

**STUDY ON THE WORKING OF  
SPECIAL COURTS UNDER THE POCSO ACT, 2012 IN MAHARASHTRA**

**By**



**CENTRE FOR CHILD AND THE LAW,  
NATIONAL LAW SCHOOL OF INDIA UNIVERSITY BANGALORE**

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## About the Centre for Child and the Law, National Law School of India University (CCL-NLSIU)

The Centre for Child and the Law, of the National Law School of India (CCL-NLSIU) is a specialized research centre working in the area of child rights, since 1996. The main thrust of the work is on Juvenile Justice and Child Protection, Universalisation of Quality Equitable School Education, Child Labour, Protection of Children from Sexual Offences, Justice to Children through Independent Human Rights Institutions, Right to Food, and Child Marriage. The mission of CCL NLSIU is to institutionalize a culture of respect for child rights in India.

The Juvenile Justice Programme at CCL-NLSIU engages in multi-disciplinary direct field action with children and families in the juvenile justice system, as well as multi-disciplinary research, teaching, training, and advocacy in order to positively impact policy, law and professional practice on issues concerning children and their families. The team adopts a human rights and multidisciplinary approach in general and a constructive, yet critical collaborative approach with the state.

CCL-NLSIU has been working on laws relating to child sexual abuse since 2004. One of the legal researchers in the team was a member of the Working Group constituted by the NCPCR to draft the Protection of Children from Sexual Offences Bill, 2010. More recently, a dedicated team of legal researchers have been researching and writing on the Protection of Child from Sexual Offences Act, 2012 (POCSO Act). The team has authored *Frequently Asked Questions on the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Act, 2013* (2<sup>nd</sup>ed, reprint December 2016). The Hindi and Kannada translations of this publication are underway. The team also authored *Law on Child Sexual Abuse in India – Ready Reckoner for Police, Medical Personnel, Magistrates, Judges and Child Welfare Committees* (November 2015). Members of the team have also conducted capacity building programs on the POCSO Act and The Criminal Law (Amendment) Act, 2013 (CLAA), relevant to child sexual abuse, for judges, police, Child Welfare Committees and other stakeholders and taken lectures at programs organized by NIPCCD, Karnataka State Commission for Protection of Child Rights and other authorities/organizations.

CCL-NLSIU has published reports on the Working of the Special Courts under the POCSO Act, 2012 in:

- Delhi (29 January 2016), available at: <https://www.nls.ac.in/ccl/jdocuments/specialcourtPOSCOAct2012.pdf>
- Assam (13 February 2017) , available at: <https://www.nls.ac.in/ccl/jdocuments/studyspecialcourtassamPOSCOAct2012.pdf>
- Karnataka (8 August 2017) , available at: <https://www.nls.ac.in/ccl/jdocuments/summaryreportrecoposcoar2012.pdf>

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A consultation on the preliminary findings of the study was held on 19 August in Mumbai and was attended by 17 participants.<sup>1</sup> The inputs provided by these participants, helped the team validate the findings and finalize the recommendations that emerged from the study.

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<sup>1</sup> List of participants include: Smt. Roshan Dalvi (Retd. Justice, High Court of Bombay), Adv. Maharukh Adenwala (Advocate, High Court of Bombay), Dr. P.M. Nair (TISS), Dr. Mohua Nigudkar (TISS), Ms. Sumati Thusoo (TISS), Ms. Navneet Kaur (TISS), Ms. L. Geetarani (TISS), Adv. Sangeeta Punekar (TISS), Ms. Nandika Ambike (MUSKAAN, Pune), Ms. Uma Subramanian (Aarambh), Adv. Audrey D'Mello (MAJLIS), Ms. Alpa Vora (UNICEF), Ms. Kishori Salunke (Justice and Care), Ms. Sharmeen Pathan (Justice and Care), Mr. Ronny Thomas (Justice and Care), Ms. Kashina (Prerana), and Ms. Madhuri Shinde (Prerana).

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## About the Study

### ***Normative Framework***

Under Section 28 of the Protection of Children from Sexual Offences Act, 2012, (POCSO Act), the State Governments should, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act. This is with a view to facilitate speedy trial. If a Session's Court has been notified as a Children's Court under the Commissions for Protection of Child Rights Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act.

The POCSO Act requires judges, prosecutors, and lawyers to modify their practice and attitudes to ensure that the proceedings are sensitive to the needs and rights of children. Without mandating a change in the structure of the courtroom, it requires that measures be adopted to prevent the child from being exposed to the accused while ensuring that the rights of the accused are not compromised. It requires the Central Government and State Government to take measures to ensure that government servants, police officers and other concerned persons are imparted periodic training on matters related to the implementation of the Act.

The term "child-friendly" has been defined in the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act) to mean "any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child".

At the international level, the *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, 2005* encapsulate core good practices that can be adopted by States in accordance with domestic law and judicial procedures to, *inter alia*, "guide professionals...in their day to day practice", and to "assist and support those caring for children in dealing sensitively with child victims and witnesses of crime."<sup>2</sup> The term "professionals" has been defined to include judges, law enforcement officials, prosecutors, defence lawyers, support persons, and others in contact with child victims and witnesses of crime.<sup>3</sup> "Child-sensitive" has been defined to mean "an approach that balances the child's right to protection and that takes into account the child's individual needs and views."<sup>4</sup> In a criminal trial, the views of a child are rarely considered. The limited extent to which the views of a child are relevant is in the context of removal from custody of the family by the Child Welfare Committee (CWC) and the place where his/her statement is to be recorded. The rights and needs of a child victim, however, should be considered by judges, prosecutors, and others while examining a child in court.

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<sup>2</sup> Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Guideline 1, paras 3(c) and 3(d) ECOSOC Resolution 2005/20. <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>

<sup>3</sup> *ibid*, Guideline 9(b).

<sup>4</sup> *ibid*, Guideline 9(d).

A more elaborate definition of “child-friendly justice” can be found in the *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010*<sup>5</sup> that stipulate the ingredients of child-friendly justice before, during and after judicial proceedings. It has been defined to mean:

“...justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level ... and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.”

The aspects of “child-friendly justice” that the POCSO Act emphasizes upon are speedy trial as well modified procedures to cater to the special needs of children. It is left to individual judges to ensure that children are dealt with and questioned in an age-appropriate manner and the atmosphere is child-friendly.

### ***Scope***

The Study on Special Courts established under the POCSO Act in Maharashtra was initiated by the Centre for Child and the Law, National Law School of India University, in January 2017 to understand if these Special Courts were facilitating “child-friendly justice” and to identify critical issues of concern related to the implementation and interpretation of this Act. To do this, the structural and procedural compliance with the POCSO Act and Rules was examined and judgments of Special Courts were studied to map the outcomes, interpretations, and emerging trends. Though they were interviewed for the study to understand their experience in the Special Court, the study does not focus on the functioning of the police, doctors, and investigating authorities under the POCSO Act. Though these aspects are equally important, it is beyond the scope of the study.

### ***Objectives***

The objectives of the study are to

1. Examine the extent to which Special Courts in Maharashtra are “child-friendly.”
2. Examine whether the Special Courts are structurally and procedurally compliant with the POCSO Act and Rules.
3. To understand the interpretation of provisions, application of presumption, appreciation of testimony of the child, disposal rate, conviction rate, factors affecting conviction and acquittal, response to ‘romantic relationships’, compensation orders, use of medical evidence, and investigation lapses. For the purposes of this study, all cases in which the victim claimed to have been in a romantic relationship with the accused at any stage of the investigation or trial, or the judge noted explicitly that a love affair could be inferred from the facts or the statement of the victim, are considered ‘romantic’ cases.
4. Identify gaps and challenges in the functioning of the Special Courts.

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<sup>5</sup> Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) – edited version 31 May 2011, [http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20\\_4\\_.pdf](http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf)

5. Identify good practices that can be adopted by Special Courts to ensure a child-friendly trial.
6. Articulate recommendations for practice guidelines and system reform based on the above.

For this study, the term “child-friendly” in the context of Special Courts signifies the following:

- *Respect for and protection of rights of children* contained in the Indian Constitution, domestic laws, and the United Nations Convention on the Rights of the Child, 1989 (UNCRC) which was ratified by India in 1990, by all actors in contact with child victims during the trial, in an age and developmentally appropriate manner.
- *Adherence to the legal procedures* stipulated in the POCSO Act and the CLAA during the trial.
- *Structural changes to the courtroom* to make the ambience child-friendly. Although, this is not expressly mandated in the law, the study seeks to document the initiatives, if any, taken by High Court and State Government to alter the design and atmosphere of these courtrooms.

### ***Parameters of Analysis***

To analyze the child-friendliness of Special Courts, three factors were examined:

#### **A. Assessment of Structural Compliance in two Special Courts**

1. Have Special Courts been designated?
2. Have Special Public Prosecutors (SPPs) been appointed? Are these SPPs exclusively dealing with POCSO cases?
3. Have any initiatives been taken to make the design of the courtroom child-friendly?
4. Are tools and facilities available to prevent exposure of the child to the accused?

In addition to the statutory mandate, the following were also examined:

5. Are Special Courts exclusively trying cases under the POCSO Act?
6. Is there a separate entrance for children into the courtroom so that they can avoid the crowds and exposure to the police and accused persons?
7. Is a waiting room available in all court complexes for children and their families?
8. Are toilets located in the vicinity of the courtroom?
9. Is there a facility for drinking water in the vicinity of the courtroom?
10. Is there a separate room in which the evidence of the child can be recorded?
11. Are the courtrooms accessible to person with disabilities?

#### **B. Assessment of Procedural Compliance**

1. Are cases coming to the Special Court directly or are they being committed by the Magistrate?
2. Are all questions to the child routed through the judge of the Special Court?
3. Are frequent breaks usually permitted by Special Courts?
4. What measures have been taken by the Judges to create a child-friendly atmosphere in the court?
5. Are children called repeatedly to court?
6. What is the extent to which aggressive questions are prohibited?
7. What measures are taken to protect the identity of the child?
8. To what extent is compensation ordered by Special Courts? What are the challenges with respect to award of compensation?
9. Is evidence recorded within 30 days? What is the extent to which the trial is completed within 1 year?

10. What measures have been taken to prevent the exposure of the child to the accused?
11. Are trials being held *in camera*?
12. Is the assistance of experts, special educators, interpreters and translators taken?
13. Are private lawyers allowed to participate in the proceedings?
14. Is a Support Person provided to the child?

Additionally, the following was also examined:

15. What is the experience of child victims before a Special Court?
16. Is there any linkage between the Child Welfare Committee and the Special Court?
17. Is the exposure to the accused prevented at all times?
18. Is there a support gap?

### **C. Assessment of Findings, Challenges and Gaps**

The judgments were analyzed with a view to gather information on the following:

- Rate of conviction and acquittal and reasons for the same
- Appreciation of testimony of children
- Rate of alleged perpetrators known/unknown to the victim and its relation to the testimony of the child and the outcome
- Rate of cases in which the survivor and the accused were married or in a romantic relationship, testimony in such cases, and the outcome
- Sex profile of victims
- Age profile of the victims/survivors and the nature of their testimony.
- Sex and age profile of the accused
- Percentage of pregnant victims and the nature of their testimony and outcome
- Charges and sentencing pattern
- Disposal rate and the time taken to dispose cases
- Application of presumption
- Interim and final compensation being awarded by Special Courts
- Treatment of ‘romantic cases’ by Special Courts
- Treatment of hostile witnesses
- Treatment of medical evidence
- Treatment of delay in lodging FIR
- Age-determination
- Lapses in investigation and prosecution highlighted by Special Courts

### ***Research Methodology***

The principal methods adopted for the study were:

- Interviews with judges, prosecutors, lawyers, Support Persons, police officers, doctors, NGOs, JJBs, CWCs, Magistrates, children, families, and other experts involved in legal proceedings concerning child victims of sexual abuse.
- Analysis of judgments of the Special Courts to ascertain application of child-friendly procedures in determining competence of child victims, appreciating evidence, ordering compensation, and in arriving at the decision.
- RTI applications to the Hon’ble High Court seeking information about pendency, disposal and compensation.

- Consultation with stakeholders on the provisional findings of the study.

Field interviews were carried out in March 2017 by Anjali Shivanand, Priyanka Lal, and Shreedhar Abhijit Kale in Pune; and in April 2017 by Swagata Raha, Priyanka Lal, and Shraddha Chaudhary in Thane and Mumbai. 32 interviews were carried out with a range of stakeholders including:

- Judges of Special Courts
- Public Prosecutors
- Member-Secretary, State Legal Services Authority
- Member-Secretary, District Legal Services Authority
- Member-Secretary, State Commission for Protection of Child Rights
- Chairperson, Child Welfare Committees
- Principal Magistrates, Juvenile Justice Boards
- Investigating Officers
- District Child Protection Officers
- Court staff
- Doctors in government hospitals
- NGOs and community-based organisations
- Child victim
- Private advocates
- Defence lawyers

While the voices of children who journey through the criminal justice system are vital to a study like this, ethical concerns prevented the researchers from approaching child victims and their families directly. One child victim under the POCSO Act was interviewed with the assistance of NGOs providing them support. Care was taken to ensure that the child victim was interviewed in the presence of a Support Person and the questions were asked by the Support Person, in the presence of one researcher.

The districts of Pune and Thane were selected based on the district-wise data on judgments passed under the POCSO Act between 2013 and 2016, as per which they recorded the highest and second highest number of cases, respectively.

A census approach was adopted with respect to the analysis of judgments of the Special Courts. The team studied 1330 judgments passed by Special Courts in 30 districts, from 1 January 2013 till 31 December 2016. The judgments were downloaded from <http://ecourts.gov.in>

#### **District-wise Total Number of Judgments Analysed**

<b>S.No.</b>	<b>District</b>	<b>Number of Cases</b>	<b>S.No.</b>	<b>District</b>	<b>Number of Cases</b>
1.	Ahmednagar	118	16.	Nagpur	4
2.	Akola	8	17.	Nanded	31
3.	Amravati	24	18.	Nandurbar	11
4.	Aurangabad	30	19.	Nashik	98
5.	Beed	65	20.	Osmanabad	55
6.	Buldana	55	21.	Parbhani	8

S.No.	District	Number of Cases	S.No.	District	Number of Cases
7.	Chandrapur	17	22.	Pune	260
8.	Dhule	11	23.	Raigad	24
9.	Gadchiroli	1	24.	Ratnagiri	16
10.	Gondia	30	25.	Sangli	79
11.	Hingoli	22	26.	Sindhudurg	7
12.	Jalna	8	27.	Thane	119
13.	Kolhapur	50	28.	Wardha	77
14.	Latur	26	29.	Washim	1
15.	Mumbai	72	30.	Yavatmal	3
<b>Total</b>					<b>1330</b>

Cases of three districts were inaccessible on the e-courts website. These were Bhandara, Jalgaon, and Satara.

A consultation on the provisional findings of the study was held in Mumbai on 19 August 2017, which was attended by 17 people. The participants represented a range of stakeholders comprising a retired judge of the High Court, academicians, advocates, NGOs, and other practitioners. Views and insights of the participants have been incorporated into the report, along with details about issues and recommendations that were discussed.

### *Limitations*

The researchers acknowledge the following limitations of the study:

- The study focuses only on the functioning of Special Courts, which is admittedly only one part of the criminal justice system that child victims will encounter throughout their experience with any case registered under the POCSO Act.
- The study is confined to the working of Special Courts, and examines the manner Juvenile Justice Boards deal with cases under the POCSO Act only in a limited way.
- The analysis of the proceedings in the case have largely been dependent on the text of the final judgment of the Special Court, as the researchers were unable to witness actual court proceedings which are held *in camera*. The decisions of the JJBs have not been analysed and neither have bail orders passed by the Special Courts.
- Only judgments uploaded on the official website of the District Courts and <http://ecourts.gov.in> formed part of the analysis. It is indeed possible that more cases were decided during the period under the study. All reasonable efforts have however been made by the researchers to ensure that no judgment in a POCSO case during this period was excluded from the analysis.
- Finally, any errors or gaps in the data collected is inadvertent and unintentional.

## Chapter 1. Structural Compliance

The POCSO Act prescribes limited structural requirements for the Special Courts. These prerequisites include the designation of Special Courts, appointment of Special Public Prosecutors (SPP), and certain mechanisms to prevent contact between the child victim and the accused at the time of evidence. The POCSO Act also vests the Special Courts with the responsibility of ensuring that the atmosphere is child-friendly. The sections below capture the extent to which the Special Courts in Pune and Thane complied with the structural necessities as prescribed under the POCSO Act.

### 1.1. Establishment of Special Courts

According to Section 28(1), POCSO Act, State Governments should, in consultation with the Chief Justice of the High Court, designate a Sessions Court to be a Special Court to try offences under the POCSO Act, to facilitate speedy trial. However, if a Sessions Court has been notified as a Children's Court under the Commissions for Protection of Child Rights Act, 2005, or if any other Special Court has been designated for similar purposes under any other law, it will be regarded as a Special Court under the POCSO Act.<sup>6</sup>

By a notification dated 27 August 2014, the Government of Maharashtra in consultation with the Chief Justice of the Bombay High Court, designated all the Sessions Judges, Additional Sessions Judges, and Ad-hoc Additional Sessions Judges to preside over the Special Courts constituted under Section 28(1), POCSO Act for their respective sessions division.<sup>7</sup>

The POCSO Act does not expressly require Special Courts to exclusively deal with offences under the POCSO Act or offences against children. Pursuant to the above-mentioned notification, all Judges in Sessions Courts deal with POCSO matters alongside other cases. One respondent within the judiciary explained that the objective is to ensure speedy disposal and hence the matters are distributed among all courts. However, other respondents were of the view that there is nothing "special" about these courts and the mindset gets affected because the judges are dealing with all kinds of matters.

Respondents in Pune and Thane shared that no specific days have been set aside for POCSO cases and they are heard almost every day.

"It is very important for there to be exclusive courts. Right now, almost all courts deal with POCSO matters, so they are all designated as Special Courts. So, in essence, it so happens that none of them are Special Courts. They handle all kinds of cases. It affects the disposal rate, it affects the mindset, and it also means that there can never be sufficient safeguards in place for children."

- Public Prosecutor

### 1.2. Appointment of Special Public Prosecutors (SPP)

According to Section 32(1), the State Government should appoint a SPP "for conducting cases *only* under the provisions of [POCSO] Act." Advocates with a minimum of seven years' practice are eligible to be appointed as an SPP. The language of the provision clearly suggests that the SPPs must exclusively handle POCSO cases.

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<sup>6</sup> Section 28(2), POCSO Act, 2012.

<sup>7</sup> Notification No.SPC 1314/C.R.67/IX dated 27 August 2014 issued by the Law and Judiciary Department, Maharashtra.

In Maharashtra, by a notification dated 22 March 2013, all Public Prosecutors/Additional Public Prosecutors appointed under Section 24(3), Code of Criminal Procedure (Cr.PC), were specified as Special Public Prosecutors for conducting cases in the Special Court designated under the POCSO Act.<sup>8</sup> The shortage of PPs and their frequent transfers was cited by several respondents in Thane as a critical challenge affecting the trial in POCSO cases. One respondent from the judiciary lamented about hearings in POCSO cases being held-up because the PP was overburdened and is constantly shuttling between different courtrooms.

The absence of a dedicated Special Public Prosecutor also affects their interactions with the child victim. According to a Support Person interviewed,

They [PPs] are very mechanical. They don't explain the child's right to refuse to answer a question which is posed to them in the court. The PP keeps repeating 'don't be scared', but that is not sufficient for the child to not feel scared. They do give scenarios that could happen in the court, but they don't understand why the children are scared.

### **1.3. Design of the courtroom**

According to Section 33(4), POCSO Act, the "child-friendly atmosphere" of the courtroom can be created "by allowing a family member, a guardian, a friend or relative, in whom the child has trust or confidence, to be present in the court." This provision bears no reference to the physical dimension of the courtroom or the behavior required to ensure that the child's interaction with the criminal justice system is child-friendly.

In Pune and Thane, there are no separate waiting rooms for child victims and their family members in the court complexes or the JJBs. The courtrooms where POCSO cases are tried are within the regular court premises and are regular courtrooms. There are no separate entrances for children. A child will inevitably be confronted with the accused, police in uniform, and other accused persons while waiting to testify. Respondents from the judiciary shared that testimony of very small children is usually recorded in the judge's chambers. In Thane, a step-ladder is kept near the witness box so that the victim can stand on it and be visible to the judge during testimony. In some cases, the child has been seated on the dais next to the judge or on the judge's lap while recording the testimony. These practices, however, are judge-specific.

One respondent from within the child protection system was of the view that Special Courts under the POCSO Act should function in a separate building and the setting should be informal, like that of a JJB or CWC.

Regarding the accessibility of courtrooms to persons with disabilities, the Special Courts in both the districts are on multiple floors. There are no ramps or lifts available in either court complex thus making it difficult for persons with disabilities to access the courtrooms.

Toilets and drinking water facilities are available in the court complex, but not on every floor. These facilities are not easy to locate within the complex.

### **1.4. Tools and facilities to record testimony and prevent exposure**

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<sup>8</sup> Notification No. SPR=-5913/(56)/D-XIV dated 22 March 2014 issued by Law and Judiciary Department, Maharashtra.

Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused at the time of recording evidence, and for this purpose it can record the evidence using video conferencing, single visibility mirrors, curtains, or any other device.

In Pune, the courtroom visited had a plywood partition to prevent exposure of the victim to the accused. In Thane, a single visibility mirror was placed at the back of one of the courtrooms. Details of the manner in which the exposure is avoided by some judges is explained in Section 2.8, Chapter II.

A respondent from a NGO that provides legal, psychological, and social support to victims in sexual offences, expressed that placing children behind a screen amounts to re-victimizing the child as “victims have felt anxious as they can’t see the proceedings fully, while everyone else in the regular courtroom is not behind a screen/curtain.” The respondent also shared that the expression “any other device” in Section 36(2) has resulted in the use of cupboards or a make-shift curtain which does not even shield the victims fully as it is patched together. Ultimately,

**the provision is not implemented in its letter and spirit and hence is ineffective, even counter-productive in many cases where the defense has taken advantage of poor "screens" i.e. flimsy curtains by raising their voices and intimidating victims with sound. Even accused persons have been known to "cough" or clear their throats, which can be easily heard by the victim. (Emphasis added)**

**Table No.1.1. Status of Structural Compliance of Special Court under the POCSO Act, 2012 in Pune and Thane**

The table below captures the status of structural compliance of Special Courts in the two court complexes i.e., in Pune and Thane, with the POCSO Act. While the points in italics are not statutorily mandated, they were included to highlight aspects of structure that may have a bearing on a child victim’s experience in the court.

Parameters of Analysis	Pune	Thane
Designation of Special Courts under POCSO Act	√	√
<i>Special Courts exclusively try offences under the POCSO Act, 2012</i>	X	X
Special Public Prosecutors appointed	*	*
Special Public Prosecutors exclusively try offences under the POCSO Act, 2012	X	X
<i>Separate entrance for children into the courtroom</i>	X	X
<i>Separate waiting room for children and families</i>	X	X
<i>Toilet located in the vicinity of the courtroom</i>	*	*
<i>Special Courts are accessible to persons with disabilities</i>	X	X
<i>Toilets are accessible to persons with disabilities</i>	X	X
<i>Audio-visual facilities to record evidence of the child available</i>	X	X
Means available to prevent exposure of the child to the accused <u>in</u> the courtroom	√	√

Parameters of Analysis	Pune	Thane
<i>Separate room for recording the evidence of child witness</i>	*	*

\* Signifies partial compliance. For instance, toilets are available in the court complexes but not on all floors. While there are no separate rooms for recording the evidence of child witnesses, the testimonies of young children are recorded in the judge’s chambers. While a notification has been passed with respect to Special Public Prosecutors, they are not dealing exclusively with POCSO cases.

## Chapter II. Procedural Compliance

The POCSO Act details the procedure that should be followed by Special Courts while trying sexual offences under the Act. The sections below detail the findings on procedural compliance, based on judgment analysis and interviews with respondents.

### 2.1. Direct cognizance by Special Court

Section 33(1), POCSO Act, empowers the Special Court to directly take cognizance of an offence based on a complaint or upon a police report, without the accused being committed to it for trial. The police must therefore bring the matter directly before the Special Court instead of initiating committal proceedings before a Magistrate. This is in furtherance of the objective of facilitating speedy trial of sexual offences against children.

This provision was largely complied with, as only 7.44% cases, i.e., 99 cases out of 1330 were committed to Special Courts. The highest number of cases, i.e., 47, were committed to Special Courts in 2013. The number dropped to 30 in 2014, 18 in 2015, and only one in 2016. One respondent from the judiciary explained that committals took place because it was not clear that the victim was a child. Apart from increasing awareness of this provision of the POCSO Act, the compliance with this provision can also be attributed to the Bombay High Court’s decision in *Kum. Shradha Meghslyam Velhal v. State of Maharashtra*,<sup>9</sup> in which it examined whether a Judicial Magistrate had the jurisdiction to deal with remand of the accused under the POCSO Act. It held:

**The Special Court is required to act under the Act following the special procedure from the very inception of the criminal prosecution which may be upon a private complaint or a police report.** Its purpose is for safeguarding the interest of the child at every stage...The very first stage of the trial which is the production of the accused for remand is no exception set out in the legislation...**It is, therefore, imperative for all police officers to produce the accused for remand before the Children Court and not before the Court of the learned Magistrates. (Emphasis added)**

### 2.2. Questioning Children

Section 33(2), POCSO Act, prohibits the Special Public Prosecutor and the defence lawyer from putting questions to the child directly. All questions during the examination-in-chief and cross-examination must be routed through the Special Court. Under Section 33(6), POCSO Act, the Special Court should not allow aggressive questioning or character assassination of the child and should ensure that dignity of the child is maintained during the trial.

<sup>9</sup> Criminal Application 354 of 2013 decided by the Bombay High Court on 03.07.14.

Interviews with respondents revealed that questions continue to be asked directly by the defence lawyers and the prosecutors. Judges intervene only when frivolous, humiliating, inappropriate, or complicated questions are asked or if the lawyers get aggressive or rude.

The implementation of this safeguard is heavily resisted by defence lawyers. A defence lawyer disagreed with submitting a list questions to the judge and stated “The questions we want to ask and the way we want to ask them is very different. This cannot be done by a judge.” Judges face resistance when they ask defence lawyers to give the questions in writing. One respondent from the judiciary shared that defence lawyers state the question loudly and then request the judge to put it to the child, defeating the entire purpose of this safeguard. Another respondent from the judiciary was of the view that asking the defence lawyer to submit the questions in writing in advance would violate the guarantee of a fair trial as “the defence’s question depends on the victim’s response. It is not possible to give the question in writing.” While the POCSO Act does not require the questions to be handed in writing, according to one of the directions issued by the Supreme Court in *Sakshi v. Union of India*<sup>10</sup>, “the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the President Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing”.

Judgment analysis revealed the nature of questions allowed by the court to be put to the child victim by the defence. In *State v. Khalid Ahamad Mohammad Hanif Julaba*,<sup>11</sup> a 9-year-old child had been sexually assaulted by an acquaintance. From her responses during cross-examination, the questions about the alleged abuse put to her by the defence can be gleaned:

“She admits the fact that accused ...had caught hold her wrist and at relevant time she shouted but persons had not gathered there.

She admits the fact that she was taken on the terrace of the building by staircase and 10 minutes have been spent for taking her on terrace from A to Z Kirana shop. **She admits the fact that 20 minutes were spent for the act including kissing her, pressing her breast and touching the tongue of accused to her urethra, and at relevant time she had not tried to rescue by moving her hand.**

**Her admissions further show that accused has kept his tongue in her mouth for five minutes, but she did not bite to the tongue of accused, but she started weeping after putting tongue by the accused in her mouth.”** (Emphasis added)

The accused was convicted for sexual assault, but not penetrative sexual assault because the victim had not disclosed to her mother that the accused had touched her urethra with his tongue, and that it was not mentioned in the FIR.

In one case<sup>12</sup>, the victim, a 17-year-old-girl, alleged that she had been raped by her father. She was raised by her grandparents in a different city and moved in with her parents two months before the first incident of rape. She disclosed it to her grandparents, who then questioned her parents. Her mother, being afraid of her father, refused to believe her. She was raped five more times after which she went and lodged a

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<sup>10</sup> AIR 2004 SC 3566.

<sup>11</sup> Special Case No. 12/2015 decided on 19.09.2016 (Dhule).

<sup>12</sup> Spl. C. No. 146/2014 decided on 22/12/2016 (Thane).

