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A Socio-Legal Critique of the Low Conviction Rates Under the Protection of Children from Sexual Offences Act, 2012

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ABSTRACT

Statement of Problem: *The POCSO Act, which was enacted to protect children from sexual abuse and decrease the sexual abuse cases, doesn't seem to be implemented properly. The POCSO Act has provisions that try to secure the identity of the victims and also to give immediate healthcare and protection but it fails in protecting the victims and their families from any type of life threat. The POCSO Act also does not have any provisions relating to the security and protection of witnesses, which according to Jeremy Bentham (a great English Philosopher, Jurist Social Reformer) are the "eyes and ears of Justice"². According to the NCRB (National Crime Record Bureau) report 2020, the total number of persons arrested in 2020 was 59002 out of which the total chargesheet filed was 557635³. However, the total cases sent for trial in 2020 were 44709 and if aggregated with previous year cases where trial is still going on being 179893 out of which conviction rate is just 39.6% or 3686 and acquittal rate being 55% or 5133 which is much higher than conviction rate.*

Hypothesis: *As the report shows there is a low conviction rate in POCSO cases. It can be possible that the accused, by using power and money destroy the evidence, buy the witnesses, or create life threat fear to the witnesses.*

Many cases do not reach the courts possibly due to many people end up doing compromise possible reason could be the accused being someone close. Hence, they might compromise and avoid going to court.

If we go by this hypothesis, it would not be wrong to say that the basic aim of the POCSO Act, which was to protect children from sexual abuse is failing in achieving its objective.

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² Prashant Rahangdale, "Witness Protection: A Comparative Analysis of Indian and Australian Legislation", Journal of The Gujarat Research Society, ISSN: 0374-8588 Vol 21 Issue 3

³ NCRB crime in India 2020 report, "Disposal of Persons Arrested under SLL Crimes (Crime Head-wise) - 2020"

I. INTRODUCTION

Protection of Children from Sexual Offences, Act 2012 which is commonly known as the POCSO Act. A law that deals with cases relating to Sexual abuse of children was introduced by the Government of India in the year 2012. Before the enactment of this act, there was no particular law that specifically deal with the cases relating to sexual abuse of children. All cases were tried through existing laws. As the procedures were not child-friendly and it was very traumatic for them. A study named 'Study on Child Abuse: India 2007' which was conducted by the Ministry of Women and Child Development showed that sexual crimes against children were increasing.⁴

India is a signatory to the UN convention on the rights of children, which was ratified by India on 11th December 1992.⁵ This requires all states to take all the measures to protect the identity of children like taking measures to protect them from sexual abuse, etc. So, it was required for India to formulate a law dealing with it⁶. So, it was due to these reasons Govt of India introduced the POCSO Act. The power to make this law comes from as stated in the Preliminary part of the Act which states that "*State has the power to make special provision for children which is conferred by Article 15 of the Constitution*"⁷.

However, inspite of many efforts taken by the Government, there are many problems that show

the objective is not fully achieved. There are still many shortcomings that need to be addressed. This research paper tries to find out the problem or the loopholes in the current law due to which the law is not able to achieve its objective.

The Research paper will go on from presenting the issue followed by hypothesis. After presenting the hypothesis some basic terms will be explained. After the terms are explained paper tries to analyze the hypothesis that whether it stands or not. When the analysis is completed the paper will present what is the outcome of the analysis. Based on the analysis and its outcome, some solutions will be presented. In the last, the scope of the study will show the limitations and what is further scope of the study.

Statement of Problem

The POCSO Act, which was enacted to protect children from sexual abuse and decrease the sexual abuse cases, doesn't seem to be implemented properly. The POCSO Act has provisions that try to secure the identity of the victims and also to give immediate healthcare and protection **but it fails in protecting the victims and their families from any type of life threat. The POCSO Act also does not have any provisions relating to the security and protection of witnesses**, which according to Jeremy Bentham (a great English Philosopher, Jurist Social Reformer) are the "eyes and ears of Justice"⁸. According to the **NCRB (National**

⁴ The Protection Of Children from Sexual Offences Act, 2012

⁵ The Protection Of Children from Sexual Offences Act, 2012

⁶ UN Convention on the Rights of the Child

⁷ The Protection Of Children from Sexual Offences Act, 2012

⁸ Prashant Rahangdale, "Witness Protection: A Comparative Analysis of Indian and Australian Legislation", Journal of The Gujarat Research Society, ISSN: 0374-8588 Vol 21 Issue 3

