mr. Sanil Kumar K.
21.	Madhya Pradesh	Mr. Thakur Das
22.	Madhya Pradesh	Mr. Devendra Pal Singh Gaur
23.	Madras	Mr. D. Lingeswaran
24.	Madras	Ms. S. Selva Sundari
25.	Orissa	Mr. R.K. Pattanaik
26.	Orissa	Ms. Pranita Mohanty
27.	Patna	Mr. Surendra Prasad Pandey
28.	Patna	Mr. Keshari Nandan Gupta
29.	Punjab &	Mr. Dinesh Kumar

	Haryana	
30.	Rajasthan	Mr. Ramesh Chand Meena
31.	Rajasthan	Ms. Prabha Sharma
32.	Sikkim	Ms. Jyoti Kharka
33.	Tripura	Mr. Sanjib Kumar Majumder

As per the narration of these thirty three participating judges we could estimate that approx 3800 case were pending in their respective courts. After that the resource persons introduced themselves. Prof S.P.Shrivastav and Mr. Sumit Bhattacharya were also present at the session. Mr. Sumit Bhattacharya again welcomed the session and stated that we could gather from the discussion of this group of people that almost 3800 cases are pending in the POCSO courts.

The baton of the session was handed over to Mr. Asheem Srivastava. Main focus of his presentation was to access The Protection of Children from Sexual Offences Act, 2012. He started his presentation by explaining that why POCSO Act was needed. He deliberated that Existing laws (IPC and JJ Act, 2000) not enough to address sexual offences committed against children. There were no specific provisions or laws for dealing with sexual abuse of MALE children. Discussing the purpose of the act he stated that this act Provide protection to children from the offences of:-

- SEXUAL ASSAULT;
- sexual harassment; and
- pornography

SPECIAL COURTS for speedy trial of such offences have been established. Explaining the salient features of the POCSO Act he pointed out following distinctive features.

- New offences / Special Courts / Special Public Prosecutor

- Special Procedures: recording of complaint, statements & Evidence
- Mandatory Reporting / Punishment for False Reporting
- Monitoring by NCPCR/ SCPCR / Convergence with JJ Act
- Compensation

He pointed out the new offences which have been added to this act which are as follows:

- Penetrative Sexual Assault (Section 3)
- Aggravated Penetrative Sexual Assault (Section 5)
- Sexual Assault (Section 7)
- Aggravated Sexual Assault (Section 9)
- Sexual Harassment of the Child (Section 11)
- Use of Child for Pornographic Purposes (Section 13)

He deliberated that one of the most attractive and distinctive part of this act is that it has lead to the establishment of Special Courts for speedy trials. He stated Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a receiving a complaint of facts which constitute such offence or upon a police report of such facts [Section 33 (1)]. Section 19(6) - the SJPU / or the local police have to report the matter to Special Court within 24 hours. Evidence of the child has to be recorded within a period of thirty days of the Special Court taking cognizance of the offence. The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence. He further explained the whole process to be followed when sexual offence is committed. He showed the following chart depicting the punishments for the prescribed offences.

OFFENCE	PUNISHMENT	SECTION IN ACT
Penetrative Sexual Assault	7 years to imprisonment for life	Section 4
Aggravated Penetrative Sexual Assault	10 years to imprisonment for life	Section 6
Sexual Assault	3 years to 5 years	Section 8
Aggravated Sexual Assault	5 years to 7 years	Section 10
Sexual Harassment of the Child	3 years	Section 12
Use of Child for Pornographic Purposes	5 years and in case of subsequent conviction 7 years	Section 14 (1)
If along with pornographic acts offence also committed under section 3,5,7 & 9	Section 3 : 10 years to life imprisonment Section 5 : Life imprisonment Section 7 : 6 years to 8 years Section 9 : 8 years to 10 years	Section 14 (2) Section 14 (3) Section 14 (4) Section 14 (5)
Storing pornographic material involving a child, for commercial purposes	3 years	Section 15

He stated that in this act Abetment treated with same gravity as commission of that offence (Section 16), Trafficking of children for sexual purposes covered under abetment (Section 16 Explanation III) and Attempt to commit an offence

penalized, for up to half the punishment prescribed for that offence (Section 18) have also been added.

Mr. Asheem Srivastava deliberated that report of happening of such offences has to sent to SJPU (special juvenile police) or the local police (Section19). In case child is in need of care and protection, SJPU/local police to provide such care within 24 hours of the report (Section19(5)). SJPU/local police has to report the matter to CWC (child welfare committee) and Special Court within 24 hours (Section19 (6)). In case of failure to report by a person, who is in charge of any company or an institution, in respect of offence committed by subordinate under his control, also punishable with imprisonment of one year and fine (Section21(2)). If false complaint against any person with malicious intent then such act is made punishable with imprisonment of 6 months or with fine or both (Section22(1)). If false complaint is against child, it is made punishable with imprisonment of one year or with fine or with both (Section22 (3)). No civil or criminal liability for giving information in good faith (Section19 (7))

He pointed out the alarming rise in child abuse. 236% jump in child rape cases between 2001 and 2011. 1 in 4 cases of child rape involve girl younger than 16 years. 90 % victims under 12 years are raped by family member and close relatives or friends. 87 % children were repeatedly abused;

He showed his concern about the concept of early child marriage. Early marriage takes place when the girl is as young as 5 years. Gauna, after the girl attains puberty (13 + years age). She becomes mother in 14 years. If we ask them Why? The answer is fear of losing virginity. Many girls get divorced by the time they are 15. Many are sold off for prostitution.

Mr. Asheem Srivastava pointed out the problems faced by victims during the medical examination and during the trial process.

## DAY-1 SESSION-2 (11:00AM- 12:30PM)

### **Forensic Science in absence of testimonial evidences.**

Resource person for this session was Ms. Nisha Menon. She started her presentation by explaining what is Forensic Science? She stated that Forensic Science is the use of science & technology for legal purpose y 'Forensic Science' is the application of various basic sciences to provide scientific evidences to court of law. Further explaining Locard's Principal of exchange she stated- "Whenever two objects come into contact, they always leave a trace on the other." Every criminal can be connected to his crime by contact traces carried from the scene of crime or left by him at the scene of crime.

She deliberated that the Protection of Children from Sexual Offences Act (POCSO Act) 2012 was formulated in order to effectively address sexual abuse and sexual exploitation of children. It is any sexual activity between adults and minors or between two minors when one forces it on the other. This includes sexual touching and non-touching acts like exhibitionism, exposure to pornography, photography of a child for sexual gratification, solicitation of a child for prostitution and communication in a sexual way by phone, Internet or face-to-face.

She further explained the concept of CHILD FORENSIC INTERVIEW. She stated that child Forensic interview is a formal, structured interview technique, that is used to investigate whether a child has experienced or witnessed physical or sexual abuse and if so, to get disclosure. The interview is conducted by specialized interviewer: a psychologist or a similar education. The Goal of Child Forensic Interview is to:

- To get maximum information while causing minimum stress and contamination.
- To assist the child in providing detailed information
- On the nature and extend of the abuse, including those responsible
- To get sufficient details of the event to take appropriate action.

Coming on to Physical Examination she stated that the physical examination of sexually abused children is essential but should not result in additional

emotional trauma. The examination should be performed immediately when the alleged sexual abuse has occurred within 72 hours, or there is bleeding or acute injury. Even after 72 hours a physical examination is conducted as soon as possible. Biological trace evidences are secured such as epithelial cells, semen and blood to maintain a “chain of evidence.” In the rare instance when the child is unable to cooperate because of the trauma, infection, and/or the need to collect forensic samples are essential, sedation are used with careful monitoring. Instruments to magnify and illuminate the genital and rectal areas are used Signs of trauma should be carefully documented by detailed diagrams illustrating the findings or photographically. Specific attention should be given to the areas involved in sexual activity—the mouth, breasts, genitals, perineal region, buttocks, and anus. Thorough genital examination is conducted as per the gender of the child victim.