FIR with the assistance of a neighbor, who admittedly had a dispute with the accused. From her responses during cross-examination, it appears that the victim was repeatedly questioned about her friendships with boys with a view to tarnish her image. The length of her cross-examination suggests that she was tired out completely by the defence with questions about the conflicts between her maternal uncle and father, her “friendships” with boys, and how she lodged the FIR. The Special Court noted, “towards the end of cross-examination, she has admitted that she has filed a false case of rape against her father.” Perjury proceedings were initiated against the victim in this case under a misconception of the law. Refer to Section 4.2, Chapter IV for the critique of the perjury aspect of the case.

A private advocate who represents child victims in POCSO cases shared, “We have seen instances where victims were aggressively questioned directly by defence counsel and the judge did not intervene; despite our interjections and objections, the court/judge was not fully appreciative of the provisions of POCSO.” A child victim interviewed shared, **“The questions asked by the defense lawyer were vulgar and he kept repeating them and I didn’t feel like answering them. I told my mother that I don’t want to go to the court again for this reason.”**

“The biggest problem is the attitude and demeanour of the defence lawyers. The way they yell at the children, and engage in their histrionic tactics makes it so difficult for the child to stick to her story and to depose without fear. They traumatize the child, and show no concern. You can have all the case law and guidelines in the world, but unless they want to change or are forced to change, what can you do? You can go on objecting, and they will go on doing whatever they like.”

- Senior Police Officer

A clinical psychiatrist interviewed was of the view that cross-examination in cases under the POCSO Act should not be conducted in a routine manner as is done in other cases. The tone of the question is important. Repeating questions and questions of an insinuating nature should not be encouraged. According to him, “Judges need training for POCSO cases particularly in the way young children interpret different kinds of questions.”

### 2.3. Creation of child-friendly atmosphere

Section 33(4) POCSO Act, requires the Special Court to create a child-friendly atmosphere by allowing a family member, guardian, friend, or a relative, in whom the child has trust or confidence, to be present in the court. The Maharashtra Guidelines under Section 39, POCSO Act provide for a pre-trial court visits of the child along with the Support Person to familiarize the child with the court environment and a run through of basic court procedures.<sup>13</sup>

“I was very scared when I entered the court room for the first time. There were so many people on the corridor who were staring at me and talking to each other. All my visits were frightening and I preferred not to go to the court. I did not like it one bit.”

- Child victim, now 19 years

A parent, relative and support persons are sometimes present in the courtroom. A parent or relative is allowed only after they have been examined already by the court and are usually seated behind the victim. In *State v. Sanjay Shankarprasad Singh*,<sup>14</sup> the victim was an 8-year-old girl, who seemed unwilling and afraid

<sup>13</sup> Maharashtra Guidelines for role of non- Governmental Organisations, professionals, experts or person having knowledge of psychology, social work, sociology, law, child development and associated with the pre-trial and trial stages, 2015 (Maharashtra Guidelines), Clause 10.

<sup>14</sup> Spl (C) S.C. No. 40/2013, decided on 24.09.2013 (Pune).

to enter the witness box alone. The Special Court, therefore, allowed her to sit there with her grandmother, and talk as per her own comfort. Similarly, in *State v. Nasir Shaikh Nazir*<sup>15</sup>, the Special Court noted that the victim's paternal aunt was with her when her testimony was recorded and precaution was taken to ensure that she did not see the accused or come into contact directly with him.

A respondent from the judiciary in Thane stated that the mother is always examined first so that she can be present when the victim is testifying in court. However, this is not necessarily a norm followed by all Special Courts. In *State v. Amol Munjaji Jire*,<sup>16</sup> for instance, the victim was a 17-year-old girl with mental retardation. In her cross-examination, she admitted that her mother and maternal uncle were peeping into the courtroom when she was testifying, which meant they were not present inside the courtroom as required under the POCSO Act. A child victim interviewed shared that during her testimony, her mother and grandmother were waiting outside the courtroom and a support person from a NGO was present in court with her. The support person was seated behind the lawyers. The support person is not seated next to the child, unless the child is very young.

“For me [child-friendly] would denote an absolute respect for the child, his needs and his identity. Also, creating a space where nothing would be done to violate the rights of the child.”  
- Social Worker

A respondent from the judiciary shared that attempts are made to break the ice with child victims in order to make them comfortable before their testimony is recorded. In one case, the victim, a 12-year-old girl, who's IQ was that of a 5-year-old, was seated on the judge's lap during the testimony. She responded to questions posed to her by scratching the judge with her nails about her reaction to the assault. The child's mother acted as an interpreter as she was familiar with her daughter's manner of communication.

Another technique used by judges to make children comfortable, is making the child stand next to them on the dais while asking general questions. However, one respondent from the judiciary felt that interaction with the child prior to recording of testimony is unnecessary, except to assess the competence of the child and whether the child understands the meaning of an oath.

A private advocate shared that the Public Prosecutor usually spends only about 15 minutes with the victim before the evidence is recorded. A Public Prosecutor interviewed stated,

We do not need to make them understand the court process. We ask them about the incident. If we feel it's genuine, then we orient the child. We tell them -“if you tell the truth the person will get punished”. We do not tell anything about the cross-examination. We keep it natural. Otherwise, the child will say, the PP asked me to say this.

The orientation to the courtroom procedures and confidence boosting is thus left to the private advocate or Support Persons, if the child victim has one. The courtroom procedures are rarely explained to the child by the APP or the judge. The PPs and judges claim that they do not interact much with the child before the recording of the evidence because the defence will raise objections. A respondent from the judiciary in Pune stated that no Support Person had appeared in any case before the Special Court. Interviews also revealed that no panel of Support Persons was in place. The pre-trial orientation for child victims may thus not have taken place in most cases in which no Support Person or private advocate was assigned to the child.

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<sup>15</sup> Special Case (POCSO) No. 34/2015 decided on 06.11.2015 (Dhule).

<sup>16</sup> Special Case (Under POCSO Act) No. 08/2013 decided on 28/08/2015 (Beed).

**Table 2.1. Ingredients of a Child-friendly Special Court**

All respondents were asked their views on measures that can be taken to make the courtrooms more child-friendly. All respondents unanimously agreed that the term “child-friendly” signifies an atmosphere where the children feel at ease and are comfortable. They emphasized the need for a change in attitude and use of language that is child-friendly and age appropriate.

A collation of their responses is as follows:

**Structural aspects:**

- An exclusive dedicated child friendly court to deal with POCSO case in a separate building with trained lawyers and professionals should be in place in every district.
- If the POCSO court deals with other cases, then exclusive days must be allotted for hearing of such cases.
- The judge should not sit in a raised dais.
- The POCSO court should look like the informal setting in which the CWCs and JJB’s conduct their proceedings.
- There should be a separate waiting room for the child victims in the court premises.
- The court room should have wheel chairs and other basic equipment for children with disabilities.
- They should have one dedicated PP per court, exclusively dealing with POCSO cases.
- Court halls should be bigger so that they can be partitioned to ensure that the accused and the victim do not confront each other.

**Procedural aspects:**

- The time-period to record the testimony of the child should be considered and the child should not be called many times.
- Efforts should be made to ensure that there is a support person for a child in every case.
- The victim’s statement should be recorded in the Judge’s chamber.
- The cases must be finished within 3-6 months; otherwise the child gets re-victimized and harassed in court.
- The government should issue detailed SOPs and checklists for procedures to be followed in POCSO cases.
- Compliance with requirements of the law relating to recording of testimony, interactions with victims, language, support, etc., should be ensured.
- The judges should inquire as to why the child turned hostile while testifying in court.

**Communication with the child**

- The judge should talk softly and not in a manner that is intimidating to the child.
- The enquiry of the child should not be done in uniform by the police. Everyone should be in civil dress.
- The child should be provided with food and water.
- There should be guidelines for defense lawyers in POCSO cases.

**Training**

- The PPs must undergo workshops and training sessions to bring real attitudinal change.
- Attitudes of staff, particularly those in the Observation Home dealing with children alleged to be in conflict with the law, should be changed.

**Monitoring**

- The High Court should conduct quarterly inspections of the courtrooms.
- The State Government should ensure compliance with the POCSO Act and put in place accountability mechanisms including surprise visits by auditing bodies.

## 2.4. Minimizing appearances in court and permitting breaks during the trial

Special Courts should ensure that children are not called repeatedly to testify in the court under Section 33(5), POCSO Act. As per Section 33(3) POCSO Act, frequent breaks should be allowed to the child during trial, if necessary. The Maharashtra Guidelines recognize that multiple depositions, delays and prolonged court proceedings are factors that stress child witnesses and affect full disclosure by them when they testify.<sup>17</sup>

While the Act does not spell it out, the age and developmental stage and needs of the child must be considered while scheduling evidence. The Maharashtra Guidelines require the lawyer, NGO, or expert providing services to a child during trial to make necessary applications in a timely manner, to ensure that special measures are taken based on the child's wishes and needs.<sup>18</sup> For instance, the evidence of the child should not be kept at a time when the child is usually napping. Care must be taken to determine if the child has missed a meal or a nap, as that can affect the behavior of the child and consequently the quality of the testimony. Recommendations by the Texas Centre for Judiciary on scheduling testimony of a child are instructive:

In criminal cases involving school-aged children, it may be best to schedule testimony during school hours. Children who are required to testify after being in school all day, may be tired and stressed from worrying about court while in school. By considering the developmental needs of child witnesses in scheduling cases, courts can easily improve the quality and coherence of their testimony.<sup>19</sup>

The Maharashtra Guidelines consider this aspect and instruct legal representatives on behalf of the child to ensure that<sup>20</sup>:

The start of children's testimony should not be delayed by other matters on the court list. It is best to make an estimate of the amount of time the child will have to be present in Court, and in doing this, to bear in mind his concentration span, the length of any recording, the best time to view it and the need for breaks. Request the Special Court to accommodate these requirements

Respondents from the judiciary and JJBs shared that they always attempt to record the statement in one day, to avoid the child having to make multiple trips to the court and also allow breaks if the child requires it. However, due to practical difficulties, it is not always possible to ensure that the testimony is completed in one day. Adjournments are granted if the child is crying incessantly, or if the defence is not prepared. Where cross-examination is deferred at the request of the defence, heavy costs are usually imposed on the defence by one Special Court in Thane. For the JJB in Pune, the pendency as well as the

<sup>17</sup> Maharashtra Guidelines, 2015, Clause 8.

<sup>18</sup> Maharashtra Guidelines, 2015, Clause 11 (II).

<sup>19</sup> Texas Center for the Judiciary, "Child-friendly Courtrooms: Items for Judicial Consideration", p.21, <http://www.yourhonor.com/assets/ic/BenchAid.pdf>. The Texas Center for the Judiciary is a non-profit organization whose objective is "to provide outstanding judicial education to Texas judges so that a qualified and knowledgeable judiciary and staff may administer justice with fairness, efficiency, and integrity."

<sup>20</sup> Maharashtra Guideline, 2015, Clause 11(II)(d)

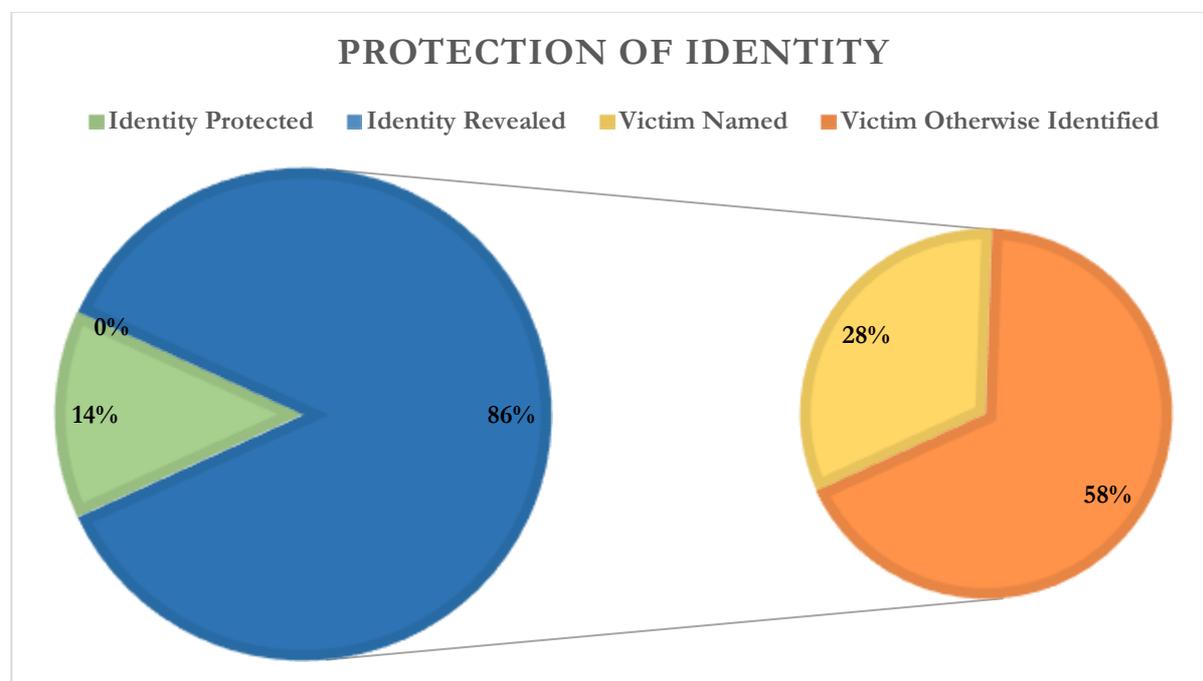
three-hours sitting present difficulties in ensuring that the statement is recorded in one day. A respondent from the judiciary in Thane stated that the time of recording the testimony depended entirely on when the prosecutor arrived in court. Although the preference would be to complete the recording in the morning, some are pushed to the afternoon because of the prosecutor’s unavailability. A private advocate appearing before the Thane court in POCSO matters revealed that there are no fixed timings for recording evidence. Nap times of children are not considered at all, “as it is a court after all”. Victims have had to wait till 5.30 pm in some matters.

“In one case, a mentally disabled child was cross examined for three months- she had to wait all day in court, she was tired, and no one even gave her food. Every IO does not spend money on them- the head constable or IO may not have money. And if the child is hungry, how will she handle court?”  
 - Senior Police Officer

One respondent from the judiciary in Pune stated that the child’s convenience is considered while scheduling the testimony, and in some cases, it is recorded on a Saturday so that the child does not miss school. However, no Support Person had appeared before the Special Court so far, making it unlikely for any applications to have been moved on behalf of the child.

## 2.5. Protection of identity

Section 33(7), POCSO Act, requires the Special Court to protect the identity of the child during the investigation and trial. For reasons recorded in writing, the Special Court can permit disclosure, if it is in the interest of the child. The Explanation to Section 33(7) states that identity of the child would include “the identity of the child’s family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.”



The identity of the victim was revealed in 86.31% of the judgments studied, i.e., 1148 cases. Of these, in 27.96%, i.e., 372 judgments, the victim was named. In the remaining judgments, although the victim’s name was suppressed or not mentioned, the parents’ names, full address, school, locality, college, or names of relatives were mentioned, thus compromising the identity of the child. The identity of the child

was also automatically evident in cases in which the accused was the father, step-father, or brother. *State v. Vilas Pawar*,<sup>21</sup> is an exception case in which the Court made every effort to protect the identity of the victim. Not only did the judge ensure that her name was not disclosed, he also protected the name of her brother and her friend.

## 2.6 Award of Compensation

Section 33(8), POCSO Act, empowers the Special Court to direct payment of compensation, in addition to punishment, for physical or mental trauma caused to the child or for immediate rehabilitation. Rule 7(1), POCSO Rules, states that interim compensation can be awarded by the Special Court on its own or based on an application by or on behalf of the child, at any time after the FIR has been registered. The purpose of interim compensation is to meet the immediate rehabilitation or relief needs of the child. Compensation, interim and final, can be awarded even if the accused is acquitted, discharged, or untraceable, if according to the Special Court, the child has suffered loss or injury.<sup>22</sup> Rule 7(3), POCSO Rules, specifies 12 factors that the Special Court should consider before it awards compensation. The compensation awarded should be paid from the Victim Compensation Fund or any other government scheme for compensating and rehabilitating victims and must be paid by the State Government within 30 days of the receipt of the order.<sup>23</sup>

The Maharashtra Victim Compensation Scheme, 2014 does not list any sexual offence in the schedule of offences for which compensation can be awarded. The Member-Secretary, District Legal Services Authority (DLSA), Thane shared that no case had been referred to them by a Special Court directing the determination or payment of compensation, as the Manodhairya Scheme is followed.

Based on the analysis of 1330 judgments, it was found:

- Compensation was recommended or awarded in 125 cases. There were no references to interim compensation.
- In 109 cases, i.e., 87.2%, the Special Courts directed the compensation to be paid from the fine imposed on the accused, if realized, or ordered the accused to pay a separate sum as compensation to the victim. In several judgments, references were made to Section 357, CrPC and Section 33(8), POCSO Act while directing the accused to pay compensation. A respondent from the judiciary felt that even though the State can be directed to pay compensation to the victim, “let it pinch the pocket of the accused also and not just that of the State.”
- In 14 cases, i.e., 11.2%, the Special Court asked the DLSA to determine the quantum of compensation to be paid to the victim, including two cases in which the Special Court directed the DLSA to give compensation in addition to the compensation payable to the victim from the fine imposed on the accused. In *State v. Niteen Dyanoba Maske*<sup>24</sup> the Special Court directed Rs 2500 from the fine of Rs 3500 imposed on the accused to be paid to the victim. Taking note of the poor economic condition of the accused, the Court also recommended the victim to approach the DLSA for adequate compensation.
- In *State v. Nagesh Dinkar Mane*<sup>25</sup>, the accused was convicted under Section 8, POCSO Act and was directed to pay Rs 50,000 as compensation to the victim under Section 5, Probation of Offenders Act.<sup>26</sup>

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<sup>21</sup> Special (Child) Sessions Case No. 96/2015 decided on 26.05.2016 (Pune).

<sup>22</sup> Rule 7(2), POCSO Rules.

<sup>23</sup> Rules 7(4) and 7(5), POCSO Rules.

<sup>24</sup> Special (POCSO) Case No. 12/2015 decided on 19/04/2016 (Beed).

<sup>25</sup> Spl. Case No. 2/2015, decided on 01/27/2016 (Kolhapur).

<sup>26</sup> Section 5(1), Probation of Offenders Act, 1958 states: “Power of court to require released offenders to pay compensation and costs.—(1) The court directing the release of an offender under section 3 or section 4, may, if it thinks fit, make at the same time a further order directing him to pay—(a) such compensation as the court thinks

### About the Manodhairya Scheme

The Women and Child Development Department, Government of Maharashtra issued a regulation on 21 October 2013, introducing the Manodhairya Scheme, applicable from 2 October 2013, to provide immediate financial aid and psychological expert services to victims of rape under Sections 375-376 IPC, victims of acid attacks under Sections 326A and 326, IPC and victims of penetrative and aggravated penetrative sexual assault under Section 3, 4, 5, and 6 of the POCSO Act.<sup>27</sup> On 1 August 2017, a revised version of the Manodhairya Scheme was notified by the Government of Maharashtra.<sup>28</sup>

The original scheme required a District Criminal Injuries and Rehabilitation Board, with the District Magistrate as Chairman, to meet within seven days of receiving information about an offence covered under the Scheme and to grant compensation within 15 days. Under the revised scheme, the responsibility has been placed on the DLSA or the SLSA, depending on the circumstances. The District Women and Child Development Officer (DWCDO) is required to forward the FIR, Medical Examination Report and the victim's statement under Section 164 Cr.P.C, to the DLSA/SLSA for them to decide. Under the revised scheme, free medical treatment in government hospitals would be provided if the rape has resulted in serious injury, illness, or HIV. Those who receive financial assistance under the revised Manodhairya Scheme cannot receive financial assistance under the Victim Compensation Scheme.

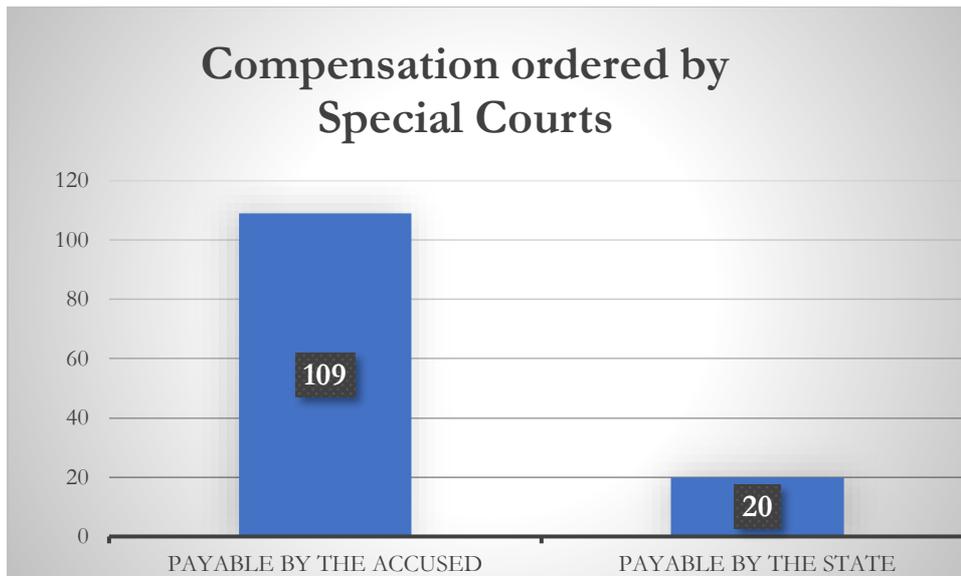
Interviews with functionaries within the child protection system revealed that the district trauma team (comprising a woman counselor, medical officer, support person, and police officers) and the District Board under the original scheme were largely on paper and there has been little intervention in cases under the POCSO Act. The DCPO was not involved in the meetings of the District Board. The District Board in some districts usually met only when 10 or more cases were received. The revised scheme acknowledges the delays caused because of the heavy workload of the District Collector and dispenses with the trauma team as well as the District Board completely. For a critique of the revised scheme, refer to <https://www.nls.ac.in/ccl/jdocuments/Manodhairyascheme2017.pdf>

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reasonable for loss or injury caused to any person by the commission of the offence; and (b) such costs of the proceedings as the court thinks reasonable.”

<sup>27</sup> Government of Maharashtra, Women and Child Development Department, Government Regulation No. 2011/Pra.Kra.6-k, Dated - 21 October, 2013. Regarding starting of the Manodhairya Scheme in the State for providing Financial Assistance and Rehabilitation for Victims of Rape, Child Sexual Assault and Acid Attack.

<sup>28</sup> Government of Maharashtra, Women and Child Development Department, Government Resolution No.MISC-2016/C.No.35/K-2, Regarding Upgradation of the eligibility criteria for financial assistance and rehabilitation under the “Manodhairya Scheme” for women and children affected by Rape/Child Sexual Assault and Acid Attack, 1 August, 2017



- In three cases from Hingoli district, the victim was referred to the District Victim Compensation Board for compensation, in addition to the amount directed to be paid from the fine.
- In two cases from Parbhani district, the District Injury and Rehabilitation Board was directed to pay compensation of Rs 3 lakhs under the original Manodhairya Scheme to the victims in cases of aggravated penetrative sexual assault.
- In one case, the State Government was directed to pay compensation to the victim if the fine amount directed to be paid by the accused to the victim is not realized from the accused.

#### 2.6.1. Link between conviction and compensation

- Of the 125 cases in which compensation was awarded, the accused had been convicted under the POCSO Act in 116 cases (92.8%) and acquitted in nine cases (7.2%).
- Eight of the accused acquitted under the POCSO Act were, however, convicted under the Indian Penal Code.
- Compensation was awarded to a victim in only one case in which the accused was acquitted under the POCSO Act and IPC. In *State of Maharashtra v. Narendra Rahangdale*<sup>29</sup>, the 13-year-old victim was 20 weeks pregnant when the FIR was lodged. She belonged to the Gond community and alleged that the accused, who was from the Pawar community, had subjected her to repeated penetrative sexual assault. Charges were framed under Sections 376(2)(m)(n) and 506, IPC, read with Sections 5 and 6, POCSO Act, 2012 and Sections 3(1)(xii) (xi) & (xii) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Atrocities Act). The victim testified against the accused, but not under oath as the Special Court was of the view that she could not understand basic questions or answer them logically. The accused was acquitted because the DNA analysis report was negative. Although the victim had received Rs 60,000 as compensation from the Officer of Social Welfare under the Atrocities Act, the Special Court was of the view that the amount was insufficient for the victim and her newborn child and deemed it a fit case for compensation under Section 357A, CrPC, directing the DLSA to consider the case.

#### 2.6.2. Link between testimony and compensation

- Of the 125 cases in which compensation was awarded, the victim testified against the accused in 111 cases (88.8%). The victim did not testify in nine cases due to disability (one case), death (two cases), and tender years (six cases), and turned hostile in five cases. In two cases, the victim testified against the accused during the examination-in-chief, but turned hostile during cross-examination. In *State v. Ajay Karansingh Pawar*,<sup>30</sup> the Special Court awarded compensation which was directed to be given from State funds despite the victim girl and her mother turning hostile.

<sup>29</sup> Special (Atrocities/Pocso) Case No. 24/2013 decided on 22.04.2015 (Gondia).

<sup>30</sup> Special Court No. 384/2015 (J)\* decided on 1.08.2016 (Greater Bombay).

**The Special Court observed that the accused was the victim’s father, on whom the family was financially dependent, and they were being pressurised by the victim’s paternal grandparents to drop the charges.**

- Some respondents from within the judiciary and Legal Services Authority were of the view that compensation cannot be denied outright if a victim turns hostile. It must be assessed whether the victim supports the commission of the offence, but states that the accused was not the perpetrator. In such a scenario, compensation can be considered as the victim partially supports the prosecution.
- While the original Manodharya Scheme did not link the award of compensation to the testimony of the victim, the Department had received directions to revoke the compensation, if granted, in cases in which the victim turns hostile in court. In *State v. Amit Gangawane*,<sup>31</sup> the Special Court directed the victim to return the compensation she had received under the Manodharya Scheme because she turned hostile. The victim had eloped with the accused in this case. The Special Court stated:

As per Manodharya scheme amount was given to the victim to support her in life and relieve from trauma of incident. Nowadays there is a tendency to accept amount of compensation under Manodharya scheme and then to turn hostile in Court. **So as to carve out such tendency, harsh steps required to be taken by asking victim to deposit the amount received by her in this case.** So, she is directed to deposit the amount of Rs.2,00,000/- in the Court. [Emphasis added]

According to a senior Social Worker based in Mumbai, such a response is misdirected against the victim as the system should be held accountable for its failure to protect the victim against threats, coercion, or pressure from the accused.

“My concern is that the mechanism has failed when a victim has turned hostile- bad investigation, no proper victim protection like appointment of support person, etc., or that the child has not felt safe enough. Therefore, there should be an exercise to ascertain where the system has failed the victim rather than trying to retrieve the money.”

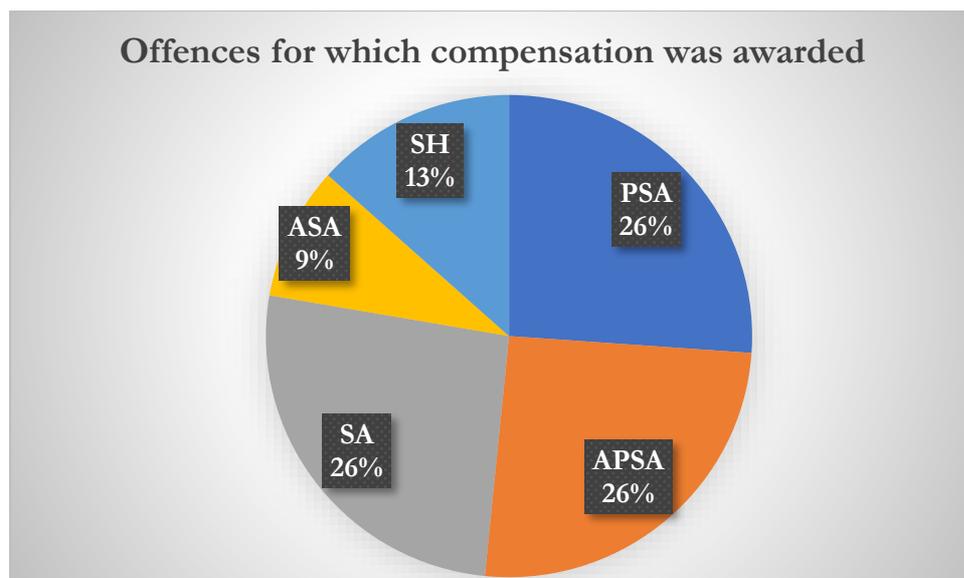
- Senior Social Worker, Mumbai

### **2.6.3. Offences for which compensation was awarded**

- Compensation was awarded in 41 cases of penetrative sexual assault (PSA), 40 cases of aggravated penetrative sexual assault (APSA), 41 cases of sexual assault (SA), 14 cases of aggravated sexual assault (ASA), and 21 cases of sexual harassment (SH). Note that in some of these cases, the accused had been found guilty under multiple charges.