Crime Record Bureau) report 2020, the total number of persons arrested in 2020 was 59002 out of which the total chargesheet filed was 557635⁹. However the total cases sent for trial in 2020 were 44709 and if aggregated with previous year cases where trial is still going on being 179893 out of which **conviction rate is just 39.6%** or 3686 and **acquittal rate being 55%** or 5133 which is much higher than conviction rate. **Many cases are also being discharged by the courts which could be due to many reasons like lack of evidence (evidence here also includes witness turning hostile)**. The rate of discharged cases was around 6.4% or 497. Many cases are **disposed off without trial** in which **compromise rate are the highest** with cases around 183¹⁰. What is worrying from the report is that many cases are being comprised which means many victims and their families due to some social factors or due to pressure end up settling the matter outside the court. Other than that, cases that are discharged are also worrying.

Research Methodology

During the research Doctrinal research was adopted. Approaches while doing the research were both Quantitative in nature. Quantitative is to find out the rate of the problem that is in how many cases the problem was there. Analytical research method was used in this research. The analytical research method is used to analyze numerous international and national laws to safeguard the rights of children and various responsible factors for the low conviction rate.

Doctrinal research technique was used to study case laws and statutory laws; to look into the purpose and policy of law that exists. Tools that were used include statutory material, case reports, government reports, etc.

Both primary, as well as secondary sources, were used while doing the research. Primary sources that were considered appropriate for research were the constitution, national gazette, rules, regulation, statutory order, directives of administrative agencies, case reports that publish the judicial pronouncements of High courts. Secondary sources that were considered as a part of doing research were dictionaries, encyclopedia, indexes, reviews. Secondary sources were used to understand different terms, to compare the data, etc.

Research Objective

This research paper seeks to fulfill the following objectives: -

- Identify and examine the socio-legal factors responsible for the low conviction rate
- Identify and examine the factors due to which people resist reporting the incident
- To critically analyze the Act and its effectiveness
- To find out the possible solutions to the problems that are hindering in fully achieving the main objective of the Act

⁹ NCRB crime in India 2020 report, "Disposal of Persons Arrested under SLL Crimes (Crime Head-wise) - 2020"

¹⁰ NCRB Crime in India 2020 Report, "Court Disposal of Crime against Children (Crime Head-wise) - 2020"

Hypothesis

As the report shows there is a low conviction rate in POCSO cases. It can be possible that the **accused, by using power and money destroy the evidence, buy the witnesses, or create life threat fear to the witnesses.**

Many cases do not reach the courts possibly due to many **people end up doing compromise possible reason could be the accused being someone close.** Hence, they might compromise and avoid going to court.

If we go by this hypothesis it would not be wrong to say that the basic aim of the POCSO Act, which was to protect children from sexual abuse is failing and is not able to bring justice to those innocent children. Which makes life-long suffering for those children. Other than that, witnesses exploitation is also not being able to be controlled and is unable to be checked.

A. Terms

Section 4

Section 4 talks about the punishment for committing penetrative sexual assault whose definition is given under section 3 of the POCSO Act. A person is said to commit Penetrative sexual assault according to section 3 if ¹¹:-

- (a) He penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person.
- (b) He inserts, to any extent, any object or part of the body, not being the penis, into the

vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person.

- (c) He manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child to do so with him or any other person.
- (d) He applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 6

Section 6 talks about the punishment for committing aggravated penetrative sexual assault which is given under section 5 of the Act. An aggravated penetrative sexual assault is said to be committed according to section 5 if ¹²:-

- a) Committed by police officer.
- b) Committed by a member of of the armed forces or security forces
- c) Committed by a public servant.
- d) Committed by a member of the management or of the staff of any custodial home like a prison on a child in their custody.
- e) Committed by a member of management or staff of a hospital, whether government or private, on a child in that hospital.
- f) Committed by a member of management or staff of an educational institution or religious institution.