Ms. Nisha deliberated that the purpose of making smears is to allow microscopic forensic analysis of the specimen to test for the presence of body fluids like blood; semen depending upon the type of sexual offense, semen may be detected in the mouth, vagina, or rectum. Samples are collected from:

- Clothing
- Perineum
- Anus
- Thighs
- Pubic area
- Bite injuries
- Finger nails
- ANY part of the victim’s body (appropriately)

She explained the types of tests conducted with biological samples retrieved from the site and collected samples. Elimination of victim’s blood group. Blood Group Analysis of the accused sample other than victim. Blood can be tested for substance abuse. Other samples can be collected for DNA Analysis. Hair Strands are matched with the victim’s and the suspect’s hair strands. Nail scrapings are tested for presence of skin traces which can be taken up for DNA analysis. Urine and Blood samples are collected within 96 hours of ingestion of drug. Samples collected are analyzed for drugs. Pregnancy tests are conducted from the samples.

Explaining Injury Marks she stated that physical examination of the child with an injury is important. Especially in cases where Injury pattern inconsistent with the history provided the child is examined for:

- Incised wounds
- Laceration
- Bruises (or contusions)
- Abrasions (or grazes or scratches)
- Bite Marks

She deliberated the ways by which on examination of these types of injury marks, age and intensity of injury mark can be ascertained. The weapon with which injury was caused can also be identified by analyzing these marks. She concluded her presentation by stating that “LET US ALL TOGETHER HELP THE CHILD VICTIMS.”

### DAY-1 SESSION-3 (1:30PM-2:30PM)

#### **“Switching over” to deal with “Specific Jurisdiction” from “General Jurisdiction”**

Professor S.P.Shrivastava began the session. For the purpose if this session the participants were divided into different groups. In this session the participating judges were asked to discuss the problems faced by them.

#### **Group-2**

- Exclusive courts must be designed to deal with case under POCSO act.
- Lack of trained and exclusive prosecutor.
- Creation of special police for such offences.
- Lack of basic infrastructure in juvenile homes.

- Lack of basic infrastructure in courts.
- Poor response for forensic report.
- Unavailability of experts of deaf and dumb witnesses.
- Number of cases should be fixed in a court.
- Non corporative attitude of bar, the much prevalent strike culture.
- Insufficiency of staff in POCSO courts.
- Lack of proper medical evidence.
- Judicial Magistrate recording confession or statement u/s 164 of Cr.P.C are not properly trained. They must be trained properly.

### **Group-2**

- Judges are unable to create child friendly atmosphere with the accused and victim.
- Judges are unable to switch mind from one situation to other.
- Special courts must be special courts as such.
- In camera trial procedure must be strictly followed.
- Untrained public prosecutor and police officers.
- How can we give priority to every case is a problem.
- Section 53 makes provision to give common compensation to victim; efficient system must be developed to for its effective implementation.

### **Group-3**

- Special designs for every special court.
- Judges have to concentrate on himself first to change their mind set. We need to have proper training programs for that purpose.
- All questions are to root through judges. It is a time consuming process, and creates difficulties for children due to repetition of questions.

### **Group-4**

- Special courts with adequate infrastructure must be constructed.
- Police Officers of POCSO courts must contain women officers too.

- Non availability of interpreters.
- Appointment of special public prosecutor.
- At least one forensic medicine officer must be appointed.
- Separate waiting rooms for victims must be created.
- The accused very easily gets bail.
- Victim accused and their representatives must be personally present at the time of taking bail, such provisions must be necessarily added in the POCSO act.

Mr. Sumit Bhattacharya appreciated the valuable suggestions given by the participating judges. Mr. Asheem Srivasatava elaborated details of next session, and explained how to use.

## DAY-1 SESSION-4

### **Role of circumstantial evidence when victim is dead.**

Session 4 was based on hypothetical situation circulated amongst the participating judges. Relevant facts of the Hypothetical problem:

#### **Prosecution Version:**

The mother of the victim (herein “M”) was at her fruit and vegetable cart near Nirmaya Hospital. Moreover, the victim’s father Prakash (hereinafter “F”) and her maternal grandfather Krishna (hereinafter “GF”) were present near vegetable cart too. “A”, who used to reside nearby, came on a motor cycle to buy fruits. The young 8 year old (victim, hereinafter “V”) was also present, who was mentally challenged having an IQ of 50% (on the IQ scale) with a permanent physical disability of 70%. “A” gave “V” a chocolate and went away. After 10 minutes “A” came back to the stall and suddenly picked up “V” on his motor cycle and speed away. “M” raised an alarm and went to look for her, but was unable to find either “A” or “V”. She immediately went and lodged complainant at Indrapur Police Station. Police arrested “A” and on interrogation “A” informed about death of the young girl “V”.

**Prosecution Witnesses:**

The prosecution led its evidence and examined 7 witnesses in all, including the doctors who conducted the postmortem and Investigation Officer (IO. PW1, PW3 and PW4 were “M”, “F” and “GF” also narrated the discovery of the body of “V” and the other evidences (described in detail below) along with police after the arrest of “A” as per his confession before the police in the police station. However, during the cross examination (which took place after three and a half months) PW1, PW3 and PW4 the important prosecution witnesses turned hostile stating that they deposed earlier under the influence of police. The evidences from the various sources inter alia the witnesses were recorded, a brief classification of which is provided below. PW2 who was the doctor who did the post mortem report testified that “V” had been raped brutally and the head injuries were the cause of her death. PW7 who was the IQ testified facts of the investigation and was examined.

**Defense Version:**

After recording the evidence of the prosecution witnesses and exhibits of documents, an opportunity was given to “A” to defend himself. His statement u/s 313 Cr.P.C. was recorded and “A” refuted all questions put to him and claimed that all allegations were untrue and he was being falsely implicated. The defense counsel also argued that there was no public witness who was examined on recovery of the motorcycle which was made on strength of the discover strength of the discovery statement of “A”.

**Charges:**

After FIR and investigation, charge-sheet was filed by the police before the competent court. “A” was charged for commission of offence u/s 363,365,376(2)(f) and 302, IPC as well as u/s 6 of POCSO Act, 2012.

**Evidence (Oral):**

Based on the information given by “A”, the police along with “F” and “GF” were able to locate the dead body of “V”.

“A” made a disclosure about the ware about of the motorcycle used to abduct “V”. The police went with a search party to locate the motorcycle. He also disclosed that he used a stone to hit the head of “V”.

The doctor testified before the court that the course of death was head injuries, which has been reported that rape was committed with palpable injuries on the victim.

### **Evidence (Documentary):**

#### Post Mortem Report

As per medical report, the deceased “V” had head injuries, injuries on her left eye, and injuries on her neck, face, chest, hands stomach, and back as well as injuries on her private parts. The postmortem report shows that there was an “ante mortem” rape done and cause of death is head injuries. It was also deposed that the deceased had been subjected to great cruelty at the time of commission of the rape and the murder thereafter.

#### Forensic Science Laboratory Report

The DNA test performed on the exhibits concluded that the DNA profile obtained from coat, pant, shirt, pajami, blood from motor cycle, frock, vaginal swab, vaginal smear is matching with the DNA profile of the blood sample of “V”.

### **Evidence (Other):**

#### Material Recovered by Police

A motorcycle was located and recovered which had blood stain on it along with the stone used to hit “V”. The police after collecting evidence of various articles, namely, coat, pant, shirt, underwear, blood sample of “A” and blood from motor cycle, control swab, frock, blood smeared soil, control soil, vaginal swab, vaginal

smear and blood sample of “V” sent the same for a DNA examination to the State Forensic Laboratory (FSL).

***Exercise:***

Considering the above mentioned charges on “A” and in view of the above facts and circumstantial evidence adduced therein, please decide by citing reasons:

1. Whether you will hold guilty of the charges and convicted him or set aside the charges based on the evidence as not conclusively proved, thereby holding him innocent?
2. Please cite reason in brief, in support of your judgment.

Following decisions were made by the respective groups, reasons were also given supporting their decision.

**Group-A**

In this group the decision came out to be in ratio of 5:3, i.e. 5 members were in favour of conviction and only 3 were in favour of acquittal. Reasons to support their answers for acquittal were:

- Medical report of genital area showed contrary.
- She consented to have sexual intercourse with three people, which was not normal.
- She was habitual to it, as she consented to have sex with three people at a time.
- She did not offer any resistance to the bike rider.

Reasons for conviction:

- There were injuries at her genital area.
- Giving consent implies right to rape.
- Blood sample of accused and vaginal swab were same.
- Evidences of passer by witnesses.
- When the girl came back late she broke down.

- Accused was previously held liable and also convicted for the offence of rape u/s 376-C IPC.