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<sup>31</sup> Sessions Case 56/2014 decided on 14.06.2016 (Islampur).



## 2.7 Prompt recording of evidence and disposal of the case

Evidence should be recorded within 30 days of the Special Court taking cognizance of the offence, as per Section 35(1), POCSO Act. Reasons for the delay should be recorded by the Special Court. However, none of the judgments studied indicated a reason for the delay in recording of evidence.

A prosecutor emphasized that the evidence should be recorded within 30 days as the incident will be fresh in the mind of the victim and the pressure to retract will also be low. Delays result in cases in which there are more than one accused persons as adjournments are sought if one lawyer is not present on behalf of one of the accused. Moreover, as mentioned in the Maharashtra Guidelines, delays and protracted court proceedings cause stress in the child, increase their vulnerability as witnesses and affect their testimony.

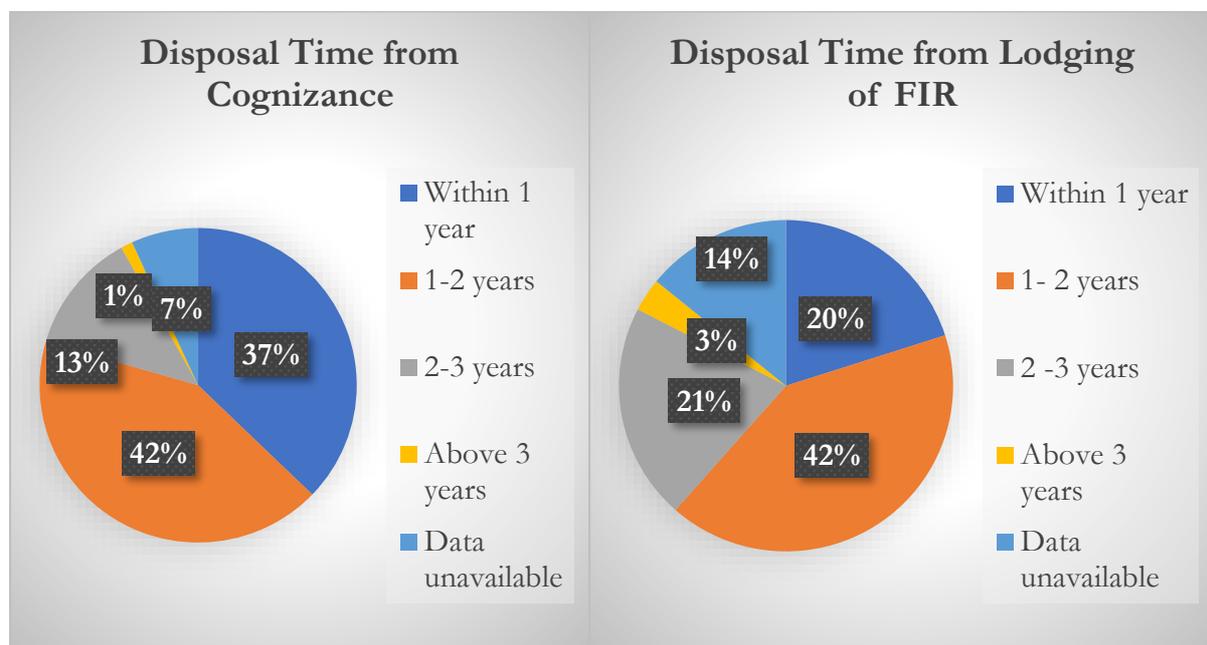
According to Section 35(2), the Special Court should complete the trial, as far as possible, within one year from the date of taking cognizance of the offence. The judgment analysis revealed that 37% cases (495) were disposed within one year, 42 % (551) between 1-2 years, 13% between 2-3 years (166), and 1% (16) took more than three years. Information about the date of cognizance was unavailable in 102 cases. The time taken from the lodging of the FIR to the disposal was within one year in 20% cases (267), between 1-2 years in 42% cases (551), between 2-3 years in 21% cases (281), and above three years in 3% cases (43). The difference in the disposal time is largely due to the time taken to complete investigations, obtain forensic reports, and file charge-sheet. Based on the information received through an RTI application, 12990 cases under the POCSO Act were pending as on 31 December 2016, with the highest number of pending cases in Mumbai (2528), followed by Thane (1786) and Pune (1279).<sup>32</sup>

Some respondents were of the view that disposal within one year is near impossible due to a heavy docket and the absence of a dedicated PP. Respondents from the judiciary felt day-to-day hearings until all witnesses are examined is impractical. This is because of the large number of witnesses in some cases, pendency, as well as lack of cooperation from the police in ensuring that the witnesses are served summons and presented before the Special Court. Respondents from the police, in turn, mentioned that in cases where the victim gets married during the trial and relocates, or her family becomes

<sup>32</sup> Reply dated 02.03.2017 received from the Deputy Registrar/Public Information Officer, Bombay High Court pursuant to an application under the RTI Act, 2005.

uncooperative, it becomes difficult to serve summons on key prosecution witnesses. Judgment analysis revealed that in at least 20 cases the victim did not testify, because she had married or relocated and her family did not want to disrupt her life.

Respondents from the judiciary stated that they discourage adjournments and impose heavy costs on the defence while granting them. One respondent explained that the court is aware that adjournments are sought by the defence to “avoid [conducting] cross [...] on same day to shake the victim. They try to prolong the matter to try to make witnesses hostile, and to contact the party to pressurize them.” However, not allowing any adjournments would prejudice the accused. A private advocate appearing in Thane shared “Cross is never held on the same day. The child appears for a minimum of three times in court. Adjournments are allowed. If there is more than one accused, then each of their lawyers will ask questions.”



Analysis of the rate of disposal would be incomplete without linking it to the nature of the testimony and the outcomes. As Table 2.2 indicates, the acquittal rate as well as the rate of victims turning hostile was highest in matters disposed within one year. This is possibly because judges dispensed with the examination of formal witnesses in cases in which the victim turned hostile. On the other hand, the cross-examination by the defence of victims and witnesses who support the prosecution is time-consuming and results in a longer trial. The conviction rate was highest in cases in which the disposal time was between two and three years and high in cases between one and two years.

While matters should certainly be completed as early as possible, the overemphasis on speedy trials should not take away from the need for sensitive and developmentally appropriate appreciation of children’s testimonies and a robust victim and witness protection program that is available from the time the FIR is lodged.

**Table No 2.2. Time taken from FIR and cognizance to disposal**

	FIR to disposal				Cognizance to Disposal			
	Within 1 year	1-2 years	2-3 years	Above 3 years	Within 1 yr	1-2 years	2-3 years	Above 3 years

	FIR to disposal				Cognizance to Disposal			
	Within 1 year	1-2years	2-3 years	Above 3 years	Within 1 yr	1-2 years	2-3 years	Above 3 years
<b>Total</b>	267 (20.07)	551 (41.42%)	281 (21.12%)	43 (3.23%)	495 (37.21%)	562 (42.25%)	166 (12.48%)	16 (1.20%)
<b>Testified against the accused</b>	95 (35.58%)	264 (47.91%)	134 (47.68%)	23 (53.48%)	174 (35.15%)	281 (50%)	88 (53.01%)	11 (68.75%)
<b>Turned hostile</b>	158 (59.17%)	249 (45.19%)	103 (36.65%)	14 (32.55%)	292 (58.98%)	228 (40.56%)	52 (31.32%)	3 (18.75%)
<b>Conviction</b>	38 (14.23%)	122 (22.14%)	54 (19.21%)	10 (23.25%)	77 (15.55%)	124 (22.06%)	43 (25.90%)	3 (18.75%)
<b>Acquittal</b>	229 (85.76%)	429 (77.85%)	227 (80.78%)	33 (76.74%)	418 (84.44%)	438 (77.93%)	123 (74.09%)	13 (81.25%)

## 2.8 Avoiding exposure to the accused

Section 36(1), POCSO Act, requires the Special Court to ensure that the child is not exposed to the accused while testifying. For this purpose, curtains, single visibility mirrors, and video-conferencing facilities can be adopted.

Interviews with respondents in Pune revealed that a plywood partition is placed between the victim and the accused in the courtroom. The accused takes a seat behind the partition after everyone is in the courtroom and is the first to leave the room after the deposition. Children below 10 years of age are usually examined in the chambers of the Judge. In Thane, the accused is seated behind a one-way mirror panel at the back of the room. The child can see the accused if she/he turns when the accused is brought into the courtroom. When the evidence is recorded in the chamber, the child sits across the judge and the accused sits behind a cupboard on the side. While the accused can hear the child, the child cannot see the accused. Video-conferencing facilities are available in the complex to facilitate the identification of the accused by the victim when the former is in jail. Where the accused is physically present, the victim is asked to identify the accused after the cross-examination.

An interview with a child victim revealed that no curtain was in place to prevent the exposure to the accused. Although a support person was in the courtroom, the victim stated, "I was afraid as the accused was sitting in front of me in the court." The child victim felt this confrontation was the most difficult part of the court experience.

No mechanisms are in place in Pune and Thane to prevent exposure outside the courtroom. In the absence of a separate entrance for victims or a waiting room, exposure to the accused, police personnel, and other accused persons is inevitable. One court in Thane has taken the initiative to let the victim wait in the DGP's room or the judge's chamber. However, the staff are not always aware when a child victim is scheduled to testify and some amount of confusion is inevitable when a child appears in court.

While curtains are used by the JJB in Pune in POCSO cases to avoid exposure of the victim to the defence counsel and the APP, in Thane the child alleged to be in conflict with the law is seated behind the child victim as no curtains are available. It appears that in Pune, the child alleged to be in conflict with the law is not present when the child victim's statement is being recorded.

## 2.9 *In-camera* trials

Section 37, POCSO Act, requires the Special Court to conduct the trial *in camera* and in the presence of the parents of the child or any other person in whom the child has trust or confidence. The child can also be examined in a place other than the courtroom if the Special Court deems it fit.<sup>33</sup>

Based on the interviews, it emerged that the testimony of the victims is recorded *in camera* in Thane and Pune. Judgment analysis also indicated that testimony is recorded *in camera* in other districts as well. Persons present include the judge, the prosecutor, the defence lawyer, clerk, stenographer, the child victim, Support Person (if available) and the accused. Respondents from the judiciary in Pune and Thane shared that besides the testimony of the IO in some cases, all other testimonies are recorded *in camera*. The option of recording the statement in a place other than the court had not been explored in either of the courts.

The proceedings in JJBs in Thane and Pune are conducted *in camera*. Attempts are made to ensure that no male staff is present in the courtroom when a female child victim is testifying in Thane. The male lawyers are also asked to be seated at the back, if the child is uncomfortable.

## 2.10 Assistance of interpreters, experts and special educators

Section 38, POCSO Act, requires the Special Court to take the assistance of a qualified translator, interpreter, special educator, or a person familiar with the manner of communication of a child if it is necessary. Pursuant to the Criminal Law Amendment Act, 2013, Section 119 of the Indian Evidence Act was amended to provide that a witness who is unable to speak, can give evidence in any other intelligible manner, such as by writing or by signs. Such writing or signs should be made in open court and considered oral evidence. While the Special Court has discretion under the POSCO Act to involve an expert, it is mandatory under the proviso to Section 119, Indian Evidence Act, 1872 for the court to take the assistance of an interpreter or special educator when recording the statement of a witness who cannot communicate verbally and to videograph the statement.

The District Child Protection Unit (DCPU) should prepare a list of such experts and ensure it is available to the Special Courts. The Maharashtra Guidelines stipulate a procedure for appointment empanelment of NGOs, professional, and experts.<sup>34</sup> It also specifies that experts and professionals should “undergo continuous short term and long term training which will take into account a victim and particular situation in the particular district.” No such empanelment or training process had been initiated in Thane or Pune.

Judgment analysis revealed the use of language interpreters only in some cases and very few instances of engagement of experts to record the testimony of children with intellectual disabilities. No reference to assistance of an interpreter or special educator was found in judgments where the victim was very young. In some districts, the Special Courts allowed teachers or parents of the child to be present while the victim’s testimony was recorded, as they could interpret the victim’s language or gestures.

### **Children with Intellectual Disabilities and Mental Retardation**

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<sup>33</sup> Proviso to Section 37, POCSO Act.

<sup>34</sup> Maharashtra Guidelines, 2015, Clause 15.

In *State v. Yunus Khan*,<sup>35</sup> the victim who was mentally ill was allegedly raped and impregnated by the accused. She was produced before the CWC to record her statement, but was unable to give any statement to them because of her mental illness. She did not testify before the Special Court. The accused was acquitted because the informant turned hostile and the DNA report excluded him. It is unclear as to why the victim was taken before the CWC for recording of the statement. The police and the Special Court appear not to have taken the assistance of a family member familiar with the manner of her communication.

In *State v. Amol Munjaji Jire*,<sup>36</sup> the victim was a 17-year-old girl who was mentally retarded. However, the mental retardation was not established by the prosecution. A FIR was lodged three days after the incident by her parents stating that two acquaintances had raped her in a ditch when she had gone to relieve herself. The Special Court observed that the testimony of the victim was not reliable enough to be the sole basis for a conviction because she admitted that the spot of the incident was a crowded area, but there were no witnesses to the incident. The victim admitted that her mother had instructed her to testify against the accused. She said that her mother had given her fruits before the testimony, and that she would do anything somebody asked her to do if they gave her favourite food. She also said that her mother told her to commit suicide if the accused are acquitted. However, the Special Court at no point stated that she had any difficulty in understanding the questions put to her. It is not clear from the judgment how questions were put to her. There is no reference to any special educator either.

In *State v. Mangesh @ Kalya Ashok Salve*<sup>37</sup>, the victim, a 17-year-old girl, had 80% “mental disability”. The accused had allegedly locked her in her house, undressed her and pressed her breasts. Her sister had seen her sleeping naked on a cot when she peeped inside the room through the slit of the door. She repeatedly asked the victim to open the door. The door was opened by the accused who ran away when she asked him what he was doing inside the room. In the examination-in-chief, the victim stated that the accused inserted his penis into her vagina, committed sexual intercourse and kissed her lips and mouth. She had not, however, stated these facts to the police. The victim’s hymen was intact and there were no injuries on her body or genitals. The doctor who examined her, testified that the victim had 80% “mental disability” and that such a patient cannot take care of herself and behaves in a disorderly way. The Special Court observed, “Had there been grain of truth in the evidence of victim girl that accused has sexually assaulted her, then there should be at least some tenderness on breasts and genitals of victim girl, when she claimed that accused has pressed her breasts and inserted his penis in her vagina.” Further, “The absence of violence marks on the body and genitals of victim girl renders testimony of victim girl unworthy of credence, in respect of having [been] sexually assaulted by accused.” The Special Court was also of the view that the age of the victim had not been established even though a school certificate was on record. It was also of the view that five hours delay in registration of the FIR was unjustifiable. It is unclear how the Special Court questioned the child considering the extent of her mental retardation. There was no mention of a special educator, or anything to indicate that the assistance of a person familiar with her manner of communication was taken.

In *State v. Sarjerao Rankhamb*<sup>38</sup>, the victim was a 14-year-old girl who was “mentally ill” from birth. After the FIR was lodged, the API called two social workers from Child Line India Foundation, one of whom was an expert in sign language. A lady PSI was also called to record the statement. The social worker used sign language to put questions to the child. A photographer was present during the recording of the evidence, who recorded the statement on a phone.

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<sup>35</sup> Sessions Trial No. 13/2016 decided on December 28, 2016 (Akola).

<sup>36</sup> Special Case (Under POCSO Act) No. 08/2013 decided on 28/08/2015 (Beed).

<sup>37</sup> Special Case No.17/2013 decided on 20/09/2014 (Buldhana).

<sup>38</sup> Special Case (POCSO) No..31 of 2014 decided on 14.07.2016 (Latur).

In *State v. Mohd. Ayub & Ors.*<sup>39</sup>, the victim, a 16-year-old girl with mental retardation had been sexually assaulted by Accused No.1. Her father and another eye-witness turned hostile. Her statement was recorded by the police with the assistance of the Head Master of a school for mentally retarded. The victim had studied in the school for one year. The Head Master had 22 years of experience. In his testimony before the Special Court, the Head Master stated that the victim had expressed through signs what the accused had done to her. She indicated that the accused had pulled her shirt and salwar, and moved his hand on her stomach and even pulled her hair. In cross-examination, he admitted that signs of expression could not be taught in one year and that the victim was partially expressing through signs and some words and that it was not possible to guess her words without signs. The Special Court held that it would be undesirable to rely solely on her statement recorded with the help of the Head Master because she had attended the school only for one year and the language could not be taught in one year. In the absence of corroborative evidence, her statement was rejected as being unreliable.

In *State v. Arun Gulabrao Ingole*,<sup>40</sup> the child was unable to testify despite assistance from an expert. A five-year-old girl who was deaf and mentally retarded was allegedly raped by the accused. The accused allegedly lured the victim by promising to give her an orange. She was found in a canal lying naked and unconscious. Her vagina was bleeding and her right leg was fractured. Teachers from a deaf school were present in court to help record the testimony of the victim. However, she was unable to testify, as she could not understand the questions put to her even with the help of experts. The forensic evidence and the testimony of other witnesses led to the conviction of the accused.

### **Children of tender years**

In 22 cases, the victim was considered too young to testify. Of these, in 16 cases, i.e., 72.72%, the victim was between 3-5 years, in four cases above six years, and in two cases below 2 years. In cases involving children above three years, the Special Courts did not seek the assistance of any child development expert to record the testimony of the children.

### **Language Interpreters**

In several cases, language interpreters were engaged to record the evidence of the victim and other witnesses. For instance, in *State v. Hunya*<sup>41</sup>, an interpreter was used to record the evidence of the prosecutrix on oath. The girl spoke in Adiwasli language. Her maternal uncle also served as an interpreter and translated her statement into Marathi for the police. In *State v. Parvin Javid Khar*<sup>42</sup>, an interpreter was arranged for the victim, a Bangladeshi girl, who had allegedly been trafficked by the accused.

In *State v. Vinod Manbhadur Bogti*<sup>43</sup>, the police officer who recorded the victim's complaint admitted that the victim spoke mostly in Nepali and the victim's brother translated it into Hindi. A cook at the hotel in which the victim and accused were employed testified and admitted during cross-examination that the victim was speaking in Hindi and Nepali. According to the Special Court, this made it clear that the complaint was recorded as per the victim's brother's version and that the police officer's statement that he recorded the victim's versions was "not faithful and correct." The case resulted in acquittal because the victim could not be found.

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<sup>39</sup> Spl.(POCSO) Case No. 15 of 2013 decided on 08.12.2016 (Nanded).

<sup>40</sup> Special (Child) Case No. 9/2014 decided on 2.04.2015 (Hingoli).

<sup>41</sup> Sessions Case No.37/2013 decided on 21.04.2016 (Nandurbar).

<sup>42</sup> Special Case No. 126/2014 decided on 12.10.2015 (Thane).

<sup>43</sup> Special Case No. 88/2013 decided on 22.07.2015 (Thane).

In *State v Dilip Gajbhare*<sup>44</sup>, the victim spoke Mathura Lamhani language. The police called a social worker who could understand the language. In her testimony, the social worker stated that she had taken the “the prosecutrix in one room, she found that there was swelling on her private part and it was reddish in colour.” It is problematic that a social worker called in to serve as an interpreter physically examined the victim without having any authority or competence to do so. The defence questioned her about it, at which time it also emerged that she had not stated in her statement to the police that she had taken the prosecutrix and examined her private parts. The Special Court observed that while this may be an improvement, her evidence that the prosecutrix and her mother had come to the police station and disclosed the incident remained unchallenged. The case ended in conviction.

## 2.11 Assistance of private legal practitioners

Section 40, POCSO Act recognizes the right of the family or guardian of the child to take assistance of a legal counsel of their choice in proceedings under the POCSO Act. The Legal Services Authority is required to provide them with a lawyer in case they are unable to afford one. Clause 22 of the Maharashtra Guidelines on POCSO Act entrusts the Maharashtra Legal Service Authority to draw a panel of qualified and experienced advocates for each district as per need in every district to represent child victims of sexual abuse. Under the Maharashtra Guidelines, the duty to ensure compliance with child-friendly procedures and special measures to cater to the child’s needs and wishes is on the professional or expert assisting the child during the trial.<sup>45</sup>

Interviews with respondents revealed that engagement of a private counsel is not the usual practice. The Member-Secretary, DSLA, Thane shared that no application for a Legal Aid Lawyer in POCSO cases had been received by the DSLA. **One PP was of the view that such a lawyer would not have any locus standi in Court and can only assist the prosecutor.** The PP felt that private lawyers can be of assistance only if they are well versed with the law and attend the court hearings regularly. **Both PPs interviewed were of the view that private lawyers’ involvement is a hindrance.**

A private advocate, on the other hand, was of the view that the PPs are cooperative, but not proactive. Attempts at drawing their attention to the procedures under the POCSO Act are met with resistance. Another respondent shared, “for many years we have faced tremendous hostilities from public prosecutors and judges, especially when we sought to represent the victim; Judges in many cases refused to give us an audience stating that under the Cr.PC we only had the right to assist the prosecution; in many cases we were not allowed to address the court directly.” The respondent also shared that there are a few sensitive and understanding judges and PPs who have fully supported private advocates. Legal representation can help the child access compensation, receive an orientation to the court procedures, and provide an opportunity to convey to the court the wishes and needs of the child on the recording of testimony. However, this was absent on the ground.

## 2.12 Appointment of Support Persons

As per Rule 4(7), POCSO Rules, the CWCs have been entrusted with the responsibility of appointing support persons with the consent of the child and the child’s parents or the person whom the child trusts.

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<sup>44</sup> Spl.C No. 35 of 2014 decided on 16.05.2016 (Nanded).

<sup>45</sup> Maharashtra Guidelines, 2015, Clause 11(II)(e).

Respondents from the child protection system in Pune shared that no panel of support persons is available and although a list had been prepared by the DCPU, it has not been updated. In Thane, respondents shared that a panel of support persons comprising representatives from NGOs based in Mumbai is in place and they are appointed in most cases. These Support Persons are asked by the CWC to prepare the Social Investigation Report, counsel the child victim, take them to court, facilitate the medical exam, and assist in repatriation processes. However, the police are not informed when a Support Person is assigned in the case. A Support Person interviewed, shared that she informs the police and the Special Court when she is appointed. Apart from supporting the child, assistance is given by the CWC to the family to avail government schemes and to ensure schooling of siblings of the child victim. Support is also extended to children living in child care institutions who do not have parents or guardians. According to a Support Person, their presence “gives them [child victims] comfort and confidence. They know that there is a person supporting them in the court.”

A child interviewed for the study shared that the support person and lawyer from the NGO had provided an orientation to her about the courtroom procedures, and that this was helpful.

In *State v. Kishan Dadarao Ghode*,<sup>46</sup> the police recorded the statement of the victim in the presence of two witnesses from Childline. When the victim refused to go home after the medical examination, she was taken to the CWC and thereafter to a Children’s Home. The witness from Childline was appearing for the second time in such a case. While the defense argued that this meant she was an interested witness, the Special Court dismissed the contention and observed that Section 39 of the POCSO Act permitted the use of experts, NGOs, etc., and that the police had done nothing wrong in utilizing their expertise to record the statement of the victim.

The process under the Maharashtra Guidelines, 2015 for appointment and empanelment of NGOs and experts has, however, not been followed in Thane or Pune. There were sparing references to the presence of a support person in court with the child in judgments. With an overburdened prosecution, no legal representation, or Support Person, it appears that most children navigate the criminal justice system entirely on their own.

### Chapter III. Findings based on Judgment Analysis

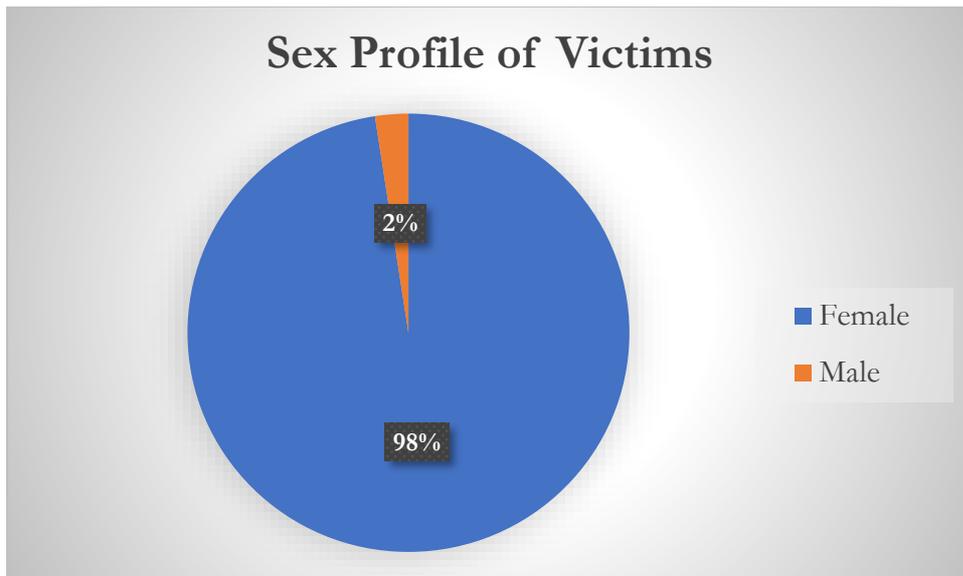
#### 3.1 Sex profile of the Victims

Of the 1330 cases analysed, there were a total of 1378 victims of which 1344 victims (98%) were female and 34 victims (2%) were male. These figures do not reflect the pervasiveness of sexual abuse of boys as captured in the MWCD Study on Child Abuse India, 2007 which stated that 52.94% boys and 47.06% girls had reported having faced some form of sexual abuse, while in Maharashtra, it was 49.43% boys and 50.57% girls.<sup>47</sup> The analysis of judgments revealed that sexual abuse against boys is heavily underreported.

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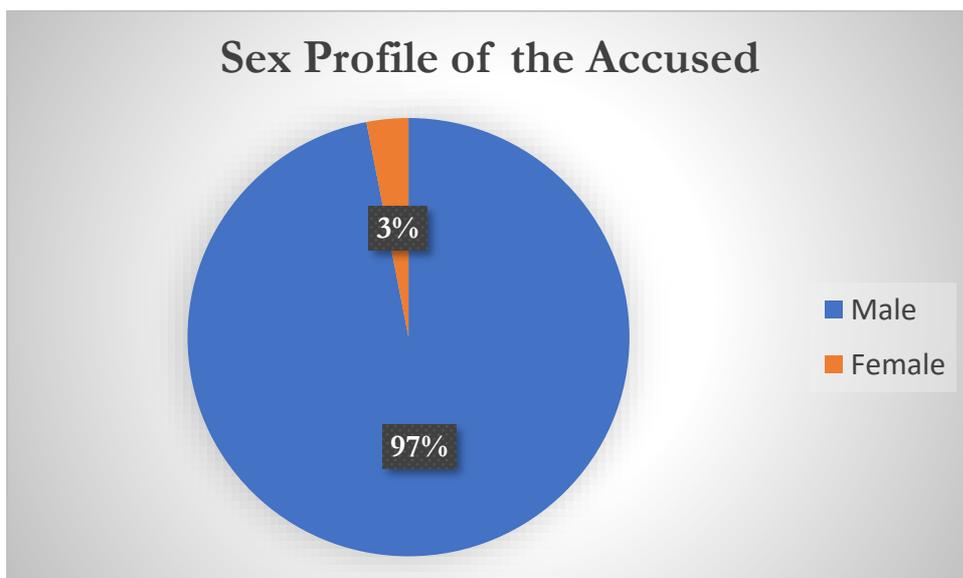
<sup>46</sup> Special Case (POCSO) No. 2/2016 decided on 25.08.2016.

<sup>47</sup> Ministry of Women and Child Development, *Child Abuse in India*, 2007, p. 75.



### 3.2 Sex Profile of the Accused

Of the 1611 persons charged under the POCSO Act, 50 were female (3%) and 1561 were male (97%). All females were charged for abetment under the POCSO Act and not for the commission of any sexual offence.