¹¹ The Protection Of Children from Sexual Offences Act, 2012

¹² The Protection Of Children from Sexual Offences Act, 2012

- g) Commits a gang penetrative sexual assault.
- h) Committed using deadly weapons, fire, heated substance or corrosive substance.
- i) Causes grievous hurt, bodily harm and injury or injury to the sexual organs of the child.
- j) Assault physically incapacitates the child or the child becomes mentally ill due to the assault.
- k) Child becomes pregnant.
- l) Inflicts the child with HIV or any other life threatening disease or infection which either temporarily or permanently impair the child.
- m) Commits the assault taking the advantage of child's mental or physical disability.
- n) Commits assault repeatedly.
- o) Commits assault on a child below 12 years.
- p) Committed by a relative of the child.
- q) A staff member, management member of any institution that is providing services to the child.
- r) A person in apposition of trust or authority of the child.
- s) Commits assault knowing that the child is pregnant.
- t) Commits assault and attempts to murder the child.
- u) Commits during communal or sectarian violence.

- v) Commits assault and makes the child to strip or parade naked in public.

B. Hostile Witness

Witnesses who change their testimony from time to time or utters statement against the party who calls them is called Hostile Witness. Black's law dictionary defines a hostile witness as "A witness who is biased against the examining party or who is unwilling to testify"¹³

II. ANALYSIS

As witnesses are eyes and ears of justice, it is necessary to protect them so that they can speak the truth without any fear. But if witnesses are not able to speak the truth due to fear delivering justice becomes difficult. To explain the effect of this problem and to connect and support the first part of the hypothesis, I will take examples of some cases. For instance, in the **Sohrabuddin Sheikh case** where Sohrabuddin Sheikh, a history-sheeter, and his wife were killed in a fake encounter¹⁴. In this case, many high-profile peoples names was involved. **When the investigation was started, out of 210 witnesses 92 turned hostile. The 3 main witnesses also turned hostile** due to which all 22 accused were acquitted.¹⁵ A large number of witnesses turning hostile shows that how important this case could have been proved if the witness might have not turned hostile. Another prominent case was that of **Mahender Chawla v. Union Of India**, Supreme Court where during the trials going on against the Asaram for committing rapes in

¹³ Prashant Rahangdale, "Witness Protection: A Comparative Analysis of Indian and Australian Legislation", Journal of The Gujarat Research Society, ISSN: 0374-8588 Vol 21 Issue 3

¹⁴ The Week magazine, "Stalin's vigilance chief arrested Amit Shah, probed charges against Pinarayi"

¹⁵ The Hindu, "Sohrabuddin Sheikh 'fake' encounter killing case: CBI court acquits all 22 accused"

numerous cases it was alleged that around 10 were attacked and 3 killed. There were **four petitions in this petition** out of which there was a petition by **Mahender Chawla who survived a murder attempt who testify**. While hearing this case, Supreme Court also showed its concern regarding the problem witnesses are facing and discussed the reasons why witnesses turn hostile¹⁶:-

- Threat/Intimidation
- Inducement by various means
- Use of muscle and money power by the accused
- Use of stock witnesses
- Protracted trials
- Hassles faced by the witnesses during investigation and trial
- Non-existence of any clear-cut legislation to check hostility of witness

These were reasons the Supreme Court pointed out and hence order the central government to come up with a scheme for the protection of witnesses and all the state government to implement those schemes in their respective states. **On the order of the Supreme Court, the central government came up with the scheme named "Witness Protection Scheme, 2018"**. Some of the measures that this scheme talked about to protect the witness were¹⁷:-

- Concealing the identity of the witness
- Close protection, regular patrolling around the witness's house

- **Threat Analysis report** which is prepared and submitted by the head of the police in the district investigating the case which **shows the level of danger by categorizing under three categories** of which category A shows that there is a threat to the life of the witness and his family and category C shows that threat is moderate which could be harassment or intimidation of the witness or his family member's reputation or property.
- Changing the number of witness

There were many more cases where the courts have expressed their concern regarding it mostly while listening to bail petition that it might be possible that if the accused gets bail, he can manipulate the witnesses through his power and money. It is also said that if the accused is a person having a powerful position or have powerful connections there is a high probability that they might manipulate the witnesses. Despite these measures and the courts rejecting bail if they see a chance of manipulation but just by rejecting the bail, we cannot conclude that witnesses are not getting manipulated if a person has a powerful connection possibly he might have many persons outside the jail who can purchase the witnesses, create fear in their mind or even can murder them. In the case of **Mahender Chawla v. Union of India, Mahender Chawla had witnessed Narayan Sai son of Asaram found doing Tantrik practice on a dead body of a child in an ashram in Madhya Pradesh, but due to the influence of**