### **Group-B**

Majority was for conviction of the accused. Reasons stated for conviction under section 376 IPC read with section 4 POCSO act were as follows:

- Section 2(d) of POCSO act defines child, which was not considered in present case.
- Conviction must be u/s 376 IPC.
- Section 42 of POCSO act directs to award punishment whichever is greater.
- POCSO act will not be applicable due to lacuna in definition.
- Though birth certificate was produced, but her mental maturity was that of a 12 year old child. She was lacking mental maturity.

Reasons for acquittal:

- Neurosurgeon is not competent to fix IQ.
- POCSO will not apply in the above mentioned case.
- Rape has to be proved first u/s 376 IPC.
- Medical evidence could not prove it.
- Victim stated that she willingly surrendered herself.

### **Group-C**

No conviction can be passed, hence acquitted the accused.

- No eye witnesses were found, it was based only on basis of accomplice.
- Police registered the case u/s 306 of the Indian Penal Code.
- Incident was such that the girl was found hanging.

### **Group-D**

The accused was held guilty of the offence.

- Both are minors section 29 of POCSO act will apply.
- There is no allegation of repeated rape.

Mr. Sumit Bhattacharya later revealed that this hypothetical situation was based on a real case and the court has convicted the accused stating that her IQ level is equivalent to that of a 12 year old child. This is to be tried by POCSO courts. Commenting upon the psychological age Professor S.P.Shrivastava stated that psychological must not be considered in such cases. Hence actual age must be considered. This case has provoked a debate between mental age and actual age. Professor Shrivastava concluded the session by stating that special provisions must be made.

Mr. Sumit Bhattacharya deliberated that the case handed over to the participating judges, out of it 30 judges convicted the accused and 3 judges acquitted the accused. Following reasons were stated for passing the order of acquittal:

- Eye witness turned hostile from the very beginning.
- DNA test came out to be positive.
- Recovery of dead body, motorcycle was admissible as relevant evidence.
- Other circumstantial evidence will have to be proved, which were not against him. There was lack of evidence.

DAY-1 (4:30PM-5:00PM)

**Library Reading**

**&**

**Computer Skills Training**

## DAY-2 SESSION-5 (9:00AM-10:00AM)

### **Contest on age of victim**

Mr. Sumit Bhattacharya gathered the session. He welcomed the speakers for today's session and introduced them. After introduction Hon'ble Justice Indira Banerjee addressed the session. She stated that the present workshop is to access nature of difficulties faced by the POCSO courts. This act is relatively new act, the POCSO act 2012. You must have new experience taking up these cases. We only face bail cases. It is only you who are going to do practical sessions.

Justice Indira Banerjee deliberated that so far age is concerned we need to back fall to previously decided cases in IPC. Commenting upon age of accused she stated that it'll be for claiming the benefits. Rule 12 of the Juvenile Justice act will have to be considered it that matters. She referred to two cases Ternail v. State of Harayana and Madhav v. State of Maharashtra.

She concluded by stating that I love to come to National Judicial Academy as resource person or as participant. As a resource person I tend to take more that I give. The baton of the session was handed over to Professor S.P.Shrivastav.

Major concern of Professor S.P.Shrivastav was on "Content on age of victim". He started the session by discussing the problems faced to POCSO courts in justice delivery system. He stated that litigation of worth is not done, people do not even go and get there cases registered. As we all know that schooling especially in rural area is very poor, thus evidence as relevant age of victim or accused are not easily available. People do not even give correct data as to the contents of their age, Indian parents have a tendency to give false data as regards to date of birth of their children. Medical science is not perfect in this area. He emphasized that issues as to age are very important and complex. Prof. Shrivastav dealt classical approach of Supreme Court regarding contest of age victim, and how they are applied in juvenile justice. Registration is very poor in India. In most of the cases documents which come to ascertain the age are

school certificate. Whether they can be relied upon is a question before court. Discussing the classical judgment of Supreme Court he took up the case of Biradmal Singhvi Vs. Anand Purohit AIR 1988 SC 1796 in this case the court had stated that entry in register is relevant fact. The content of itself does not stands proved, only the document is proved. There has to be more evidentiary proof to prove it. Transfer certificate or other document is produces it has to be proved further by the person who had actually given the information, who got it registered.

Coming on to Brij Mohan Vs. Priybrat AIR 1965 SC 282 he deliberated that in actual life false statement of age is made by parents to secure advantage at latter stage. Explanation that incorrect date was carried in school record was accepted. It was held by the High Court that the principal mmust come and prove the contents. But Supreme Court held that who gave the information have to prove the contents of the document. It is common phenomenon with parents in India to give false data as to age of the child.

Discussing the case of Umesh Chandra v. Rajasthan AIR 1982 SC 1057. The facts of the case were such that two different date of birth were registered in primary and secondary school. Question before the court was that which date out of these was relevant? High Court stated that her father was a lawyer he stated false data. A three judge bench of SC observed that it is not uncommon for parents to change the age of their children in order to get some benefit either for appearing in examination or entering a particular service.

He pointed out that in another case of Bhoop Ram v. State of Uttar Pradesh (1989)3 SCC 1 for the first time point was raised, how benefit can be given to the accused. The sessions Judge who was directed to return a finding on age of appellatant did not accept the School Leaving Certificate according to which appellatant was less than 16 years of age on the date of occurrence. SC held that certificate carried definite date of birth against which there was no material. Brij Mohan Singh's case not cited.

In Bhola Bhagat v. State of Bihar (1997) 8 SCC 720 Statement of accused under section 313 Cr P C and assessment of age by trial judge was accepted as valid proof of age in absence of any challenge by the state either in HC or in SC.

Held that if High Court doubted assessment of age an enquiry could be ordered. St of Haryana vs Balwant Singh 1993Supp SCC 1 was held not to be a good law.

Professor S.P.Shrivastava referred to the case of Daya Chand v. Sahib Singh (1991)2 SC 438 in which medical report was referred. In this case two different Dates of birth were recorded in two different schools. SC held that Medical report was to be relied upon. In this case medical report was of definitive nature which said that age was not less than 20 years on the date of examination. Tendency of many to have lesser age recorded in school is well known.

Discussing the case of Ram Deo Chauhan v. Assam AIR 2001 SC 2231 he stated that the accused committed a heinous crime and he was given heavy punishment. School records were not accepted because the source of information regarding date of birth was not proved. Register was not properly maintained. Even medical report according to which age could be around 16 years was not accepted.

He showed his concern that there are many things in a case. Each and every aspect is to be looked at. If the offender commits several offences then what is to be referred. Medical report is just a report. Rather ossification test and means to determine the age by analyzing tooth can be relied upon. Psychological aspect is neglected. He deliberated that that if 19 year old child certified 13 commits a heinous crime. The child is declared to be a child who cannot be charged at all, what can be done in that case? Judges have to work according to the law and cannot go beyond. We have to be determined and to have a holistic approach to determine the age of accused.

He further pointed out that in the case of Babloo Pasi v. Jharkhand 2008(13) Scale 137 age mentioned in voter list was accepted by first appellate court against order of JJ Board. It was held unless proved in accordance with S.35 of Evidence Act it cannot be acted upon in view of Biradmal Singhvi's case and other cases inline. Thus the person who made it has to prove it.

Coming on to Pawan v. Uttaranchal (2009) 15 SCC 259 Juvenility was claimed on the basis of School leaving certificate and statement u/s313 CrPC. SC held that since no plea was raised in trial court or the High Court and School certificate was obtained after conviction it was not accepted even for directing an enquiry. Statement u/s 313 is hardly determinative.

Again in another latest case *Kulai Ibrahim v. State DOD* (2014) before the Supreme Court. Father of accused after conviction from High Court obtained a forged school certificate to show accused a juvenile and also obtained birth certificate from City Municipal Corporation by order of Judicial Magistrate. SC directed the trial court to complete trial of case regarding fake certificates and kept pending the issue of juvenility.

Dr. Aruna Broota added to this presentation that we are moving toward bone age. Hence it may be helpful. I have friends who have tempered there age up to 5, 6,8 years. How can these records be relied upon. She added “Maa Baap he sabse bade dushman hote hai.” There are ways to find out truth. But does the court have been using such methods? All of the information given by the parents is not correct.

Professor S.P.Shrivastav deliberated that there are very much complications. Legislator has come with better legislations; Rule-12 of the Juvenile Justice Act has been proved to be much useful. Whatever rules are applied in Juvenile Justice Act can also be used in criminal matters to determine ages.