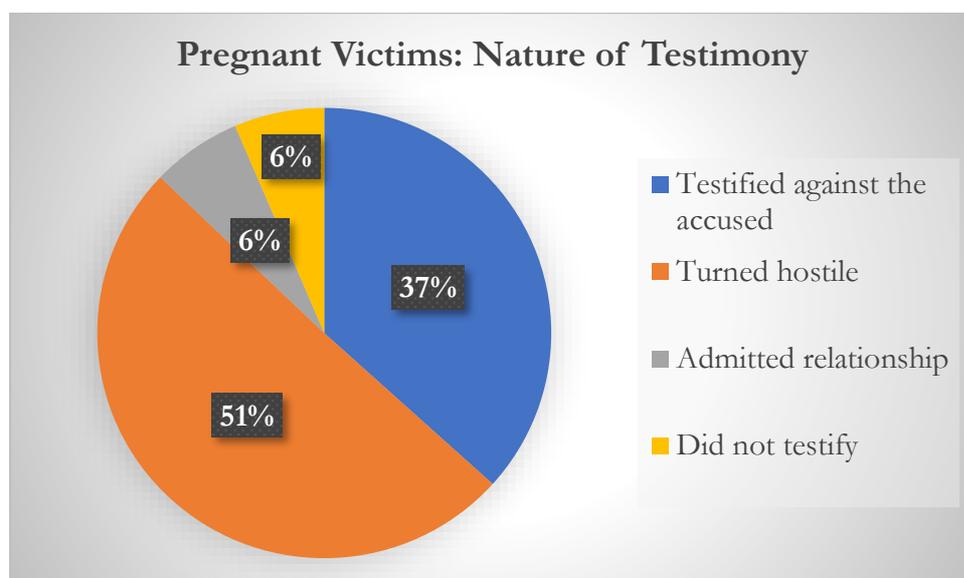
### 3.3. Pregnant Victims

In 108 cases (8.12%), the victim was either pregnant at the time of lodging the FIR or had a child subsequently after marriage with the accused, during the pendency of the trial. Respondents within the child protection system shared the challenges they face while dealing with such cases, especially if the child claimed to be in love with the accused.

In most cases, the FIR was lodged only after the pregnancy was discovered. The delay in discovery or disagreement between the victim and her parents on continuation of the pregnancy complicates the decision-making process for termination of pregnancy. Several respondents shared that the child victim is sent to a Shelter Home by the CWC because her parents wanted a termination, while the child victim

wanted to have the child and marry the accused. Since these cases constituted a significant number, it was felt necessary to examine the relationship between the victim and the accused and the outcomes in these types of cases.

- **Age-profile:** Of the victims who were pregnant, 59.25% i.e., 64 were between 16 and 18 years, and 27.77% i.e., 30 were between 13 and 15 years.
- **Relationship:** The accused was known to the victim in 106 cases i.e., 98.14%. In 54 cases i.e., 50%, the victim was in a “romantic relationship” with the accused or married to him. In eight cases, the accused was a father, brother, or the step-father. In 16 cases, the accused was an acquaintance and in 11 cases was related to the victim.
- **Charges:** In 46 cases, i.e., 42.59%, the charges framed did not reflect the aggravated nature of the offence and the accused was charged only under Section 4 (penetrative sexual assault), not under Section 6 (aggravated penetrative sexual assault).
- **Nature of testimony and outcome:** Convictions resulted in only 20 cases (18.51%) although in 40 out of 108 cases (37.03%) the victim testified against the accused. The victim turned hostile in 54 cases (50%). In six cases, the victim admitted to being in a romantic relationship with the accused, but did not testify against him and the judgment was silent on whether they turned hostile. Victims did not testify because of death (two cases), mental retardation (one case), and for other reasons such as compromise, advanced stage of pregnancy, marriage, etc. (five cases). A respondent from the judiciary was of the view that in such cases, the minimum punishment should be imposed on the accused if he accepts the responsibility of the baby conceived or born. If not, the maximum sentence should be imposed. A Public Prosecutor felt that the victim’s wishes should be considered and conviction should be pressed upon only if she desires it.
- **Compensation:** Compensation was awarded or recommended in only 12 cases in which the victim was pregnant although the pregnancy was established in all cases. Convictions were recorded in all cases in which compensation was ordered except one. In *State v. Narendra Rahangdale*,<sup>48</sup> the victim delivered a child, but the DNA test results did not indicate that the accused was the biological father. The accused was acquitted and the DLSA was asked to determine compensation for the victim girl and her newborn child. It is possible that some of the victims may have received compensation under the Manodhairya Scheme, 2013.

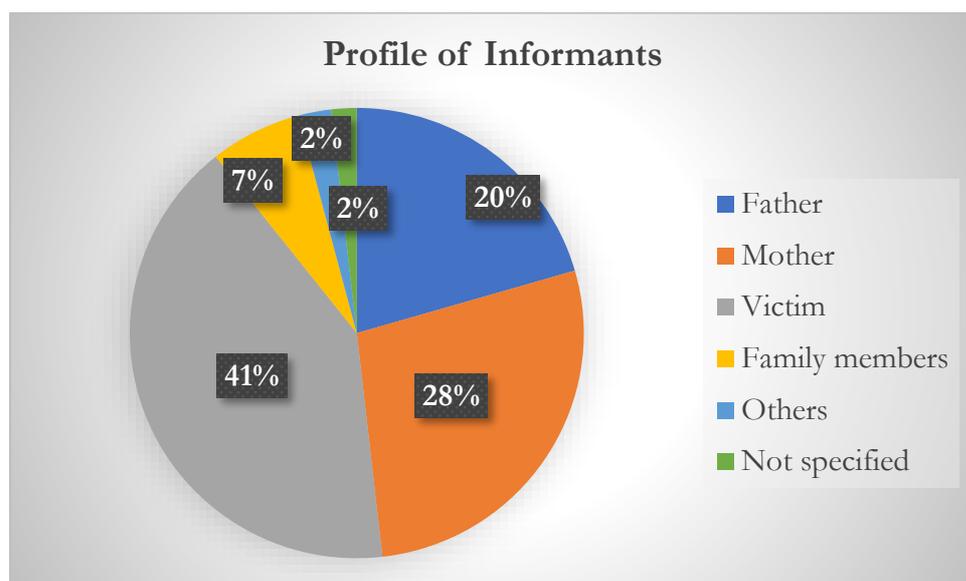


### 3.4. Profile of Informants

<sup>48</sup> Spl. (Atrocities/Pocso) Case No. 24/2013 decided on 22.04.2015 (Gondia).

Section 19(1), POCSO Act states that any person having information about the commission of sexual offences or an apprehension that the offence is likely to be committed should report the case to the police/SJPU. Failure to report the commission of an offence is a punishable offence under Section 21, which carries imprisonment upto six months or fine or both.

As the graph below indicates, majority of the cases were reported to the police by the victim (41%), victim’s mother (28%), and the victim’s father (20%). Other family members such as older siblings, uncle, aunt, grandparents, and cousins were informants in 7% cases. In most cases, the victim was accompanied by a family member to the police station for lodging the FIR. The matter was reported to the police by others in 31 cases (2%). These informants included NGOs, social workers, counsellor, hostel staff, Childline staff, police, doctors, hospitals, journalist, neighbours, local villagers, and eye witnesses.



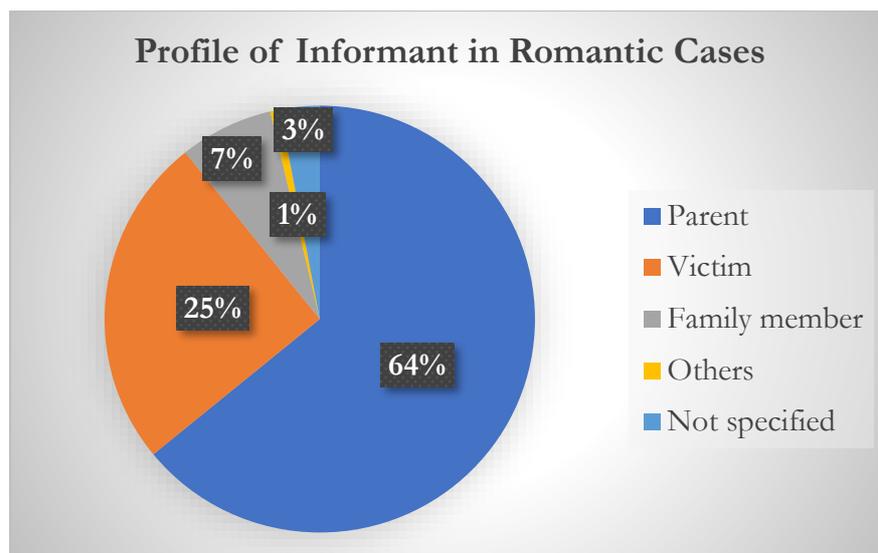
**Informants in case of abuse by father/step-father/mother’s boyfriend**

Of the 28 cases in which the accused was the victim’s step-father or the mother’s boyfriend, the complaint was filed by the victim in 17 cases and the mother in 11 cases. In one case, the victim was accompanied by NGO workers, and in another; she was accompanied by her mother and volunteers from Childline.

Of the 45 cases in which the father of the victim was the accused, the victim filed the complaint in 21 cases (46.66%), the mother in 18 cases (40%), and the grandmother; whereas the three and the three remaining cases were filed by a third person, Childline and a social worker.

**Informant in “romantic cases”**

Of the 273 romantic cases, the father filed the complaint in 105 cases (38.46%), the mother in 70 cases (25.64%), the brother in 10, the sister in one and other relatives in eight cases. As is evident in 64% of romantic cases, the victim’s parent set the criminal justice system into motion. The victim filed the complaint in 68 cases (24.81%), including one case filed with the help of Childline. *Mahila Mandal* filed one case, a doctor filed one and the complainant was not specified in nine other cases.



In several cases, the victim lodged an FIR when the accused did not fulfill his promise to marry her. In such cases, the victim usually accepted that she had filed the FIR out of spite or desperation, when the accused refused to marry her, or retracted her statement when the accused married her during the pendency of the trial. Sometimes, it is seen that the marriage of the victim and the accused has already been performed by the time the case comes before the Special Court. In *State v. Datta*,<sup>49</sup> the victim was found in a house with the accused. The victim had allegedly informed her father that the accused had enticed her with an offer of marriage. By the time the case was heard, the victim and the accused had already been married. The victim testified that she had given consent and had not, in any way, been forced by the accused. In *State v. Naim Ahmed*,<sup>50</sup> the victim lodged a FIR against her boyfriend because he refused to marry her. In her examination-in-chief and cross examination, however, she denied the suggestion that the accused enticed her with the promise to marry, and stated that they had subsequently married. The accused was, therefore, acquitted.

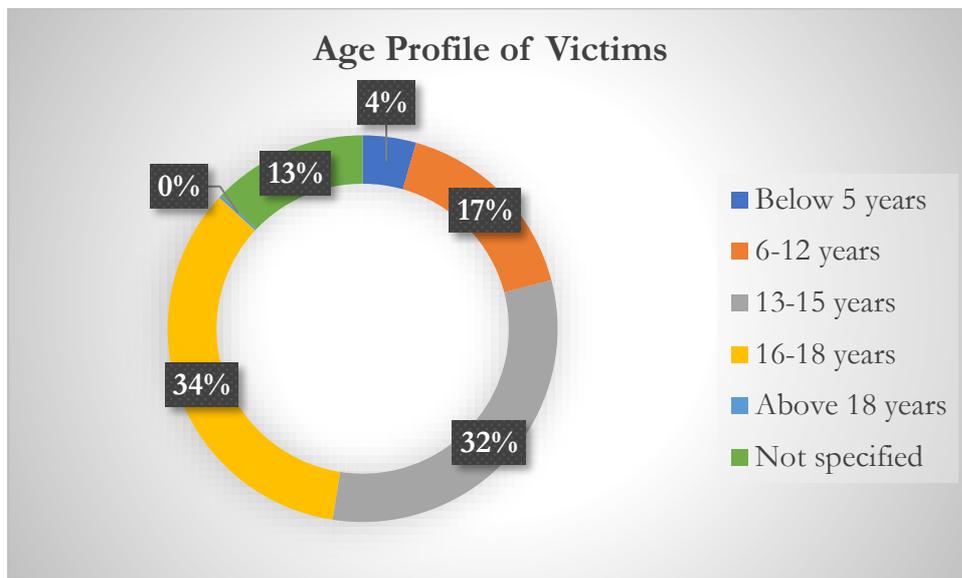
### 3.5. Age profile of victims

- The age of the victim was classified based on the age mentioned in the FIR. Majority of the victims i.e., 34% were between 16 and 18 years (474), closely followed by 32% of victims who were between 13 and 15 years (434).
- Victims below 12 years constituted 21% of the total number of victims, with children below five years comprising 4% (61) of the total number of victims.
- The victim was above 18 years of age at the time of the offence in three cases.
- While age was not specified specifically in 178 cases, in 30 of these cases, the Special Courts concluded that the child was below 18 years.
- The age of the victim was disputed in several cases by the accused or by the victim and/or her family members. For instance, while the parent stated that the victim was below 18 years at the time of lodging the FIR, the victim claimed to be above 18 years when she testified. In some cases, the parent denied the age specified earlier or the date of birth mentioned in the school records and stated that the victim was not a minor on the date of the incident.
- Of the 273 'romantic' cases i.e., cases in which the victim admitted to being in a relationship with the accused or was married to him, the victim was stated to be between 16-18 years in 60.07% cases (164 cases), and between 13-15 years in 27.47% cases (75 cases).

<sup>49</sup> Spl. Case [Child] No.07 of 13, decided on 10.08.2015 (Jalna).

<sup>50</sup> Special Child Protection Case No.33 of 2013 decided on 02.05.2016 (Mumbai).

- The Special Courts were not satisfied that the victim was a child in 14.51%, i.e., 193 cases, of which ‘romantic cases’ constituted 47.66% (92 cases).



### ***3.5.1. Age determination***

Application of the erstwhile Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (JJ Model Rules, 2007)<sup>51</sup> by the Special Courts was more of an exception. No reference was made to Section 94 of the JJ Act, 2015<sup>52</sup> in cases decided in 2016.

<sup>51</sup> Rule 12(3), JJ Model Rules, 2007:

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –  
 (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;  
 (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;  
 (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;  
 (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

<sup>52</sup> 94. (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

In *State v. Kanha Kowe*,<sup>53</sup> the 14-and-a-half-year-old victim was in a relationship with the accused and had become pregnant. When the accused refused to take responsibility, she went into depression and committed suicide. The FIR was lodged by her mother for abetment of suicide. The charges of rape and aggravated penetrative sexual assault were added later based on the confessional statement of the accused. The DNA report confirmed that the accused was the biological father of the victim's child. The defence contested the age of the deceased victim and argued that the intercourse was consensual. The Head Mistress of the school in which the victim studied produced the admission application and the admission register to show the entries indicating date of birth and the original school leaving certificate. The defence argued that the entries could not be relied upon because the person who made the entry and the person who gave the information were not examined. The Special Court, however, rejected this argument because the person who made the entry was not alive, the Head Mistress had issued the school leaving certificate, and there was no reason to doubt the veracity of the entries. According to the dental and radiological examination report, the victim was between 15 and 16 years. The accused argued that this was a clinical report and not age based on an ossification test. The Special Court, however, relied on *Jarnail Singh v. State of Haryana*,<sup>54</sup> and applied Rule 12(3), JJ Model Rules, 2007 to conclude that when date of birth as per school record is available, medical opinion on age is not relevant. The Special Court concluded that the school record established that the victim was below 16 years of age and convicted the accused for having committed rape and aggravated penetrative sexual assault.

In *State v. Bhavdu @ Somnath Rama Nameda*,<sup>55</sup> the Special Court applied Rule 12(3), JJ Model Rules, 2007. It held that where a birth certificate, a matriculation certificate or a school leaving certificate (of the first school to which the victim was admitted) was available, these documents could be used to prove the age of the victim. Where such documents were unavailable, the results of an ossification test could be used instead. In this case, while no birth certificate was available, the school register from the time of admission of the victim to Standard I was produced by the prosecution. The age mentioned in the register was based on the date of birth stated by the father of the victim. The Court found this to be sufficient proof of the age of the victim based on two grounds: first, that the father or mother of the victim would be most likely to know the date of birth of the victim, and second, that nothing was brought forward during the cross examination of the father of the victim to falsify his testimony.

In *State v. Rajkumar Bansi Ravidas*,<sup>56</sup> the 15-year-old victim had allegedly been enticed by the accused and subjected to forcible sexual intercourse. The accused, however, claimed that the victim compelled him to elope with her and they had consensual sex. The victim, however, testified against him. The victim's age was 15 years as per the school record. The Special Court held that the basis for the entry in the school records had not been established and the defence had contested her age. Since no medical examination had been carried out, her age was held to have not been conclusively established and the accused was acquitted as the victim was considered a "consenting party". The Special Court did not apply Section 34, POCSO Act, or Rule 12(3), JJ Model Rules and order an ossification test.

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Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

<sup>53</sup> Sessions Trial No.230/2013 decided on 29.11.2014 (Nagpur).

<sup>54</sup> 2013 All MR (Cri) 2946 (SC).

<sup>55</sup> Sessions Case No. 235 of 2014, Decided on 10.04.2015 (Nashik).

<sup>56</sup> Special Case No.22/2013 decided on 17.04.2015 (Thane).

### **3.5.2. Appreciation of school records**

While in some cases, Special Courts accepted the date of birth based on school records, in most cases it was rejected because the basis on which it was recorded was not established before the Special Court. If the defence did not contest the age of the victim, either the school leaving certificate was considered sufficient or the victim or the parent's statement about the victim's date of birth was accepted.

In *State v. Vaibhav Vinayak Choudhari*,<sup>57</sup> the defence contended that the birth certificate issued by the Municipal Corporation could not be relied upon unless an officer from the Municipal Corporation was examined. The prosecution relied on Section 35, Indian Evidence Act, 1872 (IEA) and the Supreme Court's decision in *Birad Mal Singhvi v. Anand Purohit*,<sup>58</sup> as per which three conditions should be satisfied for a document to be admissible under Section 35, IEA:

“firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law.”

The prosecution argued that the birth certificate fulfilled all three conditions and was therefore an admissible piece of evidence. The presumption as to genuineness of certified copies under Section 79, IEA and production of certified copies to prove contents of public documents under Section 77, IEA were relied upon. The Special Court concluded that the genuineness of the birth certificate should be presumed as it was a certified copy of a public record and was therefore a trustworthy piece of evidence about the victim's age.

In *State v. Siddheshwar Dattoba Pawar*,<sup>59</sup> the victim's age was 13 years as per oral evidence and the school records. No proof of the basis on which the age was recorded by the school was adduced before the Special Court. The Special Court observed, “in usual practice, school record is presumed genuine for ascertaining the age of a student.” It concluded that, in ordinary course, if the child had passed every year since admission, she would be between 13 and 14 years on the day of the incident, and thus a child under the POCSO Act.

In *State v. Dildar Kesharwani*,<sup>60</sup> though the head mistress was examined and true copies of the school register and leaving certificate were filed, the Special Court held that the prosecution had not established the accuracy of these documents. It observed:

“The entry as regard the date of birth taken ... is merely carry forwarded from the entry of the previous school record. There is nothing on the record to demonstrate as to who supplied the information as regard the date of birth of the prosecutrix in her previous school. Therefore, it cannot be said that it is the primary evidence as regard the date of birth of the prosecutrix. Even otherwise, entries in school record made by Head Master or Head Mistress in discharge of their official duties, can be regarded as pieces of circumstantial evidence and not as direct evidence of the date of birth of the prosecutrix. A school admission register or leaving certificate is not a conclusive evidence of the age of the prosecutrix.”

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<sup>57</sup> Session Case No. 21/2014 decided on 28.07.2016 (Thane).

<sup>58</sup> AIR 1988 SC 1796.

<sup>59</sup> Special (POCSO) Case No. 09/2014 decided on 11/02/2015 (Beed).

<sup>60</sup> S.T. No. 423/2014 decided on 05.04.2016 (Nagpur).

In *State v. Sonu Sobrati Khan*,<sup>61</sup> the Special Court held, “non-production of birth certificate on record on the basis of which entry of date of birth of the girl in school record is made has to be held as fatal lacuna and create doubt about exact age of the girl.”

### **3.5.3. Interpretation of ossification test results**

In majority of the cases, the benefit of the margin of error with respect to ossification test results was not given to the victim. For instance, in *State v. Rehman Saakir Khan*,<sup>62</sup> the victim’s age was mentioned as 12-13 years in the FIR. The doctor testified that she was between 12 and 14 years. However, he had not seen her x-ray report. As per the ossification test, she was 17 years plus/minus 6 months. The Special Court concluded that it would not be “safe to hold that the victim-girl was minor on the date of incident as there remains doubt about the age of the victim-girl” and held that the prosecution had failed to prove that she was below 18 years.

In *State v. Nitin Suryawanshi*,<sup>63</sup> the victim had allegedly been raped by the accused. Her age was 14 years as per the FIR, the entries in the school record, and her mother’s testimony. Even though her testimony was recorded a year after the incident, she stated her age as 14 years, causing the Special Court to regard her statement about her age as being unclear and unreliable. The Head Master of the school in which the victim studied was examined. He had personally filled in the information. The validity of this record was questioned because the victim’s guardian’s name was not recorded and the date of birth was mentioned orally by the parents. No documents were produced at the time of admission like birth certificate, extract issued by the Gram Panchayat or Municipality. The prosecution also examined the doctor who referred the victim to a radiologist who stated that she was above 14 years and below 16 years. The doctor who testified, had not personally examined the victim and admitted that, as per Modi’s Jurisprudence, the margin of error may be up to three years plus/minus. The Special Court relied on *Balasaheb v. State of Maharashtra*,<sup>64</sup> a judgment of the Bombay High Court which predated the JJ Act, 2000, and held that the error in case of age-based ossification test can be plus/minus three years and concluded that the advantage of the margin of error should be given to the accused, as based on the margin of error, the victim appeared to be 19 years.

### **3.6. Age profile of the accused**

Majority of the accused persons, i.e., 75% (1136) were between 18 and 30 years of age, 16% (245) were between 31 and 45 years, 5% (80) were between 46 and 60 years, and 1% (22) were above 60 years. The age of the accused was not specified in 3% cases (42). Only the age of accused charged with a sexual offence under the POCSO Act was used for the analysis of the age profile. A plea of juvenility was not raised by the defence or discussed in any of the judgments.

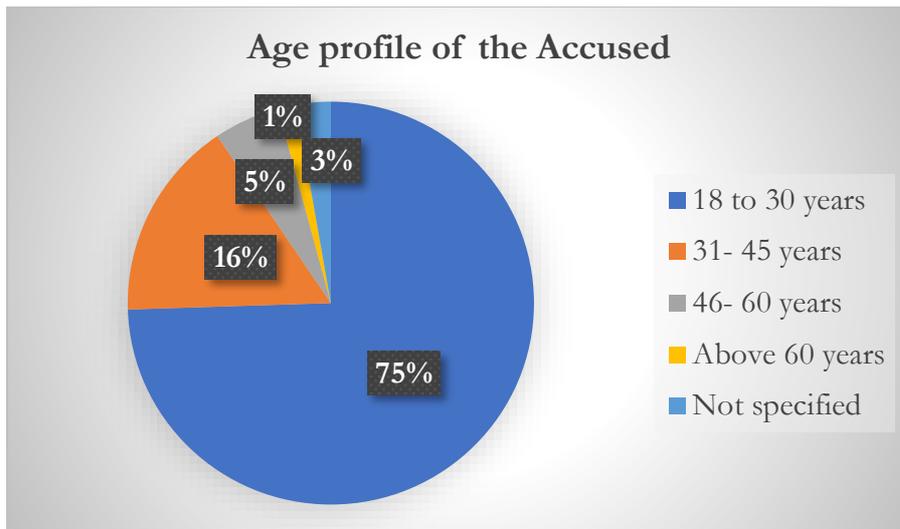
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<sup>61</sup> Special Case No. 82/2014 decided on 23.07.2015 (Thane).

<sup>62</sup> Special Case No.133/2014 decided on 07.05.2016 (Thane).

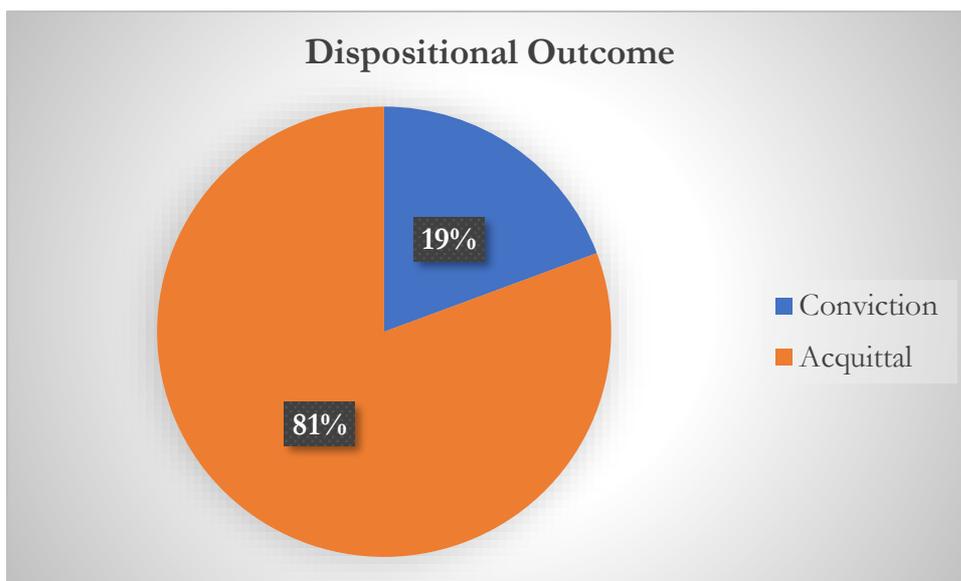
<sup>63</sup> Special Case (POCSO) No. 49/2014 decided on 16.07.2016 (Latur).

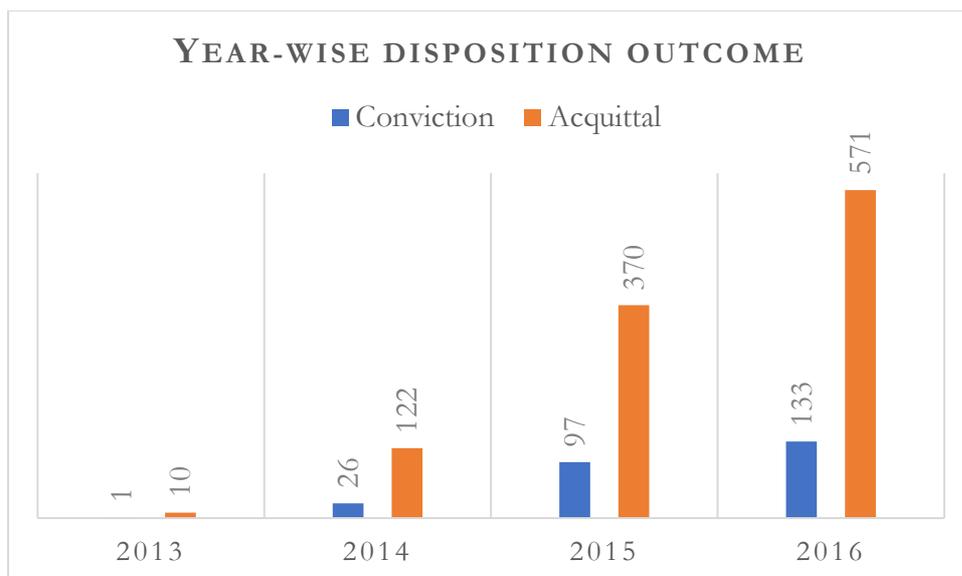
<sup>64</sup> 1994 Cr.L.J. 3044 Bom



### 3.7. Conviction Rate and Factors affecting Conviction

Conviction was awarded in 257 cases out of 1330 cases, i.e. 19% with the acquittal rate being 81%. The conviction rate was highest in 2015 at 20.77% and lowest in 2013 at 9%. It was 18.94% in 2016.





### ***3.7.1. Conviction under the POCSO Act and the IPC***

In 235 cases (91.43%), the accused was convicted under both the POCSO and the IPC. Sentences under both the IPC and POCSO were imposed in 165 cases (70.21%).

### ***3.7.2 Conviction under the POCSO Act and Other Acts***

In 103 cases (7.74%), the accused was charged under the POCSO Act as well as other Acts, not including the IPC. For details, refer to Section 3.8 below.

For instance, in one case,<sup>65</sup> there were pornographic images and videos of the minor victim found on her father’s mobile phone and the medical examination of the victim showed an old tear of the hymen, consistent with the initial complaint of the victim. Her statement under Section 164 corroborated her testimony in court. The Chemical Analyser’s report confirmed that the blood of the accused was under the fingernails of the victim and his semen stains were found in the room where the victim had said the rape was committed. The Special Court held that the prosecution had proved beyond reasonable doubt that the accused had repeatedly raped his own daughter, and had taken pornographic images of her. The accused was convicted under the IPC (Sections 376(2)(i) and 506), the Information Technology Act (Section 67B) and the POCSO Act (Section 4). He was sentenced under the IPC and the Information Technology Act, 2000 due to the alternate punishment clause provided for in Section 42, POCSO Act.