¹⁶ Mahender Chawla v. Union of India, (2019) 14 SCC 615

¹⁷ Witness Protection Scheme, 2018

Asaram, there hasn't been any investigation till date (at time when trial was going on).¹⁸ **On many occasions High Courts and Supreme Court had emphasized upon proper implementation of the scheme.** In the **Padhakumar and others vs State through the Inspector of Police and Another case**, the accused were found guilty and were sent to jail by the District Court. A petition was filed in the High Court of Madras to set aside the judgment. In this case, **prime witnesses had turned hostile.** During the cross-examination by the public prosecutor after **prime witness 2** turned hostile he **accepted that due to the fear of the accused he had not stated the occurrence in the chief examination.** In this case, the High Court of Madras pointed out that inspite of the scheme system has failed to provide confidence to the witnesses to speak the truth.¹⁹ **Supreme Court while hearing a writ petition filed by Ashwini Upadhyay** relating to unnecessary delay in criminal cases against MPs/MLAs **emphasis upon strict implementation of the Scheme by the Union and the States and UTs.**²⁰ Some other problems with these measures which shows the poor implementation of the scheme and why witnesses are not able to speak the truth are:-

a) The Scheme **provides protection for three months at a time.** Due to this, there is a

possibility that when protection is terminated witness is again exposed to the threat from the accused.²¹

b) As the scheme categorizes witnesses according to the level of threat the witness has according to the threat analysis report. As we know that there is a lot of corruption in the system and if the investigating person is corrupt and accused bribes the investigating person then there is a high chance that the investigating person might submit a wrong report. Hence, due to this witnesses could be exposed to the threat.²²

c) From the above point, one more drawback that can be drawn is that although the scheme talks about maintaining the confidentiality of witness, changing the number and location of witness but still if the official who has been assigned the responsibility of protecting the witness is corrupt there is a high chance that witness' identity, number or location could be disclosed which can create a threat to the witness.

d) The scheme also **does not** talk about **penalizing anyone who violates the provisions.**²³

The main purpose to discuss these cases and the witness protection scheme is to explain the importance of witnesses in delivering justice. If we talk about how it is relevant to low conviction under POCSO Act is that as already mentioned that the POCSO Act does not have any

¹⁸ Mahender Chawla v. Union of India, (2019) 14 SCC 615

¹⁹ Padhakumar v. State, 2020 SCC OnLine Mad 21342

²⁰ LiveLaw, "Criminal Cases Against MPs/MLAs : Implement Witness Protection Scheme, No Unnecessary Adjournments, Directs Supreme Court"

²¹ The Telegraph Online, "Due to major loopholes., the witness protection scheme does not instil confidence"

²² The Telegraph Online, "Due to major loopholes., the witness protection scheme does not instil confidence"

²³ The Telegraph Online, "Due to major loopholes., the witness protection scheme does not instil confidence"

provisions relating to the protection of Witness from any type of Threat and this scheme was brought not only to protect witnesses of a particular type of criminal cases but all type of criminal cases where witness' testimony is important. This means that to understand why witnesses are not able to speak the truth it is necessary to check and analyze whether the laws, statutes, scheme, etc. which gives protection to them is properly implemented and this ultimately tells what are the loopholes due to which there is a low conviction under POCSO cases.

Now to support the second part of the hypothesis I would present some statistics. If we see NCRB 2020 report, we can see that the **total number of cases under sections 4 & 6** of the POSCO act were **28065** out of which is around **96% or 26934 cases the accused person was some known person**²⁴. So, there are chances that people try to compromise and avoid going to court. But this is only data relating to POCSO cases registered under Sections 4 and 6 from here it can be said that if we add data of other sections of the act then the number of cases might be something different.

III. OUTCOME

To summarise all the point which proves or disproves the hypothesis are: -

As the first part of the hypothesis talked about the witnesses are being threatened and many times killed which was supported by many cases. Also, even though a witness protection scheme was introduced to safeguard the witnesses. But due to

many limitations and loopholes within the scheme, it fails to protect the witnesses. With this, the **first part of the hypothesis stands those witnesses turning hostile can be one of the causes for the low conviction in POCSO cases.**

Furthermore, many times people don't report the cases so what can be inferred after reading the analysis of the first part of the hypothesis is that if a person accused is powerful and influential then the victims and their family might hesitate in reporting of the case of which a good example was that of Narayan Sai where due to Asaram's influence the investigation was not able to be initiated. As cases are not reported so it is hard to bring supporting evidence to prove this problem but we can with the help of cases that were reported and in judgment where it is shown that **due to the accused being an influential person, people resist reporting the incident** can be a considered as supporting evidence to understand and know that what can be the possible reason for the resistance of reporting.