This session was followed by a Hypothetical case distributed to the participating judges. Facts of the case were as follows:

Accused “A” has been assigned for trial on the allegations that he kidnapped a minor child “B” aged about 15 years with the intention to compel her to marry him and thereafter committed penetrative sexual assault upon her.

**Charge:**

“A” initially was charged u/s 363 and 366 of IPC to which he pleaded not guilty and claimed trial and the charge was later suo moto amended by this Court putting charge u/s 4 of POCSO Act, 2012 to which the accused pleaded not guilty and claimed trial.

**The cause of the prosecution:**

On 05.03.2013 a police complaint was lodged by the mother of “B” reporting that her daughter aged about 15 years and four months, went missing from her house from Saket Nagar of Saurashtra after 8:30 PM on 26.02.2013. Based on the said

information, the accused “A” was arrested from whose custody “B” was recovered and sent for medical examination to hospital where “B” refused to allow her internal examination, but later on MLC was done and reported. “A” was also subjected to medical examination and was found potent enough to have sexual intercourse. During the investigation, “B” was produced before the Magistrate and her statement u/s 164 of Cr.P.C. was recorded in which inter alia she stated that she had gone away with accused to her native place where they got married in temple at Mohannagar and since then they have been together. Subsequently “B” was produced before the Child Welfare Committee Bench of Magistrate Saurashtra and after her examination; she was handed over to the mother’s custody. After completion of investigation, the present police report was filed.

However, the prosecution argued that the mandate of the POCSO Act is that no one including a married man can have sexual intercourse with a child below 18 years of age.

#### **Case of the Defence:**

The defence counsel for the accused does not dispute the correctness of the MLC of the “B” or the medical examination report of “A” which were respectively admitted by the court. Moreover, the defence counsel also does not dispute the correctness and legality of “B” recorded u/s 164 of Cr.P.C. by the Magistrate. The statement of “A” u/s 313 Cr.P.C. stated that “B” accompanied on her own will to Mohannagar where they performed marriage but he denied that he had sexual intercourse with “B”. The age of “B” was not challenged. “B” testified that he was having friendly relationship with “A” who was residing near her house and she testified that on 26.02.2013 she went to her native place Mohannagar along with “A” where they got married. She also testified that after 10-12 days they came back to Saurashtra and stayed at the home with “A” from where he was arrested on 06.03.2013. In her testimony before the court, “B” stated that after the marriage she had sexual relationship with “A” which she reveal to the doctor and which is as per MLC report.

#### **Evidence (Oral)**

#### **Statement of Accused u/s 313 Cr.P.C.**

On putting the incriminating facts and circumstances on the record, accused stated that the “B” accompanied on her own will with her native place Mohannagar where they performed marriage on 28.02.2013 but he denied that he had sexual intercourse with the “B”.

### **Statement of “B”**

“B” was categorized that she was having friendly relationship with accused who was residing near her house and she testified that on 26.02.2013 she went to her native place along with the “A”, where they got married. She testified that after 10-12 Days they came back and stayed at the house of “A” when she was arrested on 06.03.2013.

However, while in her statement u/s 164 Cr.P.C “B” she stated that when they were at Mohannagar, she along with “A” resided separately and no harm was caused to her, in her testimony before the court, she stated that after marriage she had sexual relationship with the accused.

In her evidence mother of “B” who was the complainant, stated that marriage between the accused and get daughter was accepted to her besides her community and she was certain that accused would take good care of her daughter.

### **Evidence (Documentry):**

As per MLC on 06.03.2013 “B” revealed to the doctor that she had sexual relationship with “A” after marriage.

### **Exercise:**

The question is where does the said evidence lead us to in view of the penal provision quoted above particularly the stringent one in POCSO Act?

Consider the above mentioned charges on “A” and in view of the above facts and evidences adduced herein, please decide by citing reasons whether you will convict the accused u/s 4 of the POCSO Act, 2012?

In this case out of 33 judges 22 judges convicted the accused whereas only 11 judges acquitted the accused. Following reasons were given by the participating judges who acquitted the accused.

- Under section 366 IPC there is no material on record, that boy took initiative of elopement.
- No traces which showed assault and thus there is no question of sexual assault.
- She eloped, married, she was 15 years old, and thus it was a valid marriage. Her mother accepted the marriage, she dint tried to get it annulled.
- It was rather a pleasurable assault.
- She herself refused to medical evidence.
- She dint uttered anything, before the magistrate (u/s 164 Cr.P.C), and admitted sexual relation.

## DAY-2 SESSION-5 (10:30AM-11:30AM)

### **Contest on age of accused**

The session was again taken over by Professor S.P.Shrivastava . He pointed out the problems of the victim's age. He deliberated that evidence recorded with regard to the age are not certain. Sometimes at the time of bail prosecution takes defence that his age is above 18 years. At the time of bail age is to be ascertained. Final opinion has to be of the special court. If in an elopement cases the girl says that she is above 20 years old. Prosecution asks she's less than 18 years and POCSO is attracted. Prima facie investigation is needed. He further stated that at the time of framing of charge you have to assure that the evidences are produced.

Dr. Aruna Broota shared one of her experiences with the participants. She stated that she was conducting counselling skills for judges. There was a case where the girl eloped with a boy. One of the judge insisted upon providing the punishment. The girl said that she loves the boy. The judge replied that the girl is foolish, mera bas chale toh mai ladke ko maar dalon. I asked where this rage is

coming from sir. He cried and stated that my daughter did so. Is it correct to do in this way? Judges have to train themselves to decide cases objectively.

Professor S.P.Shrivastava explained that POCSO Act is gender neutral act but it does not override any other act. But section 42-A overrides any other act. He further added that parliament has made no mention about sex with wife or anything. What about objective of the act? It is to protect the interest of the child.

Dr Aruna Broota deliberated that the judges are under huge dilemma while deciding such cases. There has be broad classification as to the age of the accused, as there will be a vast difference if such act is performed by a child who is 6 years old and a child of 17 years. Justice Indira Banerjee stated that in the previously discussed hypothetical situation my heart is with acquittal. Dr.Aruna Broota immediately pointed out that you proved my point that judges too have heart and they work according to it.

## DAY-2 SESION-7 (12:00PM-1:00PM)

### **Challenges when both victim and accused are children**

Professor (Dr.) Aruna Broota was the resource person for this session. Before Justice Indira Banerjee has a brief discussion with the participating judges. She pointed out the challenges when both victim and accused are children is a very critical issue. If a child has committed mistake, they must be rehabilitated and reformed. A boy who is 17 years and 9 months old commits rape of an infant. Then what is the situation? Laws are such that he goes caught free because of being juvenile, or to the greatest extent he will be rehabilitated. The competing interest of child who has been wronged is claiming juvenily. In today's situation of free mixing, sexual mixing is not uncommon. Time and society are changing, so the

law also needs to be changed accordingly. Justice Banerjee handed over the session to Professor Aruna Broota.

Dr Aruna Broota started her presentation by defining a Sexual Offence. She deliberated that sexual offence is a contact under three circumstances:

- A. When a child does not understand a sexual approach
- B. When a child is approached sexually without her/his consent
- C. When an adolescent is under 18

She then asked the judges to give their concept to define a child. Following answers were suggested by the participating judges:

- As per the act
- Below 18 years of age
- Mental Capacity will not be looked into

Dr. Aruna stated that when a child is born it is asexual. They do not know their sex or their sexual abilities. When a child realizes that his/her body is different from that of the other that is when he becomes sexual. Discussing the impact of Sexual Abuse she stated that their self concept is completely distorted. Need for approval is satisfied through sexual approach when the victim grows up. They think this is the only approach to meet people. She explained it by quoting the example of the movie “Mera Naam Joker”, she discussed that it is due to sexual fondling. They feel that sexual concept is the only way to interact with others this may result into depression/ weeping spells. It also changes the dressing sense of a victim when he grows. The child becomes shy in relationships/ manipulative.

Discussing upon preventive or curative or reformatory steps she stated that psychometrically assess both victim and offender should be assessed. Offender may be having an impulse control disorder/ manic personality. She explained a manic as a person who has biochemical disorders is said to be a manic. She further pointed difference between a criminal and a psychopath that a criminal doesn't ever has a guilt feeling like in Ranga Billa case on the other hand a psychopath is a person has such feelings like Chals Shobhraj. Victim could be the same as above. Counseling, Yogabhyas are essential. Psychometric assessment would decide if any one of them would have to be medicated by a psychiatrist.