Similarly, in another case,<sup>66</sup> the 14-year-old victim was married to a 20-year-old man. She was impregnated by her father for the third time and was 4.5 months pregnant when her mother-in-law discovered her pregnancy and they lodged the FIR. Charges were framed against nine persons under Sections 5,6, and 17 of the POCSO Act, Sections 9, 10, and 11 of the Prohibition of Child Marriage Act, 2006 (PCM Act), and Sections 376, 109, and 315 of the IPC. The accused included the victim’s father, mother, uncle, and husband, among others. The age of the victim was heavily contested in this case. The Special Court applied Rule 12(3), JJ Model Rules and relied on the school records to conclude that the victim was a child on the date of lodging of the FIR. Although the victim turned hostile and claimed that the pregnancy was caused by her husband, the DNA test results confirmed that the victim’s father was

<sup>65</sup> Sessions Case No. 207 of 2014, Decided on 15.07.2015 (Nashik).

<sup>66</sup> Special Case No. 02/2015, decided on 10/27/2016 (Buldana).

the biological father of the child. He was convicted under the POCSO Act and under Section 11, PCM Act (punishment for promoting or permitting solemnisation of child marriage). The victim's mother was also convicted under Section 11, PCM Act and her husband was convicted under Sections 9 (punishment for male adult marrying a child) PCM Act.

### **3.7.3 Acquittal under the POCSO Act, but conviction under the IPC or other laws**

In 35 cases (2.63%), the accused was acquitted under the POCSO Act, but a conviction was recorded under the IPC or another Act. This was seen most commonly when the sexual or other offence against the victim was established, but the age of the victim was not proved to be under 18 years.

In *State v. Pravin @ Khanna*,<sup>67</sup> both the accused had allegedly gang-raped the victim who claimed to be 15 years of age. She was walking back to her house through the village when the accused accosted her and asked her to sit with them on the motorbike. When she refused, they abducted her and took her to a field, and raped her. Later, they dropped her to the village and threatened to kill her if she disclosed the incident. The victim gave clear and convincing testimony against the accused. The testimony of all the other witnesses also corroborated her story. The medical evidence also supported a finding of rape, though the two-finger test was used to make this determination. The Special Court, however, was not convinced about her age. The Special Court relied on *Sandeep Konde v. State of Maharashtra*,<sup>68</sup> and *Ravindra Gorkhi v. State of MP*,<sup>69</sup> to hold that primary evidence is essential, and a *bona fide* certificate could only be used as corroborative evidence. Since the intercourse was non-consensual, the Special Court convicted the accused of rape under the IPC.

Similarly, in *State v. Suresh Vitthal Gavade*,<sup>70</sup> the accused was charged with kidnapping, wrongfully confining and raping a girl who claimed to be 15 years of age. Due to lack of documentary or medical evidence, the prosecution was unable to prove that the victim was below the age of 18 years on the date of the incident. The Special Court held that the POCSO Act would not apply to this case. Since the testimony of the victim was found to be reliable insofar as the charge of wrongful confinement and rape was concerned and the medical report corroborated her testimony, the accused was convicted under Sections 342 and 376(2)(k), IPC even though the victim turned hostile during cross-examination.

In *State v. Barkya @ Vishwas*,<sup>71</sup> the male victim aged 15 years was found murdered in a maize field. The previous evening, he had been spotted by his parents and other witnesses being taken away to a temple by the accused. It was alleged that the accused had been forcing carnal relations with the victim and that he had murdered him to ensure that this was not disclosed to anyone. The accused was the last person seen with the victim, the night before his body was found. The accused had also shown the police some of the belongings of the victim in his house. The injuries sustained by the accused as well as the victim supported the prosecution's version. For these reasons, the accused was convicted under Section 302, IPC. However, the medical evidence did not disclose that the victim had been sexually assaulted, and therefore he was acquitted under the POCSO Act.

### **3.7.4. Nature of Testimony**

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<sup>67</sup> Sessions Case 30/2015 decided on 23.08.2016 (Islampur).

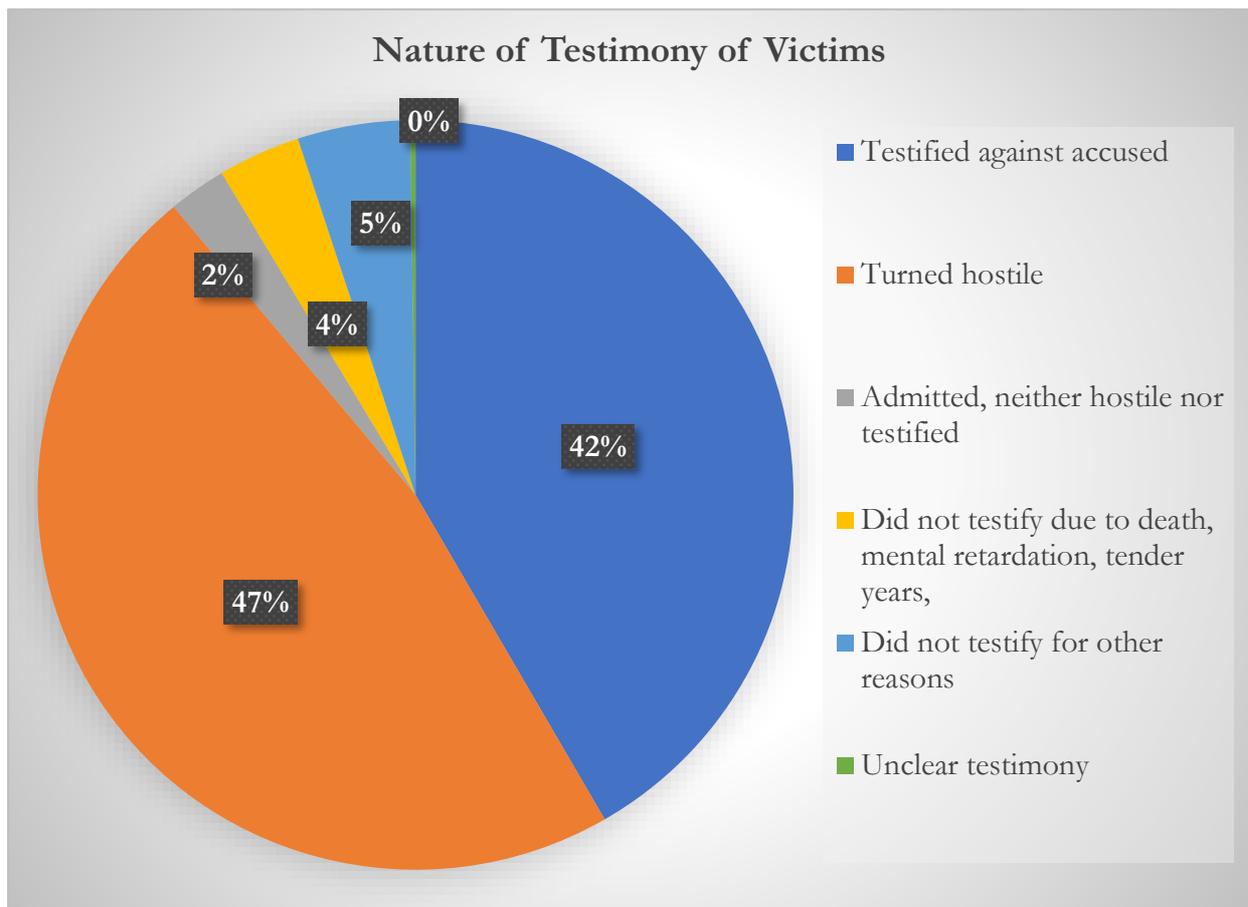
<sup>68</sup> 2016 All MR (Cri.) 1433

<sup>69</sup> 2006 Cr.L.J 2791.

<sup>70</sup> Sessions Case No. 310 of 2015, Decided on 27.10.2016 (Nashik).

<sup>71</sup> Sessions Case 17/2014 decided on 03.12.2016 (Sangli).

- In 554 cases (42%), the victim testified against the accused, and in 629 cases (47%) the victim turned hostile.
- In 33 cases (2%), the victims admitted to being in a romantic relationship with the accused, but either did not testify against him or turned hostile.
- In 47 cases (4%), the victims did not appear in court because of death (18), tender years (22), or mental retardation (7).
- In 64 cases (5%), the victims did not testify because of various reasons such as relocation, marriage, unwillingness of parents, compromise between parties, accused pleading guilty, or the victim's family being untraceable.
- In three cases, the testimony of the victim was unclear, making it difficult to classify the testimony.



### ***3.7.5. Grounds for convictions***

#### ***3.7.5.1. Cogent testimony of the child***

In *Bharwada Bhoginbai Hirjibhai v. State of Gujarat*,<sup>72</sup> the Supreme Court of India held:

“In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the

<sup>72</sup> (1983) 3 SCC 217.

woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.”

In *State of Punjab v. Gurmit Singh*,<sup>73</sup> the Supreme Court held:

“Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.”

Judgment analysis has shown that this mandate has been rarely adhered to by the Special Courts, which have recorded very few convictions based solely on the cogent testimony of the victim. For instance, in *State v. Balaji Reddy*,<sup>74</sup> it was alleged that the accused had lured the 10-year-old victim girl to his house and molested her. Her parents began searching for her when they realised she was missing, and, having found her in the house of the accused, lodged an FIR against him. The victim's testimony was clear and cogent. She stated that when she was sleeping near her parents, she was awakened by the accused and taken to his house. The accused molested her and then threatened her. The testimony of the victim was unshaken by cross-examination. Her mother's testimony corroborated the fact that the victim was found in the house of the accused, but the Special Court relied solely on the testimony of the victim to convict the accused.

In *State v. Ankush*,<sup>75</sup> the accused was convicted for luring the victim behind a temple and committing penetrative sexual assault. The court was extremely sensitive in appreciating the testimony of the victim. The victim said that the accused had removed her clothes and covered her mouth, and then she felt pain in her hands and legs. The court took notice of the fact that the child was 7 years of age when the incident occurred, and by the time she was testifying in court she was already 9 years of age. The court observed that a 7-year-old child may not even have understood as to what was happening with her, and cannot be expected to remember the exact details of an incident which occurred two years earlier.

In *State v. Rajudan Gemardan Charan*,<sup>76</sup> the 15-year-old victim filed an FIR stating that the accused, her brother's friend, had raped her on at least three occasions, four months prior to the filing of the FIR, resulting in pregnancy. The accused was convicted based on the cogent testimony of the victim, corroborated by the DNA test that showed that the accused was the father of the child.

The accused argued that the victim had consented because there was a four-month delay in filing the FIR and that the victim continued to go to the same place to relieve herself, even though it was where the accused accosted her. The Special Court stated that the delay in filing the FIR was explained by the fact that the accused had threatened to kill her if she disclosed the incident. It was noted, further, that the victim was the sole female member of her household, and did not have a mother to confide in. Moreover, the fact that the victim went to the same spot repeatedly was explained by the fact that it was the designated area for the said purpose. The presumption under S. 114A, Evidence Act was applied for the offence under S. 376, IPC, and since the accused failed to prove that there was consent, he was convicted. He was also convicted under Section 4, POCSO Act.

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<sup>73</sup> AIR 1996 SC 1393.

<sup>74</sup> Special Case (POCSO) 170/2013 decided on 09.02.2016 (Sangli).

<sup>75</sup> Spl. Case [Child] No.01/13, decided on 02.09.2013 (Jalna).

<sup>76</sup> Special Case (Under POCSO Act) No. 18/2014 decided on 13/01/2016 (Beed).

In *State v. Ganesh @ Vastad Gulab Wankhade*,<sup>77</sup> the victim, aged 12-13 years, was repeatedly raped by the two accused on two different occasions and then once only by Accused no. 1 (aged 45 years), over a period of about 10 days. They were her uncle's colleagues, and they raped her "in sequence consecutively for two times" on each occasion. The victim's parents only found out when she subsequently started showing signs of pregnancy, and by the time the report was lodged, the victim was in the ninth month of her pregnancy. Before the trial, she had already given birth to a baby girl, whose DNA tests conclusively showed that the accused no. 2 (aged 33 years) was the father. The victim remained true to her testimony, and it was further bolstered by the DNA test. The minor contradictions pointed out by the defence were overruled as it was observed that it may have been "due to slip of tongue or faint memory by lapse of time" and both accused were convicted.

### ***Special Courts' response to tutoring claim***

In some cases, Special Courts rejected the claim of the defence that the victim had been tutored by her parents or family members. For instance, in *State v. Mithilesh Cheddi Yadav*,<sup>78</sup> the Special Court dismissed the defence's argument that the victim had been tutored by her mother. The 5-year-old victim, in her cross-examination, admitted that her mother had asked her to identify the accused – her neighbor - as the same person who had committed penetrative sexual assault. The victim admitted that her mother and the accused had quarreled over water and that her mother used to say that she would file a complaint against him because they had to vacate their house due to him. The Special Court was of the view that her admission pointed to her innocence and observed:

"It is very common aspect in slum area or chawl to have some disputes on account of common water tap or wash-room but for that purpose no one can impute such serious allegations, staking character of small girl. Particularly in Indian society character of girl is most cherished for parent. **Further, even victim girl is a small girl and if her mother told her how to behave in court or how to answer that cannot amount to tutoring. Particularly when victim-girl specifically denied the suggestion that she deposed everything in her examination-in-chief as stated by her mother.**" (Emphasis added)

The Special Court also observed that "...enmity is a doubled edged weapon. Therefore, there seems reason for accused to do such heinous act."

Along the same lines, in *State v. Pankaj Fule*,<sup>79</sup> the Special Court observed:

"Though in cross-examination, the victim admitted that her brother told her how to depose before the Court ... only this admission is not sufficient to discard her entire testimony which is otherwise reliable and very well supported by other evidence and upto some extent by defence itself. Further, her brother told her 'how' to depose and not 'what' to depose, therefore also, this admission does not create any doubt on her testimony."

In *State v. Amol Maruti Sberkar*,<sup>80</sup> the Special Court observed:

"...minor victim girl is a sharp girl and she wisely faced the process of recording of evidence before the court. I don't find that she is tutored witness. Her age is so small, i.e. 4 years, she don't know what is happening with her, what accused no.1 did with her by inserting his fingers in her

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<sup>77</sup> Special Case No. 76/2013, decided on 1/8/2016 (Buldana).

<sup>78</sup> Spl. Case No. 51/2014 decided on 10.02.2016 (Thane).

<sup>79</sup> Special Criminal Case No. 12/2014, decided on 22.09.2016 (Nagpur).

<sup>80</sup> Special (Child) Sessions Case No.158 OF 2014 decided on 27-03-2015 (Pune).

vagina. She only stated whatever really occurred with her. There is no reason for this small girl to say against accused No.1 before the Court. Whatever things occurred to her, she has stated before the court.”

In contrast, in *State v. Amol @ Shrikant Bhaskar*,<sup>81</sup> the Special Court felt that the testimony of the 4-year-old victim was unreliable because she admitted that her mother taught her. In her chief examination, the victim stated that when she went to buy chocolates, the accused showed her a video of oral sex and asked her to replicate it. He then proceeded to force her to orally stimulate him. During cross-examination, she admitted she did not go to the shop and the incident did not occur, though she had stuck to the prosecution version in examination-in chief. The Special Court observed:

“In view of age of victim and admissions given by her, to the effect that her mother taught her after coming to court, she did not go in the shop of accused on that day and mobile was not shown to her, I am of the view that her evidence being evidence of child witness of the age of 4 years, could not be relied upon, when she has stated that her mother taught her. It goes to show that she is tutored and in such circumstances it is very dangerous to rely upon the testimony of the alleged victim.”

### ***3.7.5.2. Testimony of the child corroborated by testimony of others***

By their very nature, sexual offences happen in circumstances where there are likely to be no witnesses aside from the victim and the offender(s). However, while there may not be witnesses to the sexual offence itself, it was observed in several cases, that other witnesses were able to lend credence to the story of the victim, and the case of the prosecution, by testifying to facts surrounding the offence.

In *State v. Rajesh Bagde*,<sup>82</sup> the 27-year-old accused had molested the 13-year-old victim by pressing her breasts, while she was staying at her neighbor’s house since her mother was out of town. The testimonies of the victim, the neighbor and the mother all complemented and the accused was convicted. Observing that “offences of such nature are always committed in seclusion and as such one cannot expect that there would be some direct evidence”, the Court relied on the testimonies of the witnesses. It then made the following observations while appreciating the testimonies: (i) the evidence of the prosecutrix, if found to be reliable and worthy of credence, requires no corroboration; (ii) witnesses are not expected as such to depose in Court exactly as their statements made to the police (“verbatim”); (iii) the age of the victim was so tender that it was not expected from her to know about her feelings, more particularly the sexual feelings/urges which could have arisen from the act of the accused and made her uncomfortable (while assessing the impact on the victim);(iv) the victim’s “response or resistance in the form of shouts and running away from the spot shows that she has not liked the conduct of accused as per her conscience.”

In *State v. Siddheshwar Dattoba Pawar*,<sup>83</sup> the 13-year-old female victim filed an FIR stating that the accused sexually harassed her. She testified that while she was walking home from school, the accused came and caught hold of her hand, ‘made a gesture by eye’ and asked her to come with him. At that time, they heard a motorbike and the accused ran away. The person who was on the motorbike found her crying there and she narrated the incident to him. This witness testified to finding the victim there crying there while on his way home on his bike. He stated that he then dropped the victim home. The victim’s father also corroborated their evidence by stating that the witness brought the victim home and then thereafter

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<sup>81</sup> Spl.(Child Sex)C.No.33/2014 decided on 22.04.2015 (Osmanabad).

<sup>82</sup> Special Case No. 33/2013, decided on 01/22/2015 (Gondia).

<sup>83</sup> Special (POCSO) Case No. 09/2014 decided on 11/02/2015 (Beed).

he took her to the police station to file the FIR. Thus, the accused was convicted based on the testimony of the child, corroborated by the testimony of the two other witnesses.

In *State v. Suresh Soma Jadhav*,<sup>84</sup> the testimony of the six-year-old victim that the accused lured her out of her house claiming that her mother was asking for her, took her to a forested area, and abused her overnight, was found convincing. The victim described how the accused took off her pants and undressed himself, touched his penis to her vagina repeatedly, and touched her body throughout the night. While there was no medical evidence, the mother and brother of the victim corroborated the testimony of the victim, insofar as the role of the accused in luring her out of her house was concerned. This was considered sufficient for conviction, especially because the defence story of false implication did not hold much water.

### ***Conviction based on testimony of other witnesses***

Sometimes, the victim was unable, or unwilling, to testify due to tender years, or death, or other reasons not specified in the judgement. But a conviction came to be recorded due to the cogent testimony of the family members of the victim, or other witnesses, along with other supporting evidence. For instance, in *State v. Rajesh Babli Singh*,<sup>85</sup> the victim was a two-months-old female baby, whose parents were working as watchmen at a construction site. The accused would regularly socialize with the parents of the victim and play with the victim, and therefore, her parents trusted him. He took the baby with him after lunch one day, and the victim later was found by her parents and others, lying on a floor, crying, with blood oozing out of her private parts. The accused was seen running away from the scene, with his pants (near the zip) stained with blood. An FIR was lodged against him. At the trial, the parents' testimony remained unshaken and along with the medical evidence led to the conviction of the accused for aggravated penetrative sexual assault and rape.

Similarly, in *State v. Irfan*,<sup>86</sup> the sister of the deceased victim filed an FIR, stating that she discovered the victim's body in the morning. On confronting the accused, he confessed to her that he had raped and murdered the victim. However, she did not report the matter and gave a false statement initially as he had threatened her. She later modified her statement by giving a supplementary statement stating that she had seen the accused emerge from the victim's room. The accused was convicted primarily based on the medical evidence (semen samples, blood samples etc.) and the testimony of the sister.

In *State v. Pandurang Plet*,<sup>87</sup> the victim was a 7-year-old girl who was abducted by the accused on her way to school. He forcibly caught her hand and forced her into his house. This incident was witnessed by another student who immediately reported the matters to the school authorities. The authorities rushed to the house and broke down the door, only to find that the accused had disrobed himself and was holding her hand. The police were called and the complaint was filed. The Special Court discussed in detail the attempt to gain the testimony of the victim. The victim was brought in to testify on two occasions over two months apart, however, she could not give her testimony in either instance. The testimony of various eye-witnesses established that the accused had grabbed the victim and disrobed her and himself in his house. The Special Court relied on their testimony to convict the accused under Section 8, POCSO Act.

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<sup>84</sup> Sessions Case No. 42 of 2015, Decided on 04.02.2016 (Nashik).

<sup>85</sup> Spl. Case No. 8/2013, decided on 09/09/2015 (Kolhapur).

<sup>86</sup> Special Case (POCSO) No. 2/2014 decided on 03.03.2015.

<sup>87</sup> Sessions Case 205/2013 decided on 17.11.2014 (Sangli).

### **3.7.5.3. Testimony of the child corroborated by medical evidence**

In several cases, DNA reports were relied upon by the Special Court to convict the accused where the victim became pregnant because of the sexual assault.

In *State v. Chotelal Prajapati*,<sup>88</sup> the 15-year-old victim was being repeatedly raped by her step-father and became pregnant. The delay of five months in filing the complaint was condoned by the Court considering the position of power enjoyed by the accused and the stigma attached to rape. The testimony of the child coupled with the DNA test result led to the conviction of the accused.

In *State v. Rajesh Natha Charhan*,<sup>89</sup> the victim was a 5-year-old girl who had been brutally raped by the accused. The accused had visited the house of the victim to enquire about certain repairs to be conducted by the father of the victim. While the repairs were being carried out, the accused asked whether he could take the victim to a nearby shop to buy her biscuits. When the two did not return, the parents and neighbours looked for the victim. They were unsuccessful and returned home where they found the victim in a very disturbed state and saw the accused running away. The victim's pants were covered in blood and her top was soiled. She was immediately rushed to hospital, where a medical examination was carried out. Her injuries were severe and she had to undergo surgery. The victim's testimony was clear and cogent. She stated that she had been taken into the jungle where the accused raped her. When she tried to resist, he punched her in the stomach. Her testimony remained unshaken even on cross-examination and she rejected the allegations regarding her being tutored. The testimony of the doctor who examined the victim was also considered. She explained the extent of the injuries and the steps taken to operate on the victim. There were many injuries in and around the genitalia of the victim and the anus was torn as well. There was also foreign material in the stomach of the victim which was forced in during the rape. Based on the child's testimony and medical evidence, the accused was convicted.

### **3.7.5.4. Accused failed to discharge burden of proof**

In *State v. Laxminarayan @ Kochu Chotelal Kharakwar*,<sup>90</sup> the 13-year-old victim went to a nearby grocery shop to buy a packet of milk. When she was waiting at the counter, the accused moved his hand on to the back of the victim, also touching her backside. Angered by this, the victim slapped the accused and a quarrel between their families ensued. The victim's testimony and the failure of the accused to rebut the presumption under Section 30, POCSO Act, led to a conviction. The Special Court noted:

“It cannot be lost sight of the fact that Sec. 30 of the said Act provides presumption of culpable mental state. From the evidence of the prosecutrix it is explicit that the accused did possess a culpable mental state when he inappropriately touched the back of the prosecutrix which obviously resulted in a slap by her. The accused has failed to prove that he had no such mental state with respect to the act with which he is charged.”

Similarly, in *State v. Jayesh Hemant Bandale*,<sup>91</sup> while the presumption under Section 30 was not explicitly raised, the burden was placed on the accused to prove that the 17-year-old victim was making up the allegation of sexual harassment. The accused, aged 23 years, had allegedly told the victim that she looked good and had suggested that they go to a nearby lodge. He forcibly held her hand, and when she shrieked, people nearby were alerted and the accused was forced to flee. The accused's defence was that he was being falsely implicated and that the incident must have occurred between the victim and a friend of his

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<sup>88</sup> Special (Child) Case 54/2014 decided on 27.06.2016 (Wardha).

<sup>89</sup> Special (Child) Sessions Case 90/2013 decided on 21.01.2016 (Pune).

<sup>90</sup> Sessions Trial Case No. 164/2014 decided on 17.08.2016 (Amravati).

<sup>91</sup> Special Court No. 74/2014 (J)\* decided on 26.02.2016 (Goregaon).

who was walking with him, and the only reason that he was being accused was because the victim and the passer-by knew him by name. The Court disregarded this defence as the accused could provide no reason as to why the victim would want to implicate the accused in such a complaint and what grudge she had against him.

### ***3.7.5.5. Consent of minor invalid***

Some convictions were recorded purely because a minor's consent is invalid under the POCSO Act. In *State v. Sobail Patel*,<sup>92</sup> the 17-year-old victim and the accused were acquainted at a social event. After this, they began exchanging messages and speaking over the phone. As their relationship grew, they informed their parents about the same, and there was an informal understanding that the accused was free to marry the girl of his choice. The accused even moved in with the victim, and allegedly elicited her consent for sexual intercourse after promise of marriage. Later, due to her exams, he went to stay with his friends. A complaint was filed when it came to the attention of the victim and her family that the accused was getting married to someone else. The Special Court observed that there was proof of the minority of the victim. Since the incident took place prior to the 2013 amendment, it acquitted the accused of the charges framed under the IPC, but, taking cognizance of the position under the POCSO Act, convicted the accused for having committed penetrative sexual assault with a child.

Similarly, in *State v. Ramling @ Raghu Dnyandeo Keskar*,<sup>93</sup> the victim's father had filed an FIR stating that the accused had kidnapped his daughter aged 17 years. The Special Court found that the victim had "consented" to sexual intercourse:

"...it reveals that the victim went with accused on her own accord and without application of force by accused. It further reveals that no injury is found on the person of victim. It is argued that no injury is found hence there is no question of committing rape...Though she stated that accused used force, but I am of the view that such physical force is not used by the accused and the victim was consenting party to the sexual intercourse."

However, the Special Court held that the consent of a minor was irrelevant according to the sixth proviso to Section 375, as well as under Section 4 of the POCSO Act, and convicted the accused.

### ***3.7.6. Reasons for acquittal***

#### ***3.7.6.1. Victim turned hostile***

The principal ground on which acquittals took place is because the victim turned hostile.

- Out of the 629 cases in which the victim was declared hostile, acquittals were recorded in 618 cases (97.93%) and convictions in 11 (1.74 %). Of these, 159 cases (25.27%) were romantic in nature, and 31 (5.06%) were cases in which the accused was a father, brother or step-father. According to a Public Prosecutor, the pressure from the community to compromise is very high in these types of cases and that explains why victims turn hostile. It is important to note that, these categories aside, victims turned hostile in most cases in which the accused was known to them in some way. Refer to Section 3.9 for more details.
- **Hostile on the point of age:** The victim was declared hostile on the point of age in 60 cases, i.e., 9.53% of which 38 (63.33%) were romantic cases.

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<sup>92</sup> Special (Child) Sessions Case 87/2013 decided on 21.07.2015 (Pune).

<sup>93</sup> Special (Child Sex) Case No. 9/2014 decided on 19.11.2014 (Osmanabad).

- **Hostile on the point of sexual offence:** In 566 cases, i.e., 89.98%, the victim turned hostile on the point of sexual offence. Of these, 134 (23.67%) were romantic cases, and 75 (13.25%) were cases in which the accused was related to the victim.
- **Hostile on the ground of identity:** The victim turned hostile on the point of identity in 79 cases, i.e., 12.55%. Of these, the accused was a stranger in 22 (27.84%) cases. The accused was known to the victim, as a relative, friend, boyfriend, or acquaintance in 72.16% cases.
- **Hostile on other grounds:** In certain cases, the victim turned hostile because a compromise had been reached between with the accused. Sometimes, the victim also turned hostile on other grounds, stating that the medical examination had not been conducted, that the clothes sent for chemical analysis did not belong to her, or that she had never filed the FIR.
- **Hostile during cross:** In 29 cases, the victim turned hostile during the cross-examination, after having supported the case of the prosecution in the examination-in-chief. In one case, the victim was hostile in the examination-in-chief, but supported the prosecution during cross-examination.

Most Special Courts did not delve into the reasons why a victim turned hostile and acquitted the accused. In *State v. Gajanan Ganpat Yeutkar*,<sup>94</sup> it was alleged that the father of the victim had, after consuming liquor, disrobed his daughter and molested her. On being asked why he did so by his wife, he stated that he wanted to enjoy his daughter and physically threatened his wife and son with an axe. The victim's mother lodged the FIR against her husband. However, during trial, the mother and the victim both recanted their statements. The victim stated she was in her grandmother's house on the day of the alleged incident. Her mother stated that the complaint had been filed out of anger and that the accused had committed no offence. Both witnesses were declared hostile by the prosecution, no incriminating evidence could be brought out from their cross-examinations and the accused was acquitted.