As seen from the statistics where it shows that in most cases under section 4 and 6 of the POCSO Act the accused is someone close. Due to the accused being a close one it can be assumed that the many cases might not reach the court or end up doing compromise which was what the second part of the hypothesis was all about. But **just based on statistics, it cannot be said the people are ending up doing compromise.** As we need more sources or cases to show that people are

²⁴ NCRB crime in India 2020 Report, "Offenders Relation to Child Victims of POCSO Act (Section 4 & 6)"

ending up doing compromise. Because neither any proper source was found to support this point nor any case was found to support this point the **second part of the hypothesis lacks evidence to be proved and hence does not stand.**

It can be concluded that due to provisions to protect the witnesses the Act is not able to achieve its objective that was to protect the children from witnesses from sexual abuse. Hence, it is proving to be a stepping stop in the way of the Act to be enforced effectively.

IV. SOLUTION

As it has been seen through the analysis of the first half of the hypothesis that how important it is to speak the truth by the witness without any fear. But if they don't speak the truth justice cannot be brought. To protect the witness from a threat so that they can speak the truth some of the possible solutions could be: -

A. Adding Provisions for the protection of witnesses- It is already stated in the statement of problem that the POCSO Act does not contain any provisions relating to the protection of witnesses from any type of threat. So, it is necessary to have the provisions for the protection of witness and for that some of the possible measures could be: -

a) Like in the witness protection scheme an analysis report should be prepared by an independent committee or body to give protection according to the level of threat. The reason why an independent committee or body should prepare the report is that no one with either money or power could manipulate the report.

b) An alternate to report being prepared by an independent committee or body could be that police prepares the report and then the report should be sent to an independent committee or body constituted to analyze the report that whether the report is properly prepared or some manipulation has been done with the report.

c) As the process suggested could be long interim protection and security measures should be used so that witness remains protected till the time it is being decided the level of protection and security measures need to be implemented.

d) Compulsory protection should be given in cases where high profile or influential person is involved to all the witnesses with immediate effect. So, that accused does not get time to threaten the witnesses.

B. Making changes to Witness Protection Scheme- If provisions for the protection of witnesses could not be made in the POCSO Act then it is necessary to make certain improvements in the Witness Protection Scheme. All measures as stated in provisions for the protection of witnesses should be added which are: - report being prepared by independent committee or body, report submitted by police being checked by independent committee or body, interim protection and security measures should be adopted till the time report is made and checked and compulsory protection in cases where high profile or influential person are involved. Another addition to these measures that need to be adopted is that as protection to witness which is provided is for 3 months period at a time after which witness becomes exposed to threat need to be changed till the time trial is going on witness should be given protection.

C. Protecting the Victims and their families- The POCSO Act has a provision that while recording the statement or testifying should not in any way come in contact with the accused but this should not just remain during the recording of the statement. Some of the measures that can be used could be: -

a) A. It should be ensured even outside the court or besides recording of statement not in anyway the accused can contact neither the victim nor their family.

b) The victim and their family should be provided with security till the time trial is not done.

c) As given in the Witness Protection Scheme victims and their family's location, number, identity, etc. should also be changed.

D. Encouraging the victims and their families- As due to fear in the mind many times cases are not reported. So, the victims and their families must be encouraged to report the incident. For that, they must have confidence that they will not be threatened. For this possible step could be by campaigning about measures that will be taken to protect them, to safeguard their identity. Although campaigns are done but new types of methods should be used to reach a larger audience efficiently which could be by educating people through Radio, TV ads, publishing newspaper articles telling about POCSO Act, and measures that are taken to protect the victim.

V. SCOPE OF STUDY

As it can be found through this research the possible factors responsible for low conviction in POCSO cases. One of the possible factors was

witnesses turning hostile due to the lack of provisions relating to the protection of witnesses and the lack of proper implementation of the witness protection scheme. For which some solutions have been suggested. But as there was a lack of literature and sources available to support the second part of the hypothesis due to which it was not able to be proved. So, the scope of study is that if more literature and other strong sources could have been available and gathered to support the point that people ending up doing compromise as a reason could have been proved.

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