She then distributed a case study to all the participants, which had following particulars.

Akash is ten year old boy. He is very shy. He makes no eye contact with his classmates or his teachers. And you will be surprised not even with his parents.

His Headmistress of the school called both the parents to the school. And no one knew what was happening. The child was referred to a clinical psychologist.

Akash , age 10 is the older child with a younger brother aged 8 years. He is studying in class IV at a public school. He is an average student scoring between 55%-60% marks. He shows no conduct issues in school. He smiles to himself. His grasp of math is good and also science subjects. He was found to have average intelligence (102 IQ).

He belongs to an upper middle class family. He lives in a joint family doing joint business manufacturing packing bottles. His tauji(Uncle) has a son who is 12 years old and a daughter who is 10 years old. The grandparents are also living in the same house. The grandparents are on the ground floor. The father mother, tauji taiji live in the second floor. And all the children live on the third floor. Akash and his brother live in one room. Tauji's son lives in a separate room. His sister lives on the second floor with her parents.

Akash told the psychologist that when he is sleeping, his cousin brother comes into his room and unclothes him and forces him to let him lie on his body. He said that he does not remember when this thing started. But he says that now he has started having pain in his penis. One day his penis started to bleed and his mother asked him why there were blood stains on his under garments. Simultaneously his taiji asked her son as to why there were blood stains on his under garments.

Both sets of parents became suspicious. But did not pursue the matter as tauji's son was clever to tell some story and their attention was dissuaded.

The Psychologist reported after history taking and psychometric assessment:

1. Akash is sly.
2. Akash has been sexually abusing his own younger brother (8year old) for the last three months.

3. Father is into alcohol in a regular way.
4. Father has had extra-marital relations (Manic Personality).
5. Grandfather had raped her mother.
6. Akash has attention deficit.
7. Akash goes to pornographic sites on the computer.
8. Akash steals liquor from home and sells it to some senior boys in school.
9. He has poor self control as he has been stealing money from his home.
10. He peeps into his parents' bedroom when they are changing clothes.
11. Homosexual tendencies were also observed in the assessment.

Dr. Aruna Broota exclaimed what is POCSO going to do in this case? Can we look at psychological realities? How are you receiving it? Have you seen such cases? She asked judges to react upon it. One of the participating judge from Kerala POCSO court stated that one such case came to them where the complainant was in school. She was raped by her father. She got pregnant and also delivered the child. The case came six years after this incident took place. Dr. Broota deliberated that in schools in Delhi they provide one counselors for thousand students. She referred to the situation of children like Akash, what if child is reformed, where will he be sent? To the same family?

Questionnaire:

Q.) In previous session, you showed your concern why acquitted? Under section 19 of POCSO act it is your duty to report the case. So why don't you do it?

- Dr. Broota answered to this question by stating that, I can't do due to the Hypothesis. Only in a murder or such cases we can inform the concerned authority and not otherwise. But to this one of the participating judges added that section 42-A has overriding effect over any other provision. Under an oath or something like that we can't override crime, and also u/s 43 of IPC a person is legally bound to do that.

Dr. Aruna Broota added to this discussion that we should combine psychology and legal aspects so as to remove this dilemma. When cases come up to the judges they must refer those cases to the counselors or

psychiatrists. Law is sometimes interpreted by the emotional aspect of the judges, which must strictly be avoided.

Justice Indira Banerjee further added that this discussion has proved to be an eye opener for all of us. No one is born criminal in his or her psycho status. Even if a child commits crime, it is not considered as a crime. There are cases where children are referred to psychologists. Dr. Broota concluded by saying that I can work without lawyers but not without Judges.

Q.)What will you do in Akash's case?

- Dr. Aruna stated that psychological evaluation of Akash is necessary. Family counseling will also be beneficial. To this the judges suggested that the case must be referred to Juvenile Justice Board and the guidelines under POCSO act must be followed. Parents of Akash are also offenders because they did not inform proper authority when they came across such incident.

### DAY-2 SESSION-8 (2:00PM-3:00PM) **Dealings with Child Pornography Cases**

Dr. Aruna Broota was again the speaker for this session. She showed her concern as to what is happening to the world with the advancement of technology and what is going to happen? Within very few years it will reach up to rural level too. Cyber crime is already prevalent in our society and with the advancement of technology the situation will become even worse. Pornography is an illness or just diversity. It is going to plague our society. She opened a question to that entire do you think that children indulge in porn material? Why sex is considered to be taboo and suppressed? See the language of people, how sexual it is getting. It is no more classical.

She discussed the incident of a student from Delhi Public School, R K Puram. In this case a boy made MMS of a girl (8<sup>th</sup> std) and uploaded it on facebook. I was called for her counseling. Her father asked me , “ Madam, did you see the MMS, mai khud le ke aaya, aap dekhoge?” I replied no I don't see

my children that way. So now we can understand how insensible people are. The situation of our society is changing with a rapid pace, so we need to revise our law every year according to the changing situation.

She further discussed the case of “Shefali” with the participants. Following are the particulars of that case.

### **CASE STUDY: I**

Shefali aged 12, loves to watch her mother change clothes. Her mother too does not mind changing in her daughter’s presence. Sometimes Shefali hugs her mother while mother is changing clothes. Shefali touches her mother and call her the most beautiful mother on this earth.

Shefali visits many pornographic sites. She puts her nude selfies on face book she is proud that her friend boys and girls have given her very appreciative comments. Her parents do not know about this.

In her session with psychologist, she revealed that she enjoys sex. She enjoys nudity. She asked why the body which God has given has to be hidden.

History taking and Psychometric Assessment showed:

1. Shefali smoked cigarettes with Marijuana.
2. Shefali belongs to a middle class family.
3. Both parents are working.
4. She is the only child of her parents.
5. Test showed that she has an impulse control disorder.
6. She is impulsive.
7. She is very good in studies achieving (90%-96%).
8. Shefali has had physical relations with her cousin brother. (Mother’s brother’s son).
9. Shefali was sexually fondled and abused by her Father and Chacha when she was 5 and 6 years of age.

She asked the participants what should we do with Shefali? Has she committed any offence by putting her nude pictures online? To this the participating judges replied that we can't take up the case unless police refers it to us. We can also remove from family, provide her protection and send her to children welfare committee. She further asked the participant that is it normal to visit pornographic sites at the age of 12 years? Is it an offence or immoral act? The participants replied that yes it is normal to porn sites at this age these days and it is not an offence, but it may tend to turn into offence. Watching porn publically is definitely an offence.

Dr. Broota pointed out that just like in case of alcohol, people get addicted to pornographic sites. To make this point more clearly she discussed another case with the participating judges. Facts of the case are as follows:

### **Case Study-II**

Akhil is 11 year old boy from a upper middle class family from an elite International School, studies in class VI.

He failed in class V when in an elite public school. So he changed to this International School because this school is a boarding school. The children can go home on weekends, if the parents want it so.

Akhil is perpetually in his room. He does not like to go out of his room when at home. He is always on his iPad. He changes or switches sites if his mother or elder brother would come to his room. He is very irregular to his earlier school.

After being referred to a Psychologist history taking and Psychometric tests revealed:

1. Akhil is of average intelligence (IQ98).
2. Akhil used to peep into bathroom in school right from class II.
3. Akhil tries to lick kissing his aunts and his mother as well as his eldest sister.
4. Akhil goes to pornographic sites as well as websites of nude dancing clubs in the USA from the age of 6.

5. Akhil was caught many times on nude sites and beaten by his father. After two days, his father would ask him to tell him about those sites. Akhil said he also saw his father watching Porn stuff.
6. Akhil used camera and makes video films of himself having a bath and also masturbating.
7. Akhil forced himself on his eldest sister who is 10 years older than him.
8. Akhil has forced sex on his Bua's daughter who is 12 years old.
9. Akhil was caught by the police at a hotel with a young girl aged 15 at a hotel. The girl said that Akhil paid her Rs5000/- is she remained nude for three hours and allowed him to examine her body. The girl belonged to an upper socio-economic background family.
10. Akhil said he could sleep only if he was on a pornographic scene.
11. If any parent or sibling scolded him or took away his iPad, he would be aggressive and violent. He broke the drawing room TV set. He broke entire cut glass in the drawing room. He was sexually abusive and violent with his mother.
12. He did not study at all. He was diagnosed with Mania. His grandfather and his Chacha had similar behaviors. His Chacha would roam nude in his bedroom with his children around.