“In the case of relatives, there is pressure on the victim and the family. They often turn hostile, or try to compromise. In some cases, they become hostile because the whole trial goes on for so long, they have to come to court repeatedly, they feel pressure from their community or from society at large. We have to try and convince them to cooperate. In some cases, the trial goes on for so long that the victim gets married in the interim. Then when the court issues summons, we are the ones who have to go and serve it. But the family does not tell us the address because they do not want to disturb her married life, or the complainant herself wants to move on and does not want to be involved anymore. So we collect all the rest of the evidence, we find circumstantial evidence and we put it to the Court. We don't have a choice, we have to file a chargesheet.”

- Investigating Officer

“The police don't take care of witnesses or provide protection to them in many cases allowing the opposition to pressure them.”

- Respondent from judiciary

“In some cases, court have not been able to fully appreciate the psychological reasons behind a victim turning hostile and have mechanically acquitted the accused on that ground, sometimes ignoring the rest of the evidence. In many cases, courts have not realized the language barrier and have refused to acknowledge the need for an interpreter/translator in cases of foreign victims or where the language of the court was different. This has resulted in faulty recording of evidence and subsequent acquittals (in addition to other reasons as well).”

- Respondent from a NGO providing socio-legal services to victims of trafficking

<sup>94</sup> Sessions Trial No. 115/2014 decided on July 7, 2014 (Akola).

In *State v. Vijaykumar Gavali*,<sup>95</sup> it was alleged that the accused who was the science teacher of the victim aged 14 years had touched her inappropriately during class. She had revealed this information to her parents who filed the complaint. During the trial, the victim stated that she had filed the complaint as she was upset about a reprimand she had received from the teacher. She stated that she had not read her complaint and denied that any incident as alleged took place. The prosecutor also decided to not examine any other witnesses leading to the acquittal of the accused. The Special Court observed that the two parties had settled the dispute, keeping in mind the welfare of the victim girl, and to avoid future conflict with the accused.

In some cases, the victims denied that they were minors at the time of the incident, and the prosecution also failed to produce any positive proof of age, leading to an acquittal. This was most commonly seen in 'romantic' cases. In *State v. Mohammadshahid Abdulbasan Raja*,<sup>96</sup> the victim turned hostile on the point of her age. While at first, she stated her age to be 17 years (as per the date of birth she mentioned), she later stated that she was 20 years old and married to the accused and that no sexual offence was committed by him.

In *State v. Mohammad Shabebaz Mohammad Irshad Qureshi*,<sup>97</sup> the victim, aged 12 years, was returning from a store at around 7 pm. The accused was sitting on the motorcycle parked in front of his house and came near her all of a sudden and put his hand on her private part. But during evidence, the victim deposed that she did not know the accused. She further deposed that as it was dark when the incident took place, she could not identify the said boy. The victim's father deposed that on the day of incident, at about 8:30 p.m., he received a phone call from his daughter and was informed about the incident but his daughter had not disclosed the name of that boy. The Special Court noted that the evidence adduced on record did not inspire confidence and acquitted the accused.

In some cases, compromise between the parties was cited by the Special Court as an explanation for the victim and other witnesses turning hostile. In *State v. Vikas Bote*,<sup>98</sup> it was alleged that the accused had entered the house in which the seven-year-old victim was staying, and raped her. He had been caught at the scene by some neighbours, and the victim had described the assault to her parents who then filed the complaint. Both the victim and her mother turned hostile. There was no medical evidence produced and no other witnesses were examined. The Special Court remarked that the parties had settled the dispute keeping in mind the future of the girl. It observed:

The accused is residing in the neighbourhood of the victim girl. So, in order to avoid any future harassment and trouble at the hands of accused, they have decided to compound the matter.

### **3.7.6.2. Testimony found unreliable**

- In 293 of the 554 cases, i.e., 53% in which the victim testified against the accused, the testimony was found to be unreliable by the Special Court.
- The accused was acquitted in 285 cases, i.e., 97.26% cases in which the testimony of the victim was found to be unreliable. Of these, 50 (17.54%) were romantic cases, 10 (3.50%) were cases of incest, and 18 (6.36%) were cases of sexual abuse by relatives other than fathers, step-fathers, grandfathers, and brothers.

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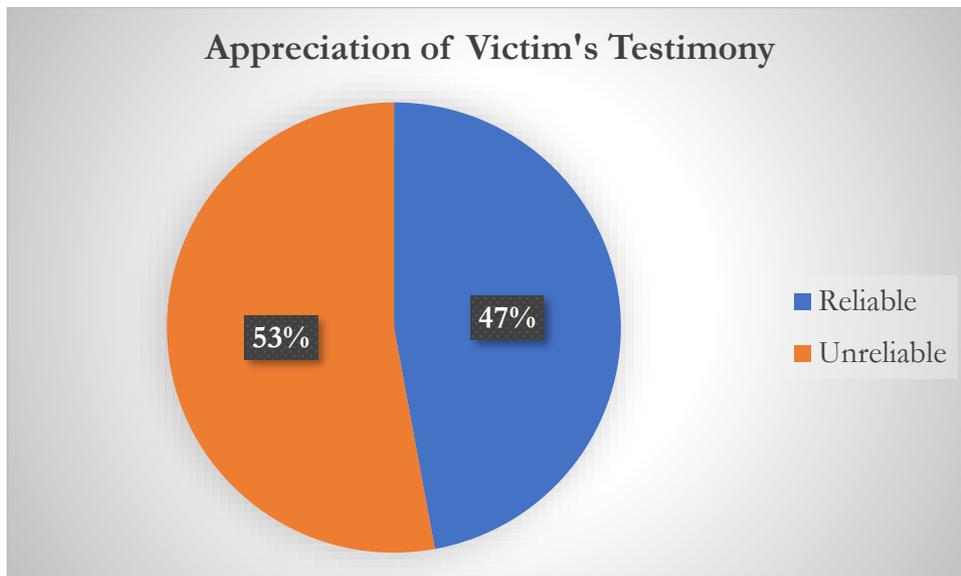
<sup>95</sup> Special (Child) Sessions Case 317/2014 decided on 11.05.2016 (Pune).

<sup>96</sup> Special Case No.5/2016 decided on 09/12/16 (Ratnagiri).

<sup>97</sup> Sessions Trial Case No. 155/2014 decided on 02.04.2016 (Amravati).

<sup>98</sup> Special (Child) Sessions Case 16/2013 decided on 18.09.2015 (Pune).

- Of the 293 cases in which the testimony of the victim was found unreliable, the victim was below 5 years in 9 cases (3.76%), between 6 and 12 years in 43 cases (17.99%), between 13 and 15 years in 93 cases (38.91%), between 16 and 18 years in 99 cases (41.42%), and above 18 years in 10 cases (4.18%). In 39 cases, the age of the victim was not specified or unclear in the judgment.



The reasons to reject the testimony of the victim were discrepancies in the testimony, absence of corroborative evidence, and in some cases unfounded assumptions about the reaction of the victim, or the character of the accused. For the latter, refer to Section 4.2, Chapter IV.

While some Special Courts overlooked minor inconsistencies and lapses in the victim's testimony, several others did not. For instance, in *State v. Kishor Ramrao Solanke*,<sup>99</sup> the Special Court laid emphasis on the social context in which the offences under POSCO Act take place. As per the statement of the victim, the accused had kissed her on her lips, but as per version of the mother, the accused had kissed her on her cheek. The judge noted that the inconsistency may be induced by the fear that her daughter may have to face problems during the time of her marriage, and disregarded the same. However, in *State v. Shaikh Sheru*,<sup>100</sup> the Special Court found the testimony of the 15-year-old victim unreliable because: *First*, the victim testified in court that the accused tied her up and gagged her before raping her. This was missing in her statement to the police recorded in the FIR and in her statement to the JMFC under Section 164, Cr.PC. *Second*, she testified that she was menstruating at that point of time. However, the doctor who examined her the next day stated that she was not. *Third*, the medical evidence showed that her hymen was intact, there were no injuries to her genital area though she had been raped thrice. The doctor in cross-examination admitted that intercourse repeatedly was likely to rupture the hymen. The only injury the victim suffered was on her knee, which the doctor stated could have been sustained because of a fall. Further, the witness who arrived at the spot on hearing the victim shout turned hostile. None of the other women that the victim claimed had also arrived at the spot were examined by the prosecution. As a result, the Special Court found the testimony of the victim unreliable and acquitted the accused.

<sup>99</sup> Sessions Trial Case No. 237/2014 decided on 07.03.2015 (Amravati).

<sup>100</sup> Special (POCSO) Case No. 20/2014 decided on 02/12/2015 (Beed).

In *State v. Ramkishor Sharma*,<sup>101</sup> the victim was the 15-year-old step-daughter of the accused. She alleged that he used to spy on her while she was taking a bath as well as behave inappropriately around her. This behavior included changing his clothes in front of her and walking in front of her naked. She informed her mother of this behavior and this led to a complaint being lodged against the step-father. The Special Court found the testimony of the victim girl to be unreliable because from the spot *panchnama* it emerged that to spy on a person in the bathroom, the accused would have to lie down in the middle of the house where he would easily be seen by others. This led the Court to conclude that this theory was improbable. Further, the Special Court stated that the victim was studying in the 10<sup>th</sup> standard and that she was supposed to be studying hard due to her board examinations. However, she had many boyfriends including one “special boyfriend” with whom she used to talk for hours. The Special Court stated that this could have caused a conflict between her and her step-father due to which she lodged this complaint against him. Her testimony was also found to be shaky on cross-examination. The Special Court stated that the entire case seemed to be a ploy between the mother and the victim to harass the accused.

### **3.7.6.3. Gaps in investigation**

In *State v. Sunder Tukaram Shejul*,<sup>102</sup> the accused was the 17-year-old victim’s neighbor and had entered her house under the pretext of a glass of water. He allegedly locked the door from the inside while she was bringing the water, and grabbed her tightly. The victim started shouting and on hearing her shout, two-three boys from the neighbourhood came to the scene. This is when the accused let her go, but before leaving, he threatened her that “he will see her”. Her brother returned home after a while, and after narrating the incident to him, she went with him to the police station and lodged an FIR against the accused. A major gap in investigation here was that although the victim claimed to have told the police while lodging the report that the accused was under the influence of alcohol at the time of the alleged incident, this was neither recorded in the report, nor investigated by the police. Another gap was that the police had not prepared the map or layout of the house, to understand where exactly drinking water is kept in the house, and if in fact the victim would have had to go inside to bring it. This was used by the defence to its advantage.

In *State v. Dinkar Chindu Bhang*,<sup>103</sup> it was alleged that the accused had lifted the 8-year-old victim while she was playing in her school, taken her inside a classroom and attempted to take off her pants. The said incident was alleged to have taken place on a Saturday, which was a working day in school, and the peons and other employees of the school were all present. Further, construction labourers were also working in the school on that day. The Court observed that if the alleged incident had taken place, there would certainly have been independent witnesses to corroborate the testimony of the victim. However, the Investigating Officer had not recorded any such statements. Therefore, it was concluded that the occurrence of the alleged incident was highly improbable.

Several investigation gaps emerged based on judgment analysis and are elaborated in Section 4.3, Chapter IV.

### **3.7.6.4. Prosecution failed to establish the minority of the victim**

In *State v. Ganesh Somnath Kale*,<sup>104</sup> the IO did not place on record sufficient documentary material to fulfil the burden of proof regarding the minority of the victim, aside from a Panchayat Samiti certificate which

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<sup>101</sup> Special (Child) Sessions Case 84/2013 decided on 27.02.2015 (Pune).

<sup>102</sup> Spl. Case [Child] No.04/14, decided on 21.11.2016 (Jalna).

<sup>103</sup> Sessions Case No. 131 of 2014, Decided on 27.03.2015 (Nashik).

<sup>104</sup> Sessions Case No. 195/2013, decided on 13-6-14 (Ahmednagar).

stated that there was no record of the victim's birth in the Panchayat register. The radiological and ossification examinations revealed that the age of the victim was around 16 years, with a margin of error to the extent of two years on either side. Age was therefore held not to have been conclusively established.

In *State v. Rajeshkumar Fulchand Jaiswal*,<sup>105</sup> the prosecution produced the school leaving certificate of the victim, which was proved by the Headmistress of the school. However, the Special Court held that the date of birth entered into the school register was based on the affidavit given by the victim's parents, and the non-examination by the prosecution of the parents and the person who had made the entry in the register made it doubtful. The prosecution made no reference to the provisions of the erstwhile JJ Model Rules, 2007 or the JJ Act, 2015 with respect to age determination. Refer to Section 4.1, Chapter IV for a critique of the gaps in age determination.

### **3.7.6.5. Ingredients of the offence not established**

In *State v. Dnyaneshwar Malche*,<sup>106</sup> the 13-year-old prosecutrix testified that the 20-year-old accused, her neighbor, had entered her house late in the night and held her hand. He fled when she raised an alarm. He used to follow her on her way to school. Two months prior to the reported incident, he had entered her house and torn her clothes. Charges were framed against the accused under Sections 354 and 354A, IPC and Section 8, POCSO Act. The accused claimed to have been falsely implicated after the prosecutrix's family rejected his marriage proposal to her. The Special Court concluded that the ingredients of Section 354 were established, but not those under Section 354A, IPC and Section 8, POCSO Act. It observed, "...the accused had only caught hold the hand of the complainant with intent to outrage her modesty and such act does not involve the physical contact without penetration which is said to commit sexual assault." The accused was thus acquitted under the POCSO Act but convicted under Section 354, IPC.

In *State v. Mohammad Faisal Farooqui*,<sup>107</sup> the accused had entered the house of the victim when the electricity went out and the victim was alone at home. The accused had also been seen loitering at a shop in front of her house on one or two occasions previously. However, the Special Court held that the offence under Section 354(d) of the IPC could not be established as the victim in her testimony did not state anything that might indicate that the accused had attempted to contact her, despite her expressing disinterest. Further, the Special Court held that the offence under Section 11(iv) was not established because the prosecution failed to prove that the accused was repeatedly following and contacting the victim with a sexual intent. No reference was made to the presumption of culpable mental state under the POCSO Act.

In *State v. Dnyaneshwar Jagannath Karvande*,<sup>108</sup> while the age of the victim was established, the Special Court found that the act of pulling down her knickers did not amount to sexual assault. The accused was convicted under S. 354-A, IPC, for sexual harassment, but the Court interpreted 'sexual assault' under Section 8, POCSO Act to require touching a private part of the child, and 'physical contact' to not cover the act of pulling her knickers down.

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<sup>105</sup> Sessions Case No. 210 of 2015, Decided on 18.03.2016 (Nashik).

<sup>106</sup> Special Case No.78/2014 decided on 14.07.2015 (Dhule).

<sup>107</sup> Special Case (POCSO) No. 6/2013 decided on 04.09.2014 (Parbhani).

<sup>108</sup> Sessions Case No. 354 of 2014, Decided on 20.01.2016 (Nashik).

In *State v. Vibhav Madhukar Kamble*,<sup>109</sup> the victim's Anganwadi teacher allegedly saw the 20-year-old accused in only his underpants with the three-year-old victim sleeping near him at the temple. She was not wearing knickers and her frock was rolled up to her neck. However, the accused was not convicted because (i) all the prosecution witnesses were connected to the complainant, (ii) the victim was not examined, (iii) the victim's father was not examined, (iv) the spot of the alleged incident was a crowded place and the Special Court did not believe that the alleged incident could have taken place there, (v) there was conflict between the victim's father and the accused, who were working together, on account of money owed to the accused, (vi) the accused lived 5 kms away from the scene of the incident and thus his presence there was doubtful, (vii) the accused claimed that his statement was recorded even before the complaint was lodged, (viii) one of the witnesses testified that the victim was sleeping facing the ground while the other testified that she was sitting on the accused's back, and (ix) although semen was found on the underwear of the accused, the judge relied on his advocate's statement that this is quite natural, common and frequent after attaining puberty and was not material. The Special Court observed that point (v) was "successfully proved" by the defence although no evidence was adduced for the same.

### ***3.7.6.6. Victim did not testify and other witnesses turned hostile***

In several cases, the victim could not testify because she was of tender years, or had died, or for other reasons, had not been examined by the prosecution. In such cases, when the other prosecution witnesses turned hostile, the accused was acquitted.

In *State v. Ganesh Rajaram Mane*,<sup>110</sup> the accused had forced sexual intercourse with the 17-year-old victim when she was alone in her house on two consecutive days, and threatened to kill her if she told anyone about it. Following this, the victim found out that she was pregnant, and then the accused assaulted her and threatened to kill her. Fearing for her life, the victim did not file a complaint or disclose to anyone what she was enduring. A few months later, the victim consumed poison, which resulted in an abortion, and three days later she was admitted in the hospital as she was experiencing acute pain. The victim then informed her mother about the accused raping her, and a complaint came to be lodged against him. Injuries were found on the private parts of the victim as well. The victim died 10 days later. The doctors diagnosed that the cause of death was either severe infection in the genitals or a result of the poisoning. The victim's parents as well as her sister turned hostile in court, and categorically denied all material facts.

In *State v. Bharat @ Gajanan @ Bhau Ananda*,<sup>111</sup> the victim was a 15-year-old girl with 50% mental retardation. She was alone at home on the day of the alleged incident, and one of her neighbors saw her crying and coming out of the accused's house. The neighbor informed the victim's mother about this, which is when the victim told her mother that the accused had taken her inside his house, removed both their clothes and "slept on her person". However, the victim's parents as well as the eye witness turned hostile. The victim's mother denied the entire incident and claimed that the victim was, in fact, at school at the time. Since her parents refused to send her for medico-legal examination or to give samples for chemical analysis, there was no medical evidence to support the case of the prosecution. The witnesses also refused to identify the accused, even though he was their neighbour. The victim herself was not examined in court, probably due to her disability. Therefore, the accused was acquitted of all charges.

In *State v. Vikas Paswan*,<sup>112</sup> it was alleged that the accused had entered the house of the victim aged 3.5 years and attempted to rape her. The victim narrated the incident to her father, who took her to a doctor.

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<sup>109</sup> Spl. Case No. 12/2013, decided on 06/13/2016 (Kolhapur).

<sup>110</sup> Spl. Case No. 03/2014, decided on 02/20/2016 (Kolhapur).

<sup>111</sup> Spl. Case No. 38/2014, decided on 11/19/2015 (Kolhapur).

<sup>112</sup> Special (Child) Sessions Case 31/2013 decided on 22.01.2014 (Pune).

Her medical examination confirmed the incident. However, the victim's mother turned hostile and stated that no such incident had taken place. She also stated that her daughter was too young and therefore could not testify. The Special Court accepted this and acquitted the accused, as no other evidence was produced.

#### ***3.7.6.7. DNA evidence did not support the case of the prosecution***

Cases mostly resulted in acquittals when the DNA evidence did not support the case of the prosecution. In *State v. Yunus Khan*,<sup>113</sup> the victim was a severely mentally ill minor girl. The accused was the owner of two hotels and the victim's mother was employed in his household. For a few days, as the employer's wife was ill, the victim was asked to stay in the employer's house. She later complained of stomach ache and pain around her private parts and it was then discovered that she was pregnant. It was observed that the victim girl could not give her testimony, as her disability was severe. The victim's mother was declared hostile. The Special Court relied on the paternity test which showed that the accused was not the father of the victim's child and acquitted him.

Similarly, in *State v. Satish Jagannath Gaikwad*,<sup>114</sup> as per the FIR filed by the victim, repeated penetrative sexual assault by the accused had resulted in pregnancy. The FIR was only filed because the doctors informed the police and they arrived to record the statement of the victim. The victim turned hostile in court. The DNA test results showed that the accused was not the father of the child. There was no evidence as to the identity of the father, as the victim consistently refused to disclose the same to her mother. As a result, the accused was acquitted.

### ***3.8. Analysis of Charges Framed***

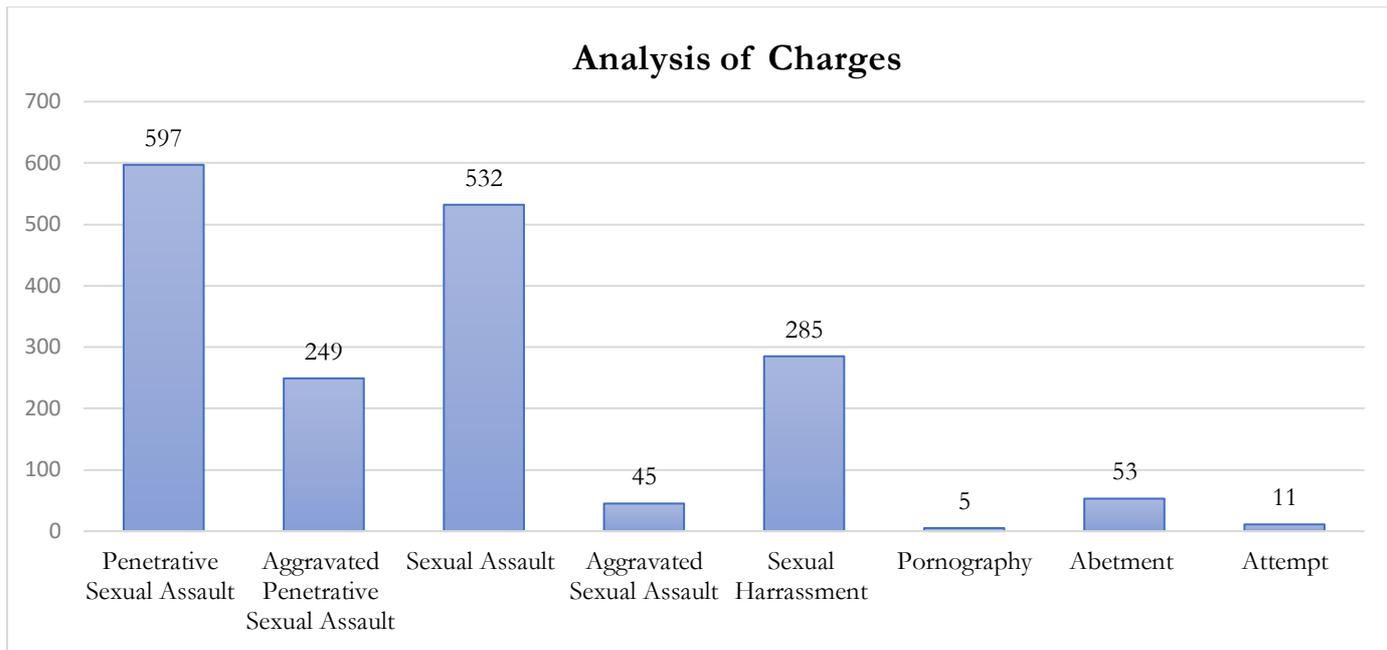
#### ***3.8.1. Charges framed under POCSO Act***

An analysis of the charges framed under the POCSO Act reveals that charges under Section 4 and Section 8 of the POCSO Act were the most common. The graph below shows the breakup of the individual charges under the POCSO Act.

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<sup>113</sup> Sessions Trial No. 13/2016 decided on 28.12.2016 (Akola).

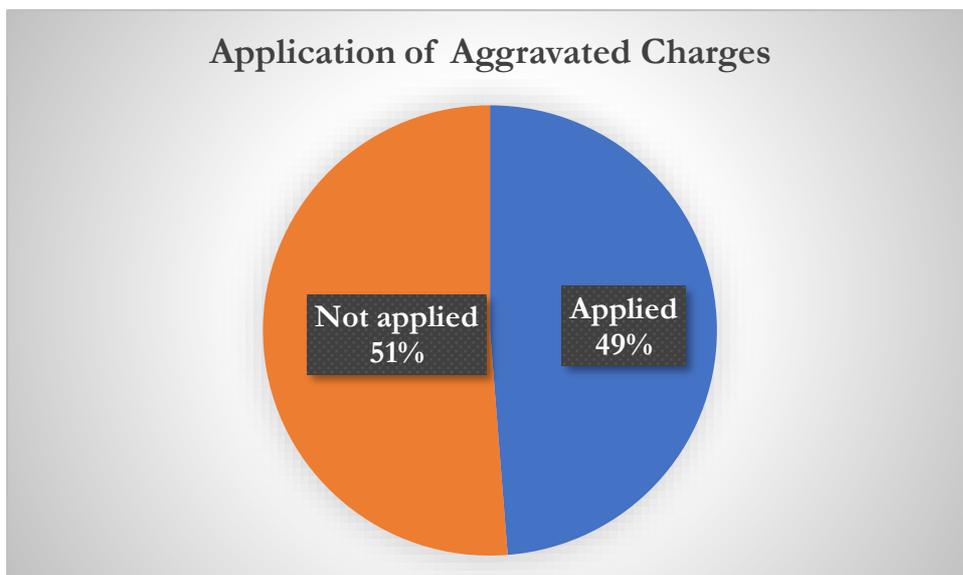
<sup>114</sup> Special Child Case No. 5/2014 decided on 16/07/2015 (Beed).



Aggravated charges were applied more often in cases of penetrative sexual assault rather than sexual assault and were mostly applied when the victim was below 12 years or when the offence was committed multiple times. Other sections under which aggravated charges were applied included:

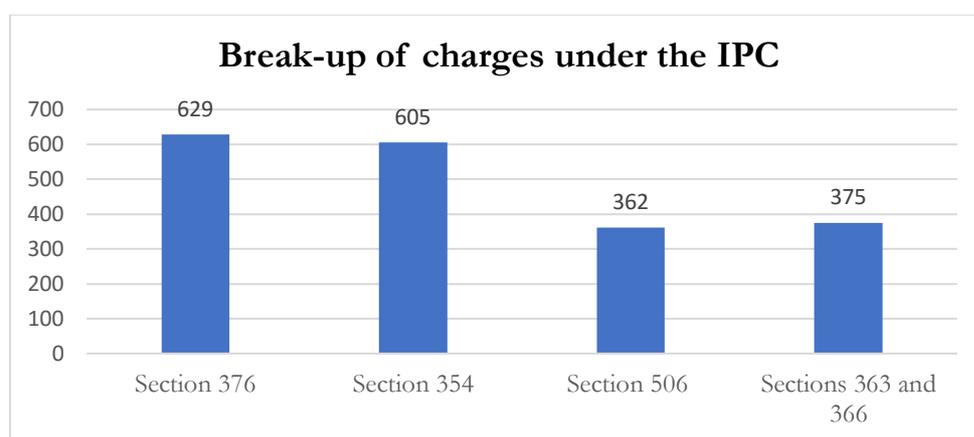
- Offence being committed by relatives;
- Offence being committed by the father;
- Victim becoming pregnant because of the offence;
- Offence being committed by a member of an educational institution;
- Offence against victim with mental retardation or intellectual disability

**The analysis also revealed that the aggravated charges were warranted in 603 cases, i.e., 45.33% cases, but were not mentioned in the charge-sheet in 309 cases i.e., 51.24%.** Cases where the victim was below the age of 12, where the offence was committed multiple times, where the victim became pregnant because of the assault and where the offender was related to the victim, were largely the aggravated grounds that were not reflected in the charge-sheet.



### 3.8.2. Charges framed under the IPC

Charges under the IPC mirrored the charges under the POCSO Act, with charges under Sections 354 - Assault or Criminal Force to woman with intention to outrage her modesty (605 cases) and 376 - Rape (629 cases) being the most common. Other charges were under Section 506- Criminal Intimidation (362 cases) and Sections 363 -Kidnapping and 366A -Procuration of Minor Girl (375 cases).