Mr. Sumit Bhattacharya pointed out that very less pornographic cases came up and there even less people who would come and talk about it. Pornography was there even before the formation of POCSO act. The number of registration of such cases is very less out of which only a few get into legislation. Rather than me telling you about this I ask you people to share your experience about it. It was readily accepted by the judges that very few such cases come up. It is due to lack of awareness rather it is due to awareness which people have these days for not reporting cases.

Justice Indira Banerjee deliberated that there are many cases and pornographic substances, but very less registration. How POCSO is going to deal with such cases. There is lot of hue and cry but nothing is going to transform anything. The main object of this act is to protect children otherwise there is no scope of this act. 90% of cases under POCSO come by near family relatives.

Pornography is a kind of racketeering. People are afraid of social stigma, due to that they do not get their case registered.

DAY-2 (03:00PM-04:00PM)

**Library Reading**

DAY-2 (04:00PM-05:00PM)

**Computer Skills Training**

DAY-3 SESSION-9 (9:00 AM- 10:00AM)

**Media's influence/Pressure/Over reach v. Right to know of citizens**

Speaker for this session was Justice Gita Mittal. She started the session by showing to the participants video clips of the training program at Saket organized by Delhi High Court Committee on 8-9<sup>th</sup> February 2014. In this video clip Suzette a rape victim shared her bitter experience and illustrated how inhuman behavior she received while fighting for justice. She emphasized that how in our society authorities are inhuman and irresponsible. Justice Mittal appreciated Suzette. She deliberated that the victims of sexual offences need special treatment. It is not like TADA, PORTA or any other law. Justice will be surely hampered if they are not given special treatment. Stressing upon the hardship the victim has to undergo she

stated that think about the situation of the victim were she has to share all those bitter instances with others in front of the court, where number of male number outrages the female member, and the accused is himself present there.

She deliberated that criminal justice system was not designed keeping children in mind. Special treatment and environment must be provided to the victim. Age appropriate language must be used. Judges are in a leadership position, we need to take initiative. Judicial insolvent and innovation is need of hour. She deliberated that child witness, victims of sexual offences, victims and witnesses in dangerous crimes are vulnerable witness. Major problems posed by justice system are to tell many different people what happened. Long wait before trial goes to court. The possibility to face the accused. The use of age-inappropriate language in the court. The use of cross-examination which is designed to “catch witnesses out.

She pointed out the guidelines for recording of evidence of vulnerable witnesses in Criminal Matters. The Guidelines draw from legislations and guidelines from all over the world including the United Nations Guidelines, New Zealand, Australia, Canada, South Africa, UK, USA, Philippines. Provision has been made inter alia for:

- Support person, facilitator, guardian ad litem, legal aid
- Pre-trial visit to court complex
- Interaction with judge and prosecutor
- Concealment of witness identity
- Developmentally appropriate questioning
- Use of screens, one way mirrors and other devices

She illustrated the initiatives that the Delhi High Court has developed for vulnerable witnesses. She illustrated it with the help of various pictures. She showed the pictures of the separate entrance made in Delhi High Court especially for the vulnerable witnesses. Justice Gita deliberated that we have created special waiting room, pantry and witness room. She also depicted the distinctive features of the vulnerable witness court room, which also has a feature of special sitting arrangement for the offender. Discussing the objective of the program she pointed out following points: securing best interests of the witness.

- Ensuring confidentiality and security of the witness
- Eliciting complete, accurate and reliable evidence.
- Minimizing harm or secondary traumatization of witness.
- Ensuring rights of the accused to fair trial.

She added that questions are asked to the victim through microphones inserted in her ears, thereby making her feel comfortable. She requested the participating judges to replicate these features in their respective courts. Training of the police officers, lawyers is also very necessary.

Later part of the session was taken by Justice Hema. K. She stated that you would have faced many cases relating to such matter, and you are more expert. Thus I will avoid any lecture about the case. Listening is not good and I will not lecture. Thus I will give you questionnaire.

Q.) Do you think as a judge, you are prejudiced or biased in any manner? If yes, state why you think so, is there any special reason?

Some of the judges said no while some others said yes. Reasons given by the judges who stated that they were biased were.

- Pre trial determination of decision.
- Already form opinion on subject.
- Bias is in mind.
- Leaning towards a particular philosophy.
- Perception because of social environment.
- Preoccupation of mind that a particular fact happened in a particular way.
- If I have a husband who is an alcoholic, I'll have the tendency to look at the case in the same manner.

She pointed out that all these things are not intentional, it comes from within.

Q.) Do you think, a judge can be influenced or pressurised by media?

To this one of the judges said that when a judge applies judicial mind there can't be bias. Justice Hema. K then asked why there was bias in the famous Bakery case. Media played a major role in Arushi case as well as Nirbhaya case. Courts are influenced by media, but it should not be so. You should feel bold enough to

say out what you feel and not be influenced by Supreme Court or higher court. Then she asked can you stop media from reporting? She deliberated that we are victims of pressure of media, but have we done anything to prevent it? If this is not done victim will be society. I would request National Judicial Academy to help them to identify the prejudice and remove it. At least find ways to eliminate bias. Then there will not be any fear of Supreme Court or High Court. The result will be amazing and only you will be judge. What other judges will say, that question shall not affect you.

### DAY-3 SESSION-10 (10:30AM-11:30AM)

#### **Obligation for reporting of cases of child abuse**

Speaker for this session was Justice Gita Mittal. She deliberated that section 19 of the POCSO act is to encourage reporting of offence. Section 19 and 20 are unique to this act. She discussed the professional delima faced by the professionals; she coined a case for that matter which was as follows:

- A mother took her daughter (19 years old) to the psychiatrist as the daughter was having trouble concentrating on her studies
- The psychiatrist stumbled on her sexual abuse when she was 17 years old.
- Should the psychiatrist report?
- What would be the appropriate order if he is being prosecuted for non-reporting?

One of the participating judges discussed that Dr. Aruna Broota who came for yesterday's session took defence of hypothesis, that due to hypothesis which she took, she can't go and report the case with the concerned authority. We repeatedly tried to make her realise her that she is obliged to report the case, but she did not accept it.

Justice Gita Mittal stated that this act imposes duty on the doctors, if such cases comes them then they are obliged to report the case even if the child or her parents are not willing to report the case. She asserted that section 42-A has overriding effect over any other law.

### DAY-3 SESSION-11 (12:00PM-01:00PM)

#### **Identifying the nature of challenges faced by POCSO Courts: Discussion**

Resource person for this session was Justice Geet Mittal. She deliberated that till 2012, there was no specific legislation governing child sexual abuse. Due to increasing incidents of Sexual offences against Children IPC recognized limited forms of Sexual Violence against children. Scattered provisions in Indian Penal Code (Sections 354, 509, 376, 377) and Immoral Traffic (Prevention) Act, 1956 (Sections 4 (1), 5 (d), 7) were applied in cases of child sexual abuse. Sexual offences other than Rape fell into the category of “**Outraging the modesty of women**” which was punishable with a *maximum term of two years and/or fine*. Sexual offences in the IPC are gender specific, except section 377. There was need for **Gender neutral legislation**.

She pointed out the provisions under POCSO Act where there is presumption of commission of offence as section 3, 5, 7 and 9. Discussing presumption of culpable mental state she explained section 30 of POCSO act.

- If the offence requires a culpable mental state
- The courts shall presume such mental state
- Burden to prove otherwise on the defence
- The standard of this proof is beyond reasonable doubt and not preponderance of probability

Explanation: “Culpable mental state” includes intention, motive, knowledge of a fact, and belief in or reason to believe a fact.

Further following punishments were stated by her:

Aggravated – minimum 10 years /life; + fine

- Penetrative Sexual Assault – minimum 7 year / life; + fine
- Sexual Assault – minimum 3 years / may be five years; + fine
- Pornography – up to 5 years + fine
- Subsequent offences –up to seven years + fine
- Pornography as well as other sexual offences – life + fine
- Sexual Assault – up to 3 years + fine

She deliberated that these were cases of violence against the child, but what about the case where sex is consensual. She pointed out that in such case both can be treated as victims, matter can also be referred to Juvenile Justice Board. She discussed the case where marriage is solemnised between two individuals, both being less than 18 years of age and they have sexual intercourse. As they are married, it is not a sexual offence. Section 376 of IPC allows sexual intercourse with wife above 15 year of age. But there is difference between IPC and POCSO Act. She further pointed out the sexual offences against a child recognised under POCSO Act as follows:

- S.3 Penetrative Sexual Assault (Rape)
- S.5 Aggravated Penetrative Sexual Assault
- S.7 Sexual Assault
- S.9 Aggravated Sexual Assault
- S.11 Sexual Harassment
- S.13 Child Pornography
- S.16 Abetment to commit above
- S.18 Attempt to commit above

She explained what is penetrative sex by stating that when a Person Penetrates penis / body parts other than penis / objects, manipulates the child's body to cause penetration, applies mouth to the vagina, mouth, urethra or anus of a child, makes the child to do so, with him or any other person. She discussed case where Babita (just above 18 years old) had voluntary sexual intercourse with Arun (just u/18 Years old). Babita became pregnant. Arun's teacher learnt about it and informed the police. She asked has Babita committed the offence of penetrative sexual offence. In another case Babita (16 years old) was dating Arun (17 Years old) with the knowledge of their parents after being engaged to be married after finishing their studies. Babita missed her menstruation and her mother took her for check up. The doctor found her to be pregnant. He informed the police. Who is the offender and who is the victim? They should be produced before whom?

Discussing the procedure under section stated that the special court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. A child was raped by her father. Father's picture is published in the newspaper. Has the newspaper violated the law? Participants replied that news paper has committed an offence as it disclosed the identity of the child. She discussed another case in which a girl called Sarita 17 years old, was travelling from Rishikesh to Delhi alone. She befriended, Suresh and Karan, two boys her age on the bus who were also going to Delhi. Their bus failed midway and all passengers had to find accommodation for overnight stay. These three could find only one room with difficulty. They decided to share the room as the boys said that Sarita can sleep on the cot and they will sleep on the couches. At mid-night, Karan put his fingers in her vagina and Suresh had sexual intercourse with her without her consent. The participating judges pointed out that both are offenders.

She showed her concern toward the problem area i.e. section 42 of the POCSO act. Section 42 of POCSO provides alternative punishment it states that if any act is punishable under POCSO or under any other law, the punishment which is greater in degree should be awarded. If a person is tried for sexual intercourse with a wife between 15 to 18 years of age, what would be the punishment awarded to him? The participating judges stated that he shall be

punished under POCSO Act as POCSO Act has overriding effect over any other act.

She further pointed out that IPC did not have any provision for rehabilitation. Girls also have not been imposed either a heavy fine or awarded compensation under Section 357 of the Cr.P.C. In POCSO offences, there would be huge medical expenses as well which have to be accounted for. She referred to an article from THE TIMES OF INDIA dated 03/31/2005, which stated:

- A five year old girl was operated upon for three hours on Monday after she was mauled by a 32 year old man in a vicious sexual assault in Gurgaon on Sunday night.
- “She was bleeding and crying and I thought she would die, “her father said.
- “Her anus and vagina were severely damaged and she bled profusely, “her grandfather said. “
- Sources said the girl might need to undergo plastic surgery because of the extent of damage to the internal linings of her private parts.
- Police suspect he intended to kill the child.

She deliberated that there are various additional issues which may arise on account of Abetment of offence (S. 16), Punishment for non-reporting (S. 21) and Onus of proof (S. 31). Justice Gita Miital then asked a few questions to the participating judges which are as follows:

Q.) A young man aged 19 years old (or older) is produced before you for commission of rape at the age of 17 years?

- It was stated by the participating judges that date of commission of crime will be referred. It will be tried by Juvenile Justice Board.

Q.) A 20 year old woman is produced before you as witness before you being the victim of rape at the age of 17 years?

- This will be tried under POCSO Act.

Q.)A 17 year old boy is produced before you for allegedly committing murder?

- He will be referred to Juvenile Justice Board.

Q.) Would the definition of child (*any person*) includes transgender as well?

- Yes.

### DAY-3 SESSION-12 (02:00PM-03:00PM)

#### **Presumption of “Culpable Mental State” & “Burden of Proof”**

Speaker for this session was Justice Hema. K. She started her presentation by asking a question to the participating judges that what are the main functions of a judge under POCSO Act. To this participating judges replied in following manner:

- Protect the child
- Adjudication with compassion
- Recording evidence
- Protect interest of the child
- Proper application of law.
- To make decision in a case, whether an offender is guilty or not.

She further asked the participating judges which are the most important provisions of the act which you are bound to know thoroughly for taking or making the main decisions in the case? She stated that presumption under section 29 and 30 of the POCSO Act is very important. It is important because you have to make decision. If you don't make presumption then you will not be able to ascertain or use other laws. She emphasized to stick to the provision (presumption as to certain offence). She further asked the participants that what do you mean by Shall Presume? She stated that Shall Presume was interpreted Shair Singh v. State of Haryana. Shall presume as interpreted in that case will not apply to POCSO Act.

She asked the participants that is there any difference in “shall presume” under section 29 and 30 of POCSO Act and section 113-B of evidence act? She herself answered to this question by stating that shall presume as directed under section evidence act shall not apply to shall presume under section 29 and 30 of the POCSO Act. Without knowing what is meant by shall presume you will not be able to deliver justice. Get rid of the bias precedent, and analyze what is presume. She recited the Oxford Dictionary meaning of the word presumes as to take for granted that something exists in the case. Then in section 29 as the case may be unless the contrary is proved.

She further discussed that what your aim in your suit is. She stated that in civil cases it is to see whether decree can be granted as prayed. Whereas in criminal cases it is to ascertain that whether accused can be acquitted or convicted. First step must be- assertion, made by party to get decree, made by prosecution to secure conviction. Second step must be to ascertain that whether the assertions made by the parties are proved or not. Then she exclaimed is assertion and proof enough? She stated that if parties desire any court to give judgment as to any legal right, or liability. It depends upon the existence of the facts, which he asserts. He must prove it. Before making judgment you make decision.

**DAY-3 (03:00PM-04:00PM)**

**Library Session**

**DAY-3 (04:00PM-05:00PM)**

**Computer Skills Training**

## DAY-4 SESSION-13 (9:00AM- 10:00AM)

### **Recording of evidence of child**

Speaker for this session was Justice Roshan Dalvi. Main focus of her presentation was on “Recording of evidence of child”. She started her presentation by quoting that the children are little people who need big rights. She stated that following are the crimes against children under POCSO act:

- Sexual assault.
- Sexual harassment.
- Penetrative sexual assault.
- Aggravated penetrative sexual assault.
- Aggravated sexual assault.
- Pornography.

She explained the 3 Rs principal which includes:

- Recognize
- Resist
- Report

Inculcate the habit in children in recognize sexual abuse. As tiny children can't resist could not resist we need to take care of it. Help children to report, sometimes children may not be able to understand it her parents must assist her. She deliberated that teachers, parents, friends and NGOs (Community Service Providers) are parents of system. They must act as a medium of awareness creation for victim needs. Impact of abuse or violence which a child faces in court can be seen amongst children in following ways:

- Destroying psychology
- Devastating life
- Bitter shock
- Disgust,
- Disbelief
- Suspicion
- Helplessness

- Frustration
- Anxiety
- Loss of security
- Feeling of guilt
- Fear of disclosure
- Confusion

She further asked the participating judges to suggest any other abuse that the children have to face in court. The participating judges stated that anger, loss of confidence, reputation, and loss of memory can be easily seen amongst such children. She deliberated that a child undergoes Re-victimization or secondary victimization, when he or she has to undergo Police investigation, Medical examination, and Court trial.

Justice Roshan pointed out that the child or the victim is under dilemma. She has to fight against this Child v/s. adult syndrome. At court she is the one who is minor. Thus friendly atmosphere must be created in the court campus. She also has to face Victim v/s. accused syndrome. So the victim needs to be represented properly. She needs to be supported. There had to be equal participation of victim. She termed it as Doctrine of Victimology. Discussing the trouble of the judiciary she stated that there are number of cases which are not reported. Numbers of cases are not pursued. Some child witnesses are tortured where as some turn to be hostile. Some cases are even doctored.