### 3.8.3. Charges framed under other Acts

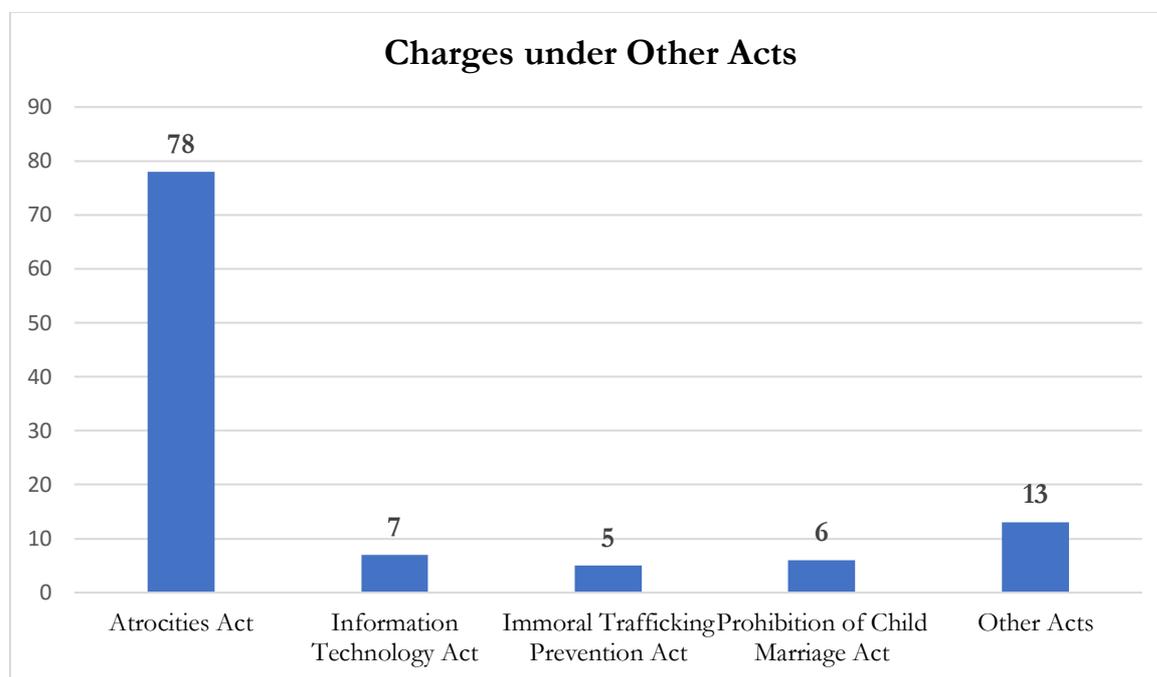
**Atrocities Act:** Apart from the IPC, there were also 78 cases registered under the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (Atrocities Act). Accused persons were usually charged under Section 3(1) (xi) and (xii) and Section 3 (2) (v) of the Atrocities Act, prior to its amendment in 2016. Section 3(1) (xi) pertains to assault on a woman belonging to SC/ST with an intention to outrage her modesty, whereas Section 3(1) (xii) deals with a person using a dominant position to sexually exploit a woman of the SC/ST. Section 3(2)(v) prescribes additional punishment if an offence under the IPC is committed against a person belonging to the SC/ST.

**ITPA:** Charges under the Immoral Traffic (Prevention) Act, 1956 (ITPA) were filed in five cases under sections pertaining to profiting from prostitution (Section 3), procuring a person for purpose of prostitution (Section 5) and detaining a person in premises where prostitution is being carried on (Section 6). However, the corresponding charge under Section 370, IPC (Trafficking of persons) was filed only in one out of these five cases.

**IT Act, 2000:** In seven cases, charges were framed under the Information Technology Act, 2000 under Section 67B dealing with the transmission of child pornography or other sexually explicit material with children.

**PCM Act:** There were also six cases in which charges were framed under the Prohibition of Child Marriage Act, 2006 (PCM Act). The charges were for an adult male contracting child marriage (Section 9), solemnizing a child marriage (Section 10), and promoting child marriage (Section 11).

**Other Acts:** Apart from these prominent legislations, there were also cases filed under the Bombay Police Act, 1951, the Arms Act, 1959 and in one instance, the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013.<sup>115</sup>



Refer to Section 3.9.5 for sentences passed under other Acts.

### ***3.9. Sentencing Pattern***

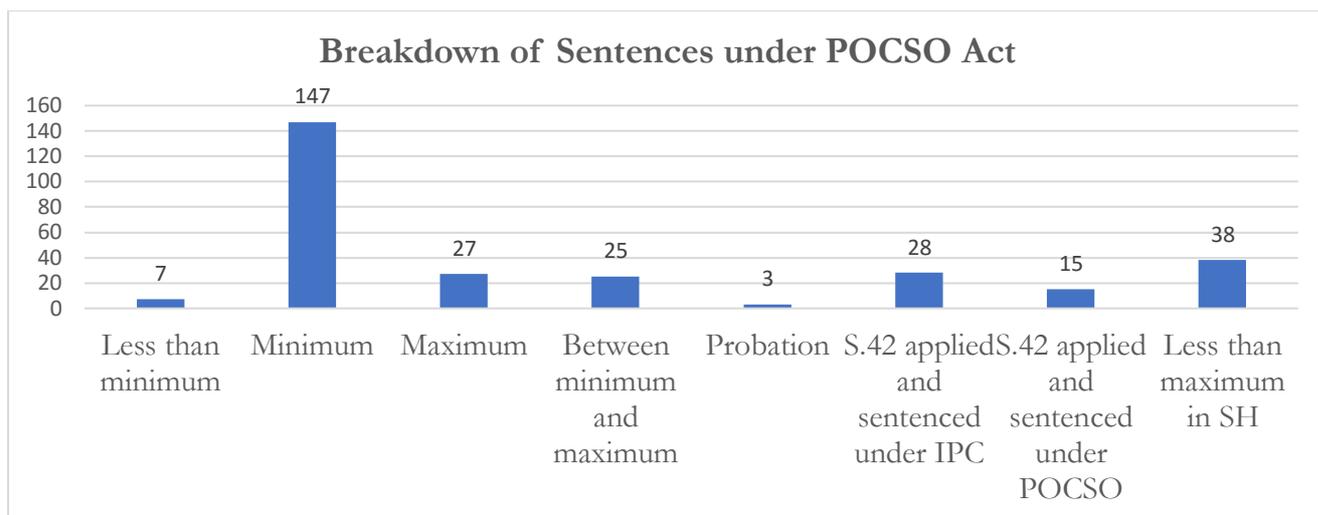
- The Special Courts imposed sentences under the IPC in 194 cases and under the POCSO Act in 204 cases. In 165 cases, the accused was sentenced under both.
- Section 42, POCSO Act,<sup>116</sup> was applied in 43 cases, of which in 15 cases the accused was sentenced under POCSO Act and in 28 cases under the IPC.

#### ***3.9.1. Minimum Mandatory Sentences – The Norm***

- An analysis of the sentencing pattern under the POCSO Act revealed that there is a clear tendency to award the statutory minimum sentence. It was imposed in 147 cases.
- In imposing the minimum mandatory sentences, the Special Courts considered the socio-economic background of the accused, the age of the accused, and the family situation of the accused.

<sup>115</sup> State v. Atul Maharaj Appasaheb Shirole, Special Child) Sessions Case 135/2014 decided on 07.05.2016 (Pune).

<sup>116</sup> Section 42 states: Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.



\*SH in the graph above refers to sexual harassment.

### 3.9.2. Maximum Sentence - An Exception

The Special Courts have been rather cautious while imposing the maximum prescribed sentence. It was applied in only 27 cases under the POCSO Act. In one case,<sup>117</sup> the accused who was the father of the victim, had raped her repeatedly. The victim became pregnant because of the assault. The Special Court felt the circumstance, where a daughter was raped multiple times and impregnated by her own father, warranted the imposition of the highest sentence - i.e. life imprisonment. Similarly, in *State v. Deepak Savant*,<sup>118</sup> the 13-year-old victim was raped multiple times by her mother's partner. The Special Court considered the fact that the accused was in a position of responsibility vis-à-vis the victim and the repetitiveness of the rape to impose the maximum sentence of life imprisonment.

In *State v. Atul Lode*,<sup>119</sup> the accused raped and then murdered a 6.5-year-old girl. This was the only case in which the accused was sentenced to death. The Special Court, in sentencing the accused to life imprisonment under POCSO Act and to death under the IPC observed:

Would the society not expect the accused who has committed rape on a tender girl of 6 1/2 years in an extremely brutal, barbaric, gruesome manner and caused her death for no fault of hers, to be hanged? Would the society not expect, the holders of the judicial powers centre, to award proportionate sentence to the accused who had no respect for human values and treated a young girl of 6 1/2 years in most brutal, cruel and inhuman manner? Would the society not expect such depraved act to be dealt with in a stern manner? The recent amendment to the I.P.C. as a matter of fact echoes the sentiments of the society at large. The sentiment of the society is glaringly explicit, that such heinous crime on helpless women and especially children are required to be dealt with an iron hand.

### 3.9.3. Probation

Although probation was granted in only three cases, there were other cases in which the accused pleaded probation, but was denied in view of the minimum mandatory sentences under the POCSO Act. In *State*

<sup>117</sup> Special Case No. 02/2015, decided on 10/27/2016

<sup>118</sup> Special (Child Act) Case No. 144/2013 decided on 08.05.2015 (Wardha).

<sup>119</sup> Special Case 107/2014 decided on 28.09.2016 (Thane).

v. *Nitin Patil*,<sup>120</sup> the accused was charged under Section 8 for molesting a girl aged 12 years. The Special Court held that the intention of the POCSO Act would preclude the Probation of Offenders Act from being applied and did not impose probation.

In *State v. Nitin Gajabe*,<sup>121</sup> the accused had allegedly come from behind, gagged the victim's mouth, and caught hold of both her hands with his other hand. He released her when she shouted. The accused was charged under Section 3 and 4 of the POCSO Act and Section 354-A, IPC (sexual harassment). The Special Court held that the charges were not made out. However, it invoked the presumption of culpable mental state and convicted the accused under Section 8, POCSO Act for sexual assault and convicted him under Section 354, IPC (outraging the modesty of a woman). Probation was awarded and the reasoning of the Special Court was:

“...there is nothing on record to show that the accused has any criminal antecedents. Accused is a young boy of 22 years. In the facts of the present case, the nature of the offence is not such that the accused needs to be put behind the bar for one year or more. If that is done then it is likely that he would come in contact with hardened criminals which may adversely affect his character and his future life.”

In *State v. Sagar Manoj Sarwan*,<sup>122</sup> the accused was convicted under Sections 8 and 12 of the POCSO Act. Considering that the accused was 19 years, the Special Court called for the report of the Probation Officer and then allowed the accused probation for one year.

#### **3.9.4. Sentences below the statutory minimum**

In seven cases, the Special Court imposed a sentence that was less than the minimum mandatory sentence. In *State v. Asha Shetty*,<sup>123</sup> the accused was convicted of abetting the sexual assault of a 7-year-old victim. The accused admitted guilt and was in detention for 1.5 years. Taking these factors into account, the Special Court sentenced her to the period already undergone, even though the minimum sentence under Section 8, POCSO Act is three years.

#### **3.9.5. Sentences under other Acts**

- **Atrocities Act:** Though there were 16 cases where the accused was convicted under the POCSO Act as well as the Atrocities Act, sentences under the latter were passed in only three cases. In *State v. Avinash Punjaram Buva*,<sup>124</sup> the accused was convicted under Section 4, POCSO Act and Section 376, IPC. The Special Court felt that the victim had consented to the intercourse, yet convicted the accused holding the consent irrelevant. The charges under Section 3(1) (xii) of the Atrocities Act could not be sustained, as the Special Court believed that the accused was not in a dominating position over the victim. In *State v. Raju Naik*,<sup>125</sup> the Special Court convicted the accused under Section 6, POCSO Act, Section 376, IPC as well as Section 3(1)(xi), Atrocities Act. The accused was convicted of raping the 11-year-old victim in her home.
- **ITPA:** Of the five cases in which charges were framed under the ITPA, only two resulted in a conviction. A sentence under the ITPA, however, was passed in only one case in which the Special Court sentenced the accused to 10 years rigorous imprisonment under Sections 5(1)(d) and 6 of the Act.<sup>126</sup> In this case, the victim was forced into prostitution by her husband and two other accused persons. The charges under the POCSO Act could not be sustained, as the Special Court did not

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<sup>120</sup> Special (Child) Sessions Case 61/2015 decided on 14.11.2016 (Pune).

<sup>121</sup> Special Case 46/2014 decided on 05.01.2015 (Wardha).

<sup>122</sup> Sessions Case No. 309 of 2015, Decided on 05.12.2016 (Nashik).

<sup>123</sup> Special Case No. 221 of 2014 decided on 13.08.2015 (Thane).

<sup>124</sup> Sessions Case 172/2014 decided on 04.11.2015 (Aurangabad).

<sup>125</sup> Special (Atrocity) Case 7/2013 decided on 19.09.2016 (Sangli).

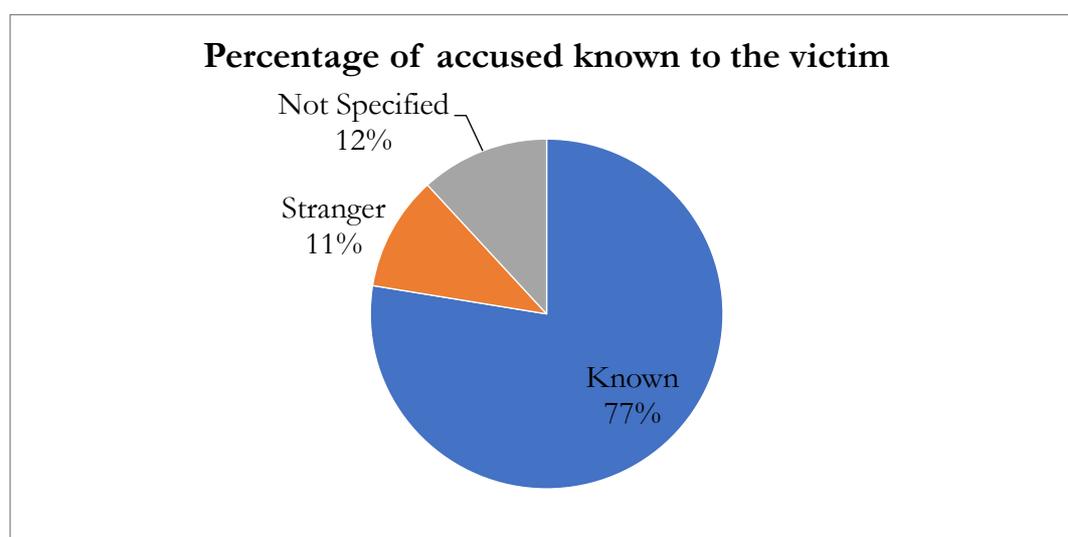
<sup>126</sup> *State v. Sudhakar Kamble*, Sessions Case No. 208/2013, decided on 21-8-15 (Ahmednagar)

think the evidence was sufficient for a conviction. However, the Court convicted the two accused under the ITPA for detaining a person to participate in prostitution and procuring a person for prostitution. No charge was, however, framed under the PCM Act even though the victim was below 18 years and married.

- **PCM Act:** Though there were 6 cases in which charges were framed under the Prohibition of Child Marriage Act, 2006, the Special Court recorded a conviction only in one of those cases. The accused persons were sentenced under Sections 9 and 11 of the PCM Act.<sup>127</sup>

### ***3.10. Profile of the accused and its implication on testimony of the victim and outcome of the case***

The accused was known to the victim in 1032 cases i.e., 77% of the cases; was a stranger in 141 cases, i.e., 11%; and the relationship between the accused and victim was not specified in 157 cases i.e., in 12% of the cases.

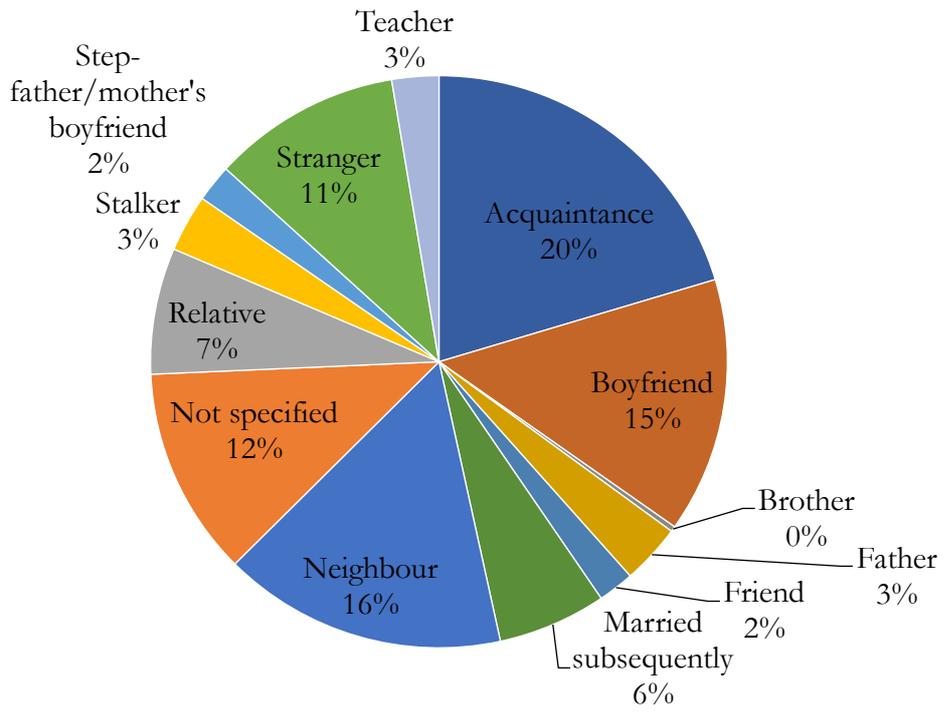


The breakdown of the profile of the accused shows that acquaintances constituted the largest group (20%), followed by neighbours (16%). Acquaintances included local vegetable vendors, school bus/auto drivers, friends of family members, parents' employers, tenants, landlords, persons from neighbouring villages and even priests at the local temple. Boyfriends constituted a significant proportion of the accused (15%), along with cases in which the accused and victim were married before or during trial (6%). Relatives formed 7% of the cases, and included brothers-in-law, uncles and cousins, while the accused was the victim's father in 3% of the cases. There were four cases in which the accused was the victim's brother. In one case, both the brother and father were accused. The category "father" also includes adoptive father. The category "teacher" (3%) includes tuition teachers and a karate teacher.

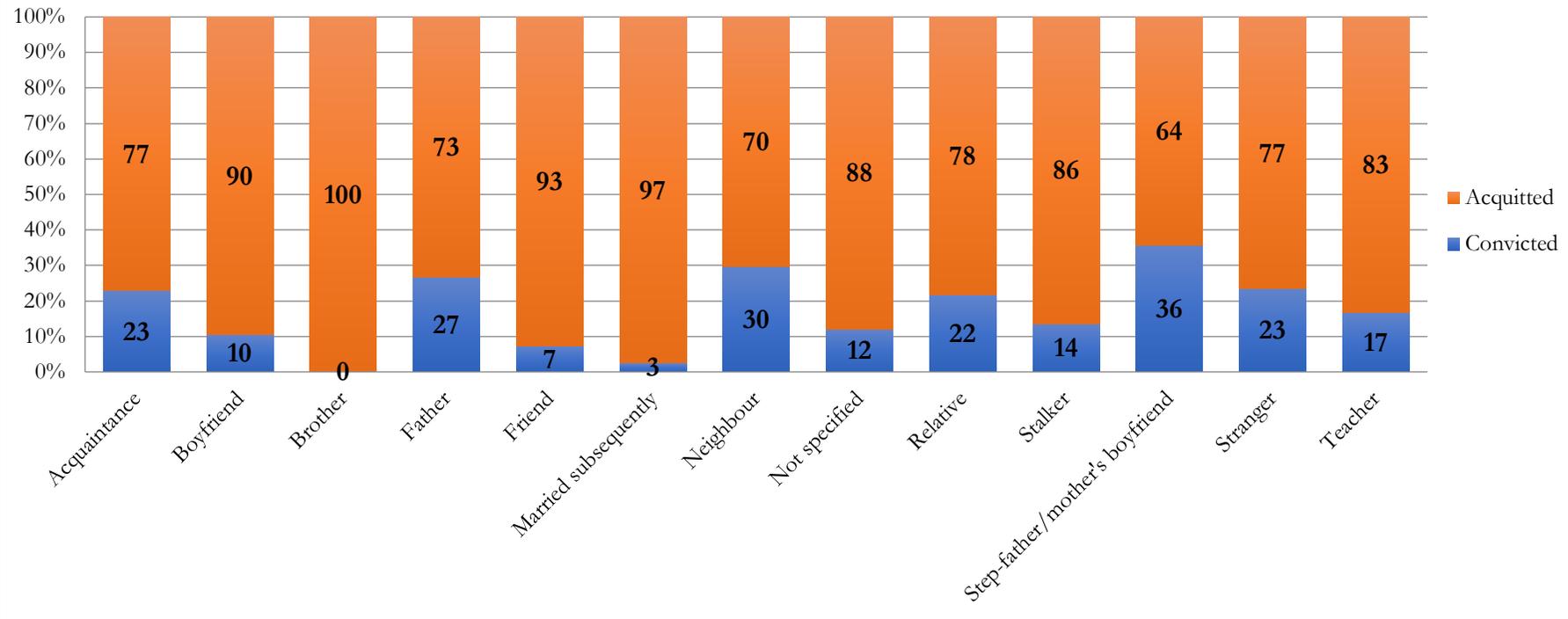
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<sup>127</sup> State v. Prakash Dhansing Chavan, Special (POCSO) Case 2/2015 decided on 27.10.2016 (Buldana).

### Profile of the accused known to the victim



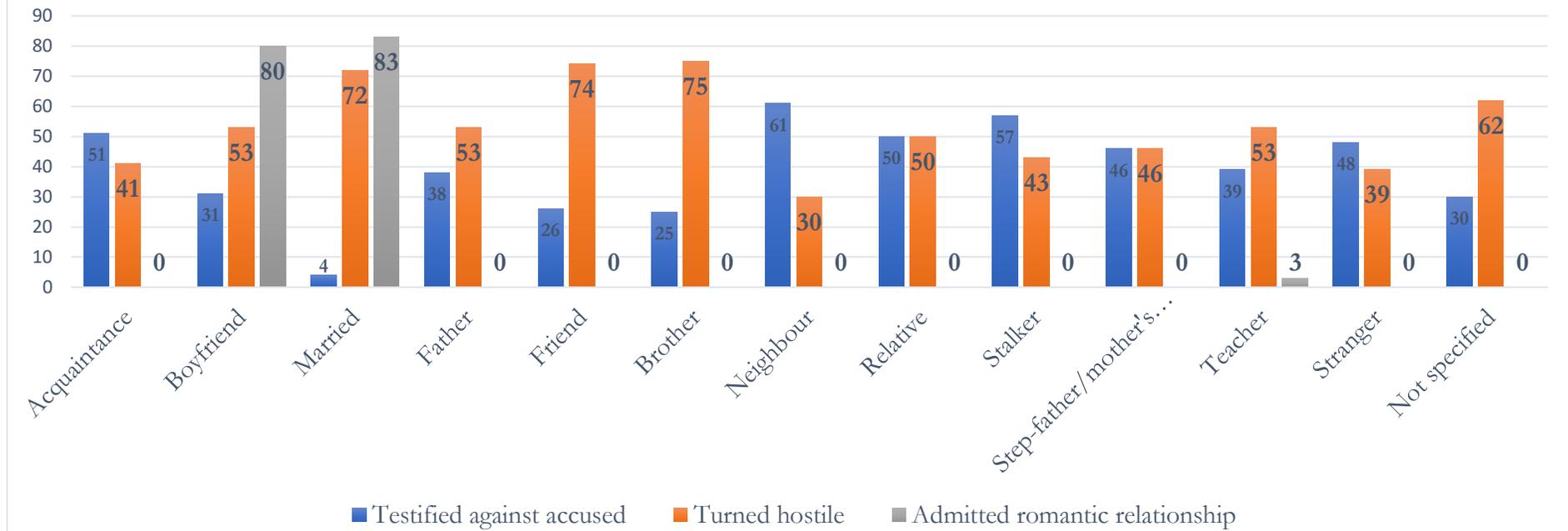
## Outcome of the case based on profile of the accused



The graph above reveals that in cases where the accused was the brother of the victim, he was always acquitted. In cases with a larger sample size, the lowest conviction rate was in cases where the accused and victim were married (3%) followed by cases in which the victim was a friend (7%), boyfriend (10%), not specified (12%), stalker (14%) and teacher (17%). The conviction rate was highest in cases in which the accused was either the victim's step-father or in a romantic relationship with the victim's mother (36%), followed by the victim's neighbour (30%) and victim's father (27%).

The graph that follows helps understand the outcomes better as it indicates the testimony of the child, based on the profile of the accused.

## Testimony of the victim based on profile of the accused in percentage



- **Low Conviction:** The low rate of conviction in cases in which the accused and victims were siblings, friends, married, in a romantic relationship or in a student-teacher relationship is explained by the fact that the victim turned hostile in 75% cases (3 out of 4 cases) in which the accused was the brother, in 75% of the cases in which the accused was a friend, 72% of cases in which the two were married, 51% of cases where the accused and victim were dating and 53% of the cases where the accused was the victim's teacher.
- **Highest percentage of testimony against accused:** The highest percentage of cases in which the victim testified, were those in which the accused was the victim's neighbour (61%), stalker (57%), relative (51%), stranger (48%), and acquaintance (48%).
- **Lowest percentage of testimony against accused:** The lowest percentage in which the victim testified were those cases in which the accused was married to the victim (4%), followed by brother (25%), friend (26%), and boyfriend (34%) of the victim.
- **Brother as accused:** Of the four cases in which the accused was the victim's brother, the victim testified in one and turned hostile in three. In the only case in which the victim testified,<sup>128</sup> both the father and the brother were accused of raping the victim. However, they were both acquitted as the testimony of the victim was found to be unreliable.
- **Father as accused:** Of the 45 cases in which father was the accused, 33 cases ended in acquittals and 12 in convictions. The pressure to retract in such cases is apparent, as in over half the cases (24) the victim turned hostile. In four cases, the victim did not testify because she was dead (two), untraceable (one) or due to her tender age (one). In *State v. Ashok Amar Singh*,<sup>129</sup> the accused had allegedly sexually abused his son (13 years) and daughter (10 years). However, the accused was acquitted as the testimony of the children was found unreliable.
- **Victim and accused married:** Out of 79 cases in which the accused and the victim were married, the victim testified against the accused in only four cases, and turned hostile in 55 cases. In two cases, the victim did not testify at all because she was untraceable (one) or was in an advanced stage of pregnancy (one). In 18 cases, the victim admitted her relationship with the accused, but did not testify against him or was declared hostile by the court or prosecution. Convictions were recorded in three cases.
- **Victim and accused in a relationship:** The accused was the victim's boyfriend in 194 cases. The victim testified against the accused in 60 cases, and turned hostile in 103 cases. The victim did not testify for various reasons in seven cases, was dead in four cases, and was untraceable in two cases. In two cases, the testimony of the child was unclear. In 16 cases, the victim admitted the romantic relationship, but neither testified against the accused nor turned hostile. The accused was convicted in only 20 cases.
- **Relative as accused:** The accused was the victim's relative in 101 cases. The victim testified against the accused in 51 cases and turned hostile in 50 cases. The accused was convicted in 20 cases. In six cases, the accused and victim were also in a romantic relationship. These cases ended in acquittal because the victim turned hostile. Similarly, in one case, the victim and her cousin were married during the trial. In another case,<sup>130</sup> the victim's cousin was also her stalker. Based on the testimony of the victim, the accused was convicted under S. 354 of the IPC; however, he was acquitted under the POCSO Act, as the prosecution failed to establish that she was a minor.
- **Step-father/mother's boyfriend as accused:** Of the 28 cases in which the victim's step-father or her mother's boyfriend was the accused, the victim testified against the accused in 13 cases and turned hostile in 13. In the two cases that the victim did not testify against the accused, she was married and the family did not want to disturb her married life by involving her in the case. Out of the 13 cases in which the victim testified against the accused, he was convicted in eight cases. The victim was found unreliable in five cases in which the accused was acquitted. In two cases, the accused was convicted even though the victim turned hostile.

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<sup>128</sup> State v. Hardik Mahesh Prasad, Special Case No. 1/2013 decided on 12.08.2014 (Kalyan).

<sup>129</sup> Special Case No. 263/2014 decided on 24/05/2016 (Thane).

<sup>130</sup> State v. Pritam Ashokrao Khaladkar, Special (POCSO) Case No. 7/2015 decided on 17.06.2015 (Osmanabad).

### Step-father convicted even though the victim turned hostile

In one case,<sup>131</sup> the Special Court evinced sensitivity towards the family situation of the victim who had allegedly been raped by her step-father. During trial, the victim's mother (informant) as well as the victim, turned hostile. They claimed that the accused had consumed liquor and beaten the victim's mother through the night, and thus, in order to be rid of him for a while, the victim had filed a false complaint. The Special Court however, reasoned that all the medical evidence and other prosecution witnesses including the doctors and police officers, who had no incentive to lie, supported the prosecution case, which was built on the cogent statements of the victim and her mother in front of the police as well as the Magistrate. The Special Court also noted that the victim and her family, including a 3-year-old boy with a heart disease were all financially dependent on the accused, and hence, the act of turning hostile could have been a result of this, along with the pressure faced by the victim and her mother from the family of the accused. Understanding the situation of the victim and her family, the Court convicted the accused under Section 6 POCSO Act and Section 376, IPC, but did not make him pay the compensation, as that would have further increased the pressure on the victim's mother from her in-laws. The Special Court ordered compensation to be paid to the victim from the State funds and also directed the treatment of her young brother in a hospital.