She pointed out the basic requirements of the criminal justice system. Most basic need is to have basic infrastructure which shall include Victim Support Centers

- Victim Examination Suites
- Video recording of statements
- Video recording of evidence

Another problem faced by in the court is that of interpretation. Sometimes the child belongs to a community, which uses such language which is not easy to understand, that time arises the problem of interpretation. Besides this the court climate and court room conduct must be sensitized. Discussing judicial sensitivity

she pointed out that the court room atmosphere needs to be made child friendly. Special courts must be created and officers must be appointed. Priority in disposal of cases must be set. Date and time for determination of cases must be fixed. There must be proper representation of victim, she must also be supported. There must be no contact between the accused and the victim. Courtroom conduct must be child friendly. Evidences must be taken in court chamber. There must be specified places for all. Victim confidentiality must be maintained. Recording of evidence must be through court. Rest time and breaks must be provided.

Later part of the session was taken by Dr. Manju Mehta. Main focus of her presentation was on Methods to Interview Child with Sexual Abuse. She deliberated that my major concern will be on psychological perspective, but both legal and psychological aspect has to be combined. She stated that first of all we need to understand the challenges faced by the while interviewing a child which are as follows:

- Rapport building
- Communication
- Time Factor
- Informants
- Setting
- Infrastructure : Child Friendly

We need to develop better methods of taking interview of such victims like observation. Observation can be done by observing the child's behavior or physical symptoms. She discussed the one of the incident in which a 2 and half year she after returning from school was rubbing her private parts. When her private parts were observed it was swelled up and there was redness. After that her mother immediately consulted gynecologist, the gynecologist confirmed that she was sexually abused. Thus we can easily make it out by observing there behaviors. Interview, drawings/play and question are other effective methods.

First and foremost approach must be to understand the case well. An interviewer must know the details of how the abuse came to be suspected. Look specifically at whether the child chose to report or if the "disclosure" was accidental. Respect the child. Put at ease; let them know the Judge is a parent,

husband/wife, and brother/sister. Explain they care very much about children. Use self-disclosure. Research shows that to do some self-disclosure helps another person become comfortable with his or her own self-disclosure. Try to share some neutral issues that demonstrate things you have in common with the child...that you had a pet, that you have kids. The person taking interview of the child must talk to the child away from the parent if the child is comfortable with the separation. For young children say something like, "Would you like to show your mom/dad where you want them to sit while you and I talk for a few minutes?" Assume the parent does not know everything about their child's experience on the topic of suspected abuse. One thing a child may hide from their parent is that they may have enjoyed parts of the sexual experience, or some aspects of the relationship they had with that person. He must develop child communication habit. He must adapt with the way child communicates and find out what a child calls certain parts of the body. Very general line drawings are available so that you can point to body parts and ask, "What does your family call this?" The examination will go more smoothly if all parties concerned use the child's vocabulary. He must build rapport with the child. Spend time to build a rapport before getting to more difficult issues, sensitive topic. Do in a meeting prior to the trial. Ask a child about pets or their best friend. For a teen, ask about a favourite video or computer game, who they text the most often or what they most enjoy doing when they are with their friends. He must ask only neutral questions to the victim. He must begin direct examination with very general questions that potentially bring spontaneous information. A short series of questions that works well is:

- "Who is the nicest child you know?"
- "Who is the nicest grown-up you know?"
- "Who is the meanest child you know?"
- "Who is the meanest grown-up you know?"

Concluding her presentation she stated that the aim must be to focus, fact finding, creditability assessment and multidisciplinary team. Techniques must be rapport building and obtaining details of the abuse. She stated that the 4W1H has been proved to be much helpful which includes:

- Who

- When
- Where
- What
- How
- Informal setting
- Use drawing and play

This session was followed by an activity given by Justice K. Hema. In this activity the participants were requested to “Please think of the detail of the last sexual act which you had gone through in your life”. The participants were requested to share it with the partner sitting next to them. In this activity almost all of the participants denied to share their experience with the person sitting next to them. Justice Hema. K then stated that now you people know each other and I have asked you people to share that beautiful experience with other. But you people are ashamed and feeling shy to share it with others then thing about the child who has under gone such trauma, she has to say it at any cost to get justice. So kindly keep these things in mind while deciding such cases.

Justice Roshan Dalvi gave another activity to the participating judges. In this activity the she showed a picture to the participating judges and asked them to observe the picture for 1 minute. Immediately after that she started asking questions to them regarding the details of that previously shown picture. The participants could not answer most of the questions correctly. Concluding the activity she stated that in present activity you could not answer questions as to situation given to you one minute before. Then how do you expect the girl to remember each and every detail of what she had undergone. This is what happens in oral evidence. Judges keep on asking questions to her repeatedly, but we should not do so and keep in mind that she can’t remember each and every detail of the terrible trauma which she had undergone.

Dr. Maju Mehat guided the participants how to make out that the case is tutored or natural case. She asked the participants how you ascertain whether a particular case is natural or tutored one. Participants stated that if the child uses adult language we can easily make out that the case is tutored one, as children are

used to using such language. The moment the child enters and starts speaking even if she is not asked to narrate then it may be a tutored case. Her cool attitude makes it very clear. To this she gave guiding tips to ascertain whether a case is natural or tutored one. She stated that if there is mismatch between what she feels and what she describes it may be a tutored case, in mugged up cases there will be no explanation. The language used by the child may be age inappropriate. When asked reputedly if the child divulges exact same sentences then it may be a tutored case but it is not so in the case of a natural case. When the person is asked to enact what they said then there is difference between what they said and what they enact.

#### DAY-4 SESSION-14 (10:30AM-11:3AM)

#### **Bail in cases involving several accused.**

Speaker for this session was Justice Roshan Dalvi. She deliberated that which accused to be release on bail and which to not be released is a crucial question before the court, which we have to ascertain. In cases of human traffic, if trafficker is released then everything is lost in the case. She pointed out that in case of bail we need to make specific distinction. She asked the participating judges to coin the grounds of granting or denying the grant of bail to the accused under section 376 IPC and section 376 along with section 366. Participating judges stated following reasons for denying grant of bail under section 376:

- Gravity of offence-violence.
- Repeated offence.
- Offender may abscond.
- He may influence witness or evidence.
- Age of accused/victim is below 12 years.
- Safety of victim.
- Profession of accused (teacher, lawyer, doctor or any person having fiduciary relation with the victim).
- Clout of accused.
- Vagabond.

Grounds for granting bail under section 376 IPC:

- Charge sheet filed.
- After examination in chief of the accused.
- Evidence of witnesses.
- Medical report.
- False implication.
- Medical grounds.
- Consent.

Justice Roshan Dalvi pointed out the grounds which one should keep in mind while considering bail application under section 376/366. She pointed out following points:

- No violence.
- No repetition of offence.
- No influence on the witnesses or the evidences.
- Age of the accused and victim.
- Safety.
- Profession.

She requested the judges to please draw balance sheet while granting bail. People were seen doing work not judiciously. Discretionary power has to be practised judiciously. After the amendment act of 2013 under section 326 even if the boy is poor or young he'll have to be sentenced up to 7 years of imprisonment.

Mr. Sumit Bhattacharya stated that after 3 day's journey we come to a new beginning. After getting this information we consider you as ambassadors to spread it further to others.

Professor (Dr.) Geeta Oberoi addressed the gathering by asking the participants that if we design a conference next year, what will be the issues you would like to be included. One more important thing is that if all of you can give best of your five judgments delivered under POCSO act, the basic idea is to create a Bench Book. We are also planning to make a POCSO directory. Following points were suggested by the participating judges.

- Involvement of police officers as resource person.
- Child Welfare Committee member's involvement.

- Involvement of Public Prosecutor.
- Child Welfare Committee member's and public prosecutors must be sensitised.
- Stake holders meeting.
- Involvement of eminent lawyers as Resource Person.
- Junior lawyers must be trained.
- Sessions must be organised on judgment writing.

Professor (Dr.) Geeta Oberoi concluded the workshop by stating that now time has come to say good bye, but before leaving let us have a huge round of applause for all of our recourse persons, and also for Mr. Sumit Bhattacharya for organising such a great workshop.

#### DAY-4 SESSION-15 (12:00PM-1:00PM)

#### Evaluation and Feedback