- **Teacher as accused:** The accused was the victim's teacher in 36 cases. The victims testified against the accused in 15 cases and turned hostile in 19. In one case there were six victims of which four turned hostile and two testified against the accused. In one case, the victim did not testify as her mother did not permit her to, as she felt that the experience would disturb her. In *State v. Suresh Paul*,<sup>132</sup> the accused was a teacher who sexually assaulted seven female students. Of the seven victims, five turned hostile and did not support the prosecution's case. The Special Court found that the testimony of the other two victims was not satisfactory, as it was vague and inconsistent. In another case,<sup>133</sup> the victim admitted that she was in a romantic relationship with the accused. Though she testified against the accused, he was acquitted because her testimony was found to be unreliable. The victim's testimony was held to be unreliable in nine cases, including the two discussed above.
- **Friend as accused:** The accused was the victim's friend in 27 cases. In 20 of these, the victim turned hostile and in the remaining seven cases the victim testified against the accused. However, the accused was convicted in only two cases as the victim's testimony was held to be unreliable in five out of those seven cases.
- **Neighbour as accused:** Of the 212 cases in which the accused was the victim's neighbour, the victim testified against the accused in 129 cases, turned hostile in 64 cases, and did not testify in the remaining 19 cases. The accused was convicted in 63 cases and acquitted in 149. Cases in which the accused is the neighbour have the lowest rate of victim turning hostile (30%) and the second highest rate of conviction (30%).
- **Acquaintance as accused:** The accused was an acquaintance in 271 cases. The victim testified against the accused in 137 cases, turned hostile in 112 and did not testify at all in 22 cases. The accused was convicted in 62 cases and acquitted in 209.
- **Stalker as accused:** Of the 44 cases in which the accused was stalking the victim, the victim testified against the accused in 25 and turned hostile in 17 cases. The victim did not testify in the remaining two cases, because the victim had committed suicide in one case and for an unspecified reason in the other. The accused was convicted in only 6 cases.

<sup>131</sup> Special Court No. 384/2015 (J)\* decided on 1.08.2016 (Greater Bombay).

<sup>132</sup> Special (Child) Sessions Case 110/2015 decided on 30.07.2016 (Pune).

<sup>133</sup> State v. Rajendra Sahebrao Sabale, Special (Child) Sessions Case No. 142/2014 decided on 30.04.2015 (Pune).

- **Stranger as accused:** The accused was a stranger in 141 cases. The victim testified against the accused in 68 cases and turned hostile in 55. The accused was convicted in 33 cases and acquitted in 108.
- **Relationship with Accused not specified:** Of the 157 cases in which the relationship between the victim and the accused was not specified, the victim testified against the accused in 47 and turned hostile in 97. The accused was convicted in 19 cases and acquitted in 138.

### ***3.11. Application of Presumptions***

#### ***3.11.1. Rare reference to presumptions***

Sections 29 and 30 of the POCSO Act provide for the presumption as to certain offences and the presumption of culpable mental state. Since the presumptions are similar to those under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), the Supreme Court’s rulings on presumptions under NDPS Act are instructive. In *Kali Ram v. Himachal Pradesh*,<sup>134</sup> the Supreme Court held, “There are certain cases in which statutory presumptions arise regarding the guilt of the accused but the burden even in those cases is upon the, prosecution to prove the existence of facts which have to be present before the presumption can be drawn.” Further, it stated,

“Once those facts are shown by the prosecution to exist the court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption.

The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused.”

A reference to the presumptions was found in only 151 of 1330 cases (11.35%). A reference did not, however, imply that the presumption was applied in the case. Reference to the presumptions was made in only 100 of the 257 cases (38.91%) that resulted in conviction. The presumption was thus not invoked in majority of the cases that resulted in convictions.

For Public Prosecutors, little has changed in terms of the burden of proof. A respondent from the judiciary stated, “The onus shifts [on the accused] and not the burden ... the prosecution has to do its own case.” One Public Prosecutor interviewed shared that defence counsels always object to the invocation of the presumption and that once this objection is made, the Special Court has no choice but to agree. According to a defence lawyer,

“The POCSO has disturbed many of the established tenets of criminal law. A reverse presumption is always misused...It would be impossible for the defence to discharge the kind of burden the POCSO tries to impose. In practicality, such a presumption can never be applied.”

The wide scope of the presumptions under the POCSO Act were questioned by the Bombay High Court in *Yogesh Maral v. State of Maharashtra*,<sup>135</sup> wherein it was observed that “a plain reading... indicates the said provision to be contrary to the basic and normal principles of criminal jurisprudence.” The Bombay High Court noted that the ambit and scope of the presumption under Section 29, POCSO Act requires detailed discussion in an appropriate case.

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<sup>134</sup> AIR 1973 SC 2773.

<sup>135</sup> 2015(3) B.Cr.C. 687

The analysis of judgments revealed that presumptions were invoked only after the prosecution has fully established its case. This was reiterated by respondents within the criminal justice system. For instance, according to one respondent “Judge should pay attention to it; burden of proof is not diluted. What presumption says, you cannot ask evidence on that point, certain evidence has to be brought on it before it is applied.” Another stated, “The burden is the same as in other cases. The case has to be proved beyond reasonable doubt. There is no burden on the defence.”

In *State v. Ashok Amar Singh*,<sup>136</sup> the Special Court observed:

“Sections 29 and 30 [do] not mean that without any cogent evidence on record, the presumption can be drawn against the accused. **Even though, provision is very much incorporated in the Act with a view to shift burden on the accused to state about his mental state, however, as per the Rule of Jurisprudence the basic responsibility lies with the prosecution to prove the allegations against the accused beyond reasonable doubt.**” (Emphasis added)

In *State v. Mohammad Farid Shaikh alias Malau Shaikh*,<sup>137</sup> in a case of alleged penetrative sexual assault by a father upon his 13-year-old daughter, the Special Court observed:

“...the well-established cannon of criminal justice “fouler the crime higher the proof” is also required to be kept in mind. Though, the twin pair of presumption is given under section 29 and 30 of P.O.C.S.O. Act, however, presumptions, are rules of evidence and do not conflict with the presumption of innocence of the accused and the burden to prove its case, beyond all reasonable doubt, still remains intact and prosecution is required to discharge said burden.”

The presumption was not applied in the case because the victim’s testimony was found to be unreliable and the accused was acquitted.

Nevertheless, there have been a few cases when the presumption was invoked by the prosecution and this resulted in convictions. In *State v. Mithilesh Chbedi Yadav*,<sup>138</sup> the Special Court explained the rationale behind the two presumptions and their nature as follows,

“The first set out of this pair-presumption takes care of the child who is victim of a sexual offence and has limited capacities and capabilities of appreciation and understanding. **A child is quite incapable of appreciating and understanding the mental state of others and even of himself. In all cases or most of the cases, in absence of such a pair-presumption the victim might not find itself to give a complete account of mental state and mental elements of the accused which the victim might have come across during the commission of the offence. Such contingencies would have frustrated the legislation of the POCSO Act. The Legislature with a view to ensure the proper and smooth functioning of the Act has provided this pair- presumption. This is just to ensure the just ends of the statute.**” (Emphasis added)

In *State v. Shrikant Amle*,<sup>139</sup> the accused had verbally harassed the 16-year-old victim. The Special Court applied the presumption of culpable mental state of the accused and sought rebuttal from the defence.

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<sup>136</sup> Special Case No. 263/2014 decided on 24.05.2016 (Thane).

<sup>137</sup> SPECIAL CASE NO. 45 of 2013 decided on 30.11.2015 (Thane).

<sup>138</sup> Spl. Case No. 51/2014 decided on 10.02.2016 (Thane).

The defence stated that the case was falsely lodged against the accused because of a dispute between him and the victim's relatives relating to a housing society. However, no evidence was led to support this claim, and the Special Court held that this defence was not credible and the accused was convicted.

### ***3.11.2. Standard of proof for rebuttal***

Section 30(2), POCSO Act states that the standard to rebut a presumption under the POCSO Act is one of beyond reasonable doubt. In *Noor Aga v. State of Punjab*,<sup>140</sup> the Supreme Court examined the constitutionality of presumptions under the NDPS Act and held,

“An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. **Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused.**” (Emphasis added)

Special Courts have followed the standard of preponderance of probabilities for rebuttal by the accused.<sup>141</sup> For instance, in *State v. Nagraj Shinde*,<sup>142</sup> the accused aged 30 years was having sexual relations with the victim aged 15 years. The Special Court observed that the prosecution had established enough facts to apply the presumption and that the burden shifted to the defence. The Special Court then observed that the standard of rebuttal for the defence is a preponderance of probabilities. However, the Court held that his rebuttal did not meet this standard, and convicted the accused.

However, in *State v. Dilip Gajbhare*,<sup>143</sup> the accused was expected to rebut the presumption beyond all reasonable doubt. The accused attempted to explain the injuries on the body of the victim by stating that they were caused by a fall. The Court, rejecting the explanation of the defence, stated, “mere preponderance of probabilities is not sufficient” to rebut the presumption under Section 29.

### ***3.11.3. Link between application of presumption and victim's testimony***

Special Courts have also shown a tendency to refrain from applying the presumptions when the victim turned hostile. Thus, out of the 629 cases where victims turned hostile, the presumption was mentioned in only 23 cases. In *State v. Ravindra Sware*,<sup>144</sup> the accused was the victim's cousin, and had been accused of raping her. Following the FIR, the mother and the victim were repeatedly assaulted by their relatives, leading to them turning hostile at the trial. The Special Court, however, refused to apply the presumption, noting that the victim and her mother had not supported the prosecution.

A similar approach was also taken by the Special Court in *State v. Arif Husain Abrar Ansari*.<sup>145</sup> The accused in this case had lured a 7-year-old boy to his house with chocolate and committed penetrative sexual

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<sup>139</sup> Sessions Trial 86/2015 decided on 31.12.2015 (Akola).

<sup>140</sup> (2008) 16 SCC 417.

<sup>141</sup> *State v. Nagraj Shinde*, Special (Child) Sessions Case 35/2015 decided on 23.12.2016 (Pune); *State v. Omprakash Ramchandra Parikh*, Special Case 132/2013 decided on 29.09.2015 (Thane).

<sup>142</sup> *State v. Nagraj Shinde*, Special (Child) Sessions Case 35/2015 decided on 23.12.2016 (Pune)

<sup>143</sup> *State v. Dilip Gajbhare*, Special Case No. 35/2014 decided on 16.05.2016 (Nanded).

<sup>144</sup> Special Case No. 37/2014, decided on 05/19/2015 (Kolhapur).

<sup>145</sup> Special Case No. 26/2013 decided on 09.03.2015 (Thane).

assault. The victim and his mother turned hostile during the trial. The Special Court noted that the medical evidence supported the prosecution and that it was unlikely for a false case of this nature be lodged. Since the victim refused to identify the accused, the Special Court held that it could not apply the presumption under Section 29.<sup>146</sup>

A notable exception was *State v. Prakash Dhansing Chavan*,<sup>147</sup> in which the Special Court applied the presumption even though the victim turned hostile. The presumption was applied because the prosecution established the minority of the victim and the DNA analysis revealed that the accused was the biological father of the victim's child.<sup>148</sup>

### **3.11.4. Presumption under Indian Evidence Act, 1872**

In *State v. Somnath Suresh Varpe*,<sup>149</sup> and *State v. Mukeshbmkumar Chhotelal Pal*,<sup>150</sup> the Special Court invoked the presumption under Section 106, Indian Evidence Act, 1872 (IE Act) concerning special knowledge of the accused. In both cases, the incident in question took place in closed rooms, thus the burden to prove that no offence occurred was placed on the accused. In both cases, the accused persons could not discharge this burden, and were convicted.

In two cases, Special Courts applied the presumption under Section 114A, IE Act, to shift the burden to the accused to prove consent once the fact of intercourse had been established.<sup>151</sup> This was invoked even though the victim's age was established to be under 18 years thus rendering the question of consent irrelevant.

### **3.12. Outcomes in 'romantic cases'**

For the purposes of this study, all cases in which the victim claimed to have been in a romantic relationship with the accused at any stage of the investigation or trial, or the judge noted explicitly that a love affair could be inferred from the facts or the statement of the victim, are considered 'romantic' cases. Charges were most commonly framed under Sections 4 or 6, and occasionally under Sections 8, 10 or 12 of the POCSO Act. Additionally, charges were also framed under the IPC, most often under Sections 363, 366, 366-A and 376. Occasionally, charges under the IPC were framed under Sections 354, 504 and 506.

- Out of the total of 1330 cases analysed, 273, that is 20.52% cases, were classified as 'romantic' in nature.
- The accused person was convicted in a total of 25 cases of which 23 cases were under the POCSO Act and two under the IPC. Acquittals were recorded in the remaining 248 cases. In one case, the accused was convicted under the IPC and ITPA. The rate of conviction in romantic cases is 9.15%, whereas the rate of acquittal is 90.85%.
- In 54 romantic cases (19.78%), the victim had become pregnant, allegedly because of sexual intercourse with the accused. Of these, convictions were recorded in a total of 10 cases of which

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<sup>146</sup> *State v. Arif Hussain Abrar Ansari*, Special Case No. 26/2013 decided on 09.03.2015 (Thane).

<sup>147</sup> Special Case No. 02/2015, decided on 10/27/2016 (Buldana).

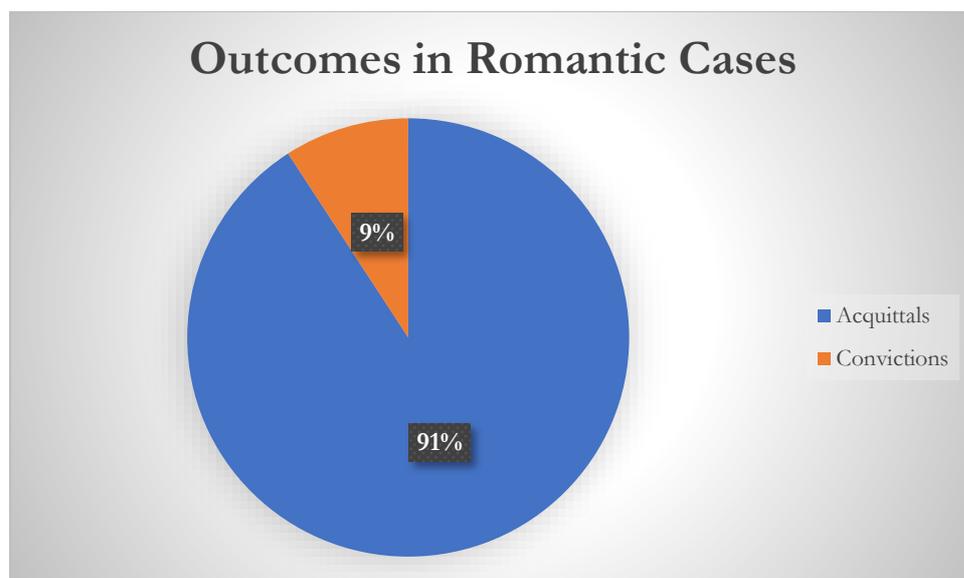
<sup>148</sup> Special Case No. 02/2015, decided on 10/27/2016 (Buldana).

<sup>149</sup> Sessions Case No. 5 of 2015, Decided on 17.10.2016 (Nashik).

<sup>150</sup> Sessions Case No. 186 of 2015, Decided on 17.10.2016 (Nashik).

<sup>151</sup> *State v. Sanjay Popat Aghane*, Sessions Case No. 232 of 2014, Decided on 29.10.2015 (Nashik); *State v. Somraj Sahebrao Gavali*, Sessions Case No. 151 of 2014, Decided on 16.06.2015 (Nashik).

eight were under the POCSO Act, one case under the IPC and ITPA, and one case under the IPC.



Each of the 25 cases in which a conviction was recorded also saw the accused being sentenced either under the POCSO Act, or under the IPC, or under both. In 24 cases, the minimum sentence prescribed for the offences with which the accused was charged was awarded. In one case, the maximum sentence was given for one of the offences (S.12, POCSO), while the minimum sentence was awarded for the other offences. Compensation was awarded in 7 cases (2.59%), all of which had resulted in a conviction. The victim was pregnant in three of these cases.

“In consensual cases, if the victim knows that there is imprisonment to the accused, she will definitely turn hostile. The professionals dealing with the child should not say this out loud. The child victim definitely would not want to see her lover being tortured or in jail. They usually try to save their boyfriends/family/brother. The culture is such.”

- Respondent from the child protection system

As is evident from the profile of informants in romantic cases [Section 3.4 above], FIRs are primarily lodged by family members of the victim who disapprove of the relationship between the victim and the accused. When the accused and the victim are discovered to have eloped together, FIRs are lodged under the POCSO Act. In such cases, the victim either refuses to testify against the accused, or turns hostile in court, stating that she is above the age of 18, or that there were never any physical relations between her and the accused, thereby resulting in an acquittal. For instance, in *State v. Vikram*,<sup>152</sup> it was alleged that the accused had kidnapped the victim and raped her. The victim herself stated that she was in love with the accused and had accompanied him willingly. Further, she stated that she had married him and engaged in sexual intercourse only after turning 18. Her father, the complainant, appeared before the court and stated that he had no problem with the relationship and had filed the complaint based on a misunderstanding. This led to the acquittal of the accused. In some cases, even if the victim testified, her testimony was found to be unreliable due to other evidence, and the Court concluded that she was being unduly influenced by her family. In *State v. Ravidas Hiranman Bhangare*,<sup>153</sup> though the victim initially stated

<sup>152</sup> Special (Child) Sessions Case No. 6 of 2015, decided on 28.11.2015 (Pune).

<sup>153</sup> Sessions Case No. 148 of 2014, Decided on 18.08.2015 (Nashik).

that she had been subjected to sexual intercourse without her consent, the Court chose to rely, instead, on love letters written by the victim to the accused. These were admitted by her during her cross-examination, and the Court held that the defence had proved that she had accompanied the accused willingly, out of love.

In *State v. Akshay Vasant Kale*,<sup>154</sup> the mother of the victim admitted that she had lodged the report initially because her daughter had eloped with the accused and married him but she had accepted their marriage. The marriage may be formal, and with the consent of one or both the families, or a personal arrangement between the victim and the accused without performing any essential ceremonies. In *State v. Ravindra Vilas Khaire*,<sup>155</sup> the victim testified that upon turning 18, she had accompanied the accused, married him, and started residing with him. There was no evidence as to whether essential ceremonies of the marriage had been performed, but considering that the victim and the accused were living happily as husband and wife, the Special Court acquitted the accused.

The above trends were endorsed by most stakeholders. Almost all respondents from Pune, as well as Thane spoke of the high rate of compromise and out-of-court settlements in ‘romantic’ cases. A senior respondent from the police lamented, “There is nothing we can do about it. We have to file the FIR. Sometimes compromises happen in the interim, but these things can only be considered by the Court.” On the other hand, one respondent from a NGO involved in creating community awareness on child sexual abuse, highlighted the moral policing that accompanies such cases and shared examples in which the police blamed the girls involved for enticing the boys to elope and suggested that the victim marry the accused.

### **Appreciation of age difference**

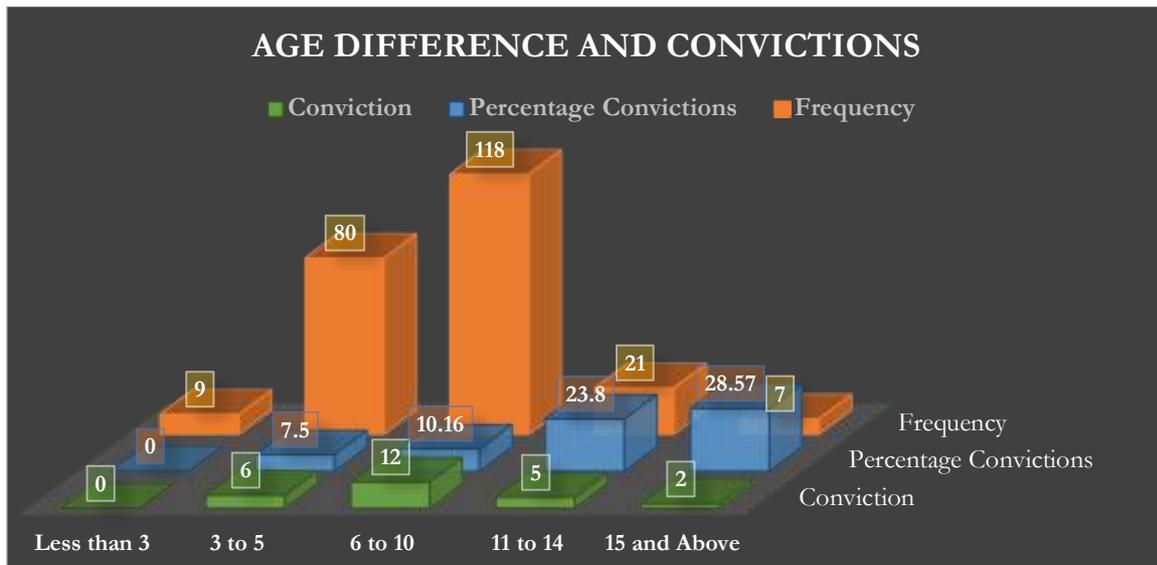
The difference in the age between the victim and the accused is a relevant factor as it makes the free and informed consent of the victim appear improbable and places the burden on the accused to not pursue a relationship with the minor victim. However, this was rarely considered by Special Courts while examining such cases under the POCSO Act.

A profile of the age difference between the victim and the accused in the cases where the age of both the victim and the accused is mentioned (235 cases) is depicted below. The age of the victim and the accused mentioned in the FIR has been used, even though, due to the nature of the cases, the age of the victim was often contested by the accused, or in some cases, by the victim herself.

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<sup>154</sup> Special Court No. 488 of 2015 (J) decided on 26.07.2016 (Greater Bombay).

<sup>155</sup> Sessions Case No. 347 of 2015, Decided on 30.07.2016 (Nashik).



The graph indicates an increase in rates of conviction with the increase in age gap between the victim and the accused. From this correlation, however, no causal link can be drawn between the two events due to several factors such as the contested age of the victim, the tendency amongst victims and their families to turn hostile, and other factors such as compromises, marriages and pregnancies which weigh on the mind of the Special Court. Moreover, difference in age is hardly ever overtly considered as a factor by judges in reaching a verdict, although, as the numbers suggest, it might be considered subconsciously. Since an age of consent does exist, and adolescent sexual relationships are caught in the net of criminal law, a large age-gap might be a useful red flag for grooming. Where the difference in ages between the victim and the accused is more than 5, or in some cases, 10, years, the Court must consider whether the victim was conditioned by her partner into accepting the sexual abuse.

“...if there is consent between children who are above 16, there should be no case under the POCSO. But you should see how the consent was taken, the age difference between the parties, and the kind of relationship. Sometimes, they may be together, the girl says also that there was no force against her, but the parents file a case of kidnap. But in such cases, the police says that the child does not have consent. And they punish the guy only, and not the girl. And everyone treats the CICL as though he went to jail. You cannot punish anyone because they have fallen in love. Give them education, give them counselling.”

- Respondent working in a NGO

#### **3.12.1. Conviction**

While it is rare, in some cases, the Special Court accepted and relied on the testimony of the victim, even if there was no corroborating evidence. **21 out of the 74 cases in which the victim testified against the accused resulted in convictions, at a rate of 28.37%.**

#### **Consent of minor irrelevant**

In *State v. Suraj Damai*,<sup>156</sup> for instance, the accused and the victim were admittedly having a romantic relationship. The victim thought that they were in love and that they would elope and marry. When they

<sup>156</sup> Sessions Case 22 of 2015 decided on 18.06.2016 (Islampur).

did run away, the victim alleged that the accused kissed her without her consent. Though there was a relationship, the victim denied giving consent for the kiss. The judge believed the testimony of the victim to convict the accused.

“Just because a girl is having an affair, does not mean she is agreeing to everything. Date rape concept should be recognized.”

- Respondent from the judiciary

Similarly, in *State v. Ajit Maruti @ Papa Bhosale*,<sup>157</sup> the victim’s testimony remained unshaken, and she stated that the accused had lured her with a chocolate, taken her to his sister’s house, and had sexual intercourse with her on the false promise of marriage. While medical evidence indicated that the victim was ‘habituated to sexual assault’, and an attempt was made to argue that this was proof of her consent, the Court held that the consent of a minor was irrelevant and convicted the accused.

In *State v. Prashant Dinkar Dhulekar*,<sup>158</sup> and *State v. Mohan Pandu Gare & Anr.*,<sup>159</sup> the accused were married persons in their 30s. The victims had willingly accompanied them on the promise of marriage, unaware that they were already married. On learning this, they no longer wanted to have a relationship with accused persons, but were forced to engage in sexual intercourse. The Special Court held that the accused persons had kidnapped and raped minor girls on the promise of marriage. The consent of the victims was irrelevant in any case, since they were below the age of 18. Even if it was considered that they had consented to go with the accused persons or to have sexual intercourse with them, this consent was invalid because it was based on fraud. Therefore, convictions were recorded in both cases.

#### **Medical evidence relied upon**

In *State v. Shivdas Umaji Bhil*,<sup>160</sup> the victim was approximately 15 years old when she eloped and married the accused. She also had a child with him, and the DNA test confirmed that he was the biological father. The victim testified that she was above 18 years of age and had accompanied the accused willingly. The Special Court concluded that the marriage was illegal and her consent was of no relevance as she was below 18 years. The accused was convicted under Section 6, POCSO Act.

Along the same lines, in *State v. Somraj Sabebrao Gavali*,<sup>161</sup> the accused and the victim claimed to have had a love affair, and that they had been engaging in consensual sexual intercourse. However, when the victim got pregnant, the accused refused to take responsibility for the child, because of which the victim lodged an FIR. The victim turned hostile because she wanted to marry the accused and his family was maintaining her daughter and her. The Special Court observed that the prosecution had successfully proved that the victim was below the age of 18 at the time of sexual intercourse. DNA analysis of the baby girl delivered by the victim also proved that the accused was the father of the child. The Special Court applied the presumption under S. 114-A, IE Act to hold that, the consent of a minor being irrelevant, the accused was guilty of rape.

In *State v. Pramod Dattatreya Jadhav & Ors*,<sup>162</sup> the Court observed that medical evidence indicated that there had been sexual intercourse between the victim and the accused. The victim was hardly 14 years old at the

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<sup>157</sup> Spl. Case No. 21 of 2014, decided on 08.07.2015 (Kolhapur).

<sup>158</sup> Sessions Case No. 95 of 2014, Decided on 02.01.2015 (Nashik).

<sup>159</sup> Sessions Case No. 239 of 2014, Decided on 11.08.2015 (Nashik).

<sup>160</sup> Special Case No. 3 of 2015 decided on 2-3.12.2016 (Dhule).

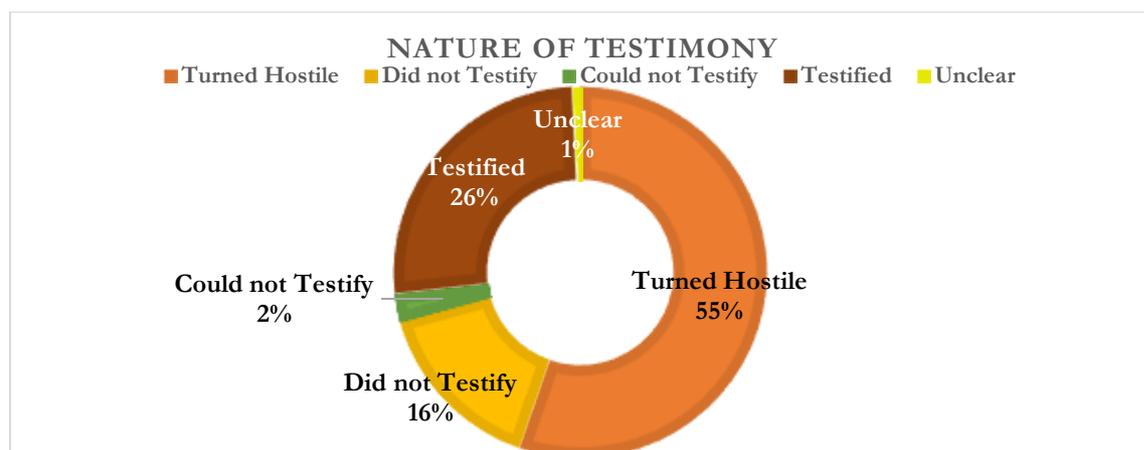
<sup>161</sup> Sessions Case No. 151 of 2014, Decided on 16.06.2015 (Nashik).

<sup>162</sup> Sessions Case No. 121 of 2014, Decided on 16.02.2015 (Nashik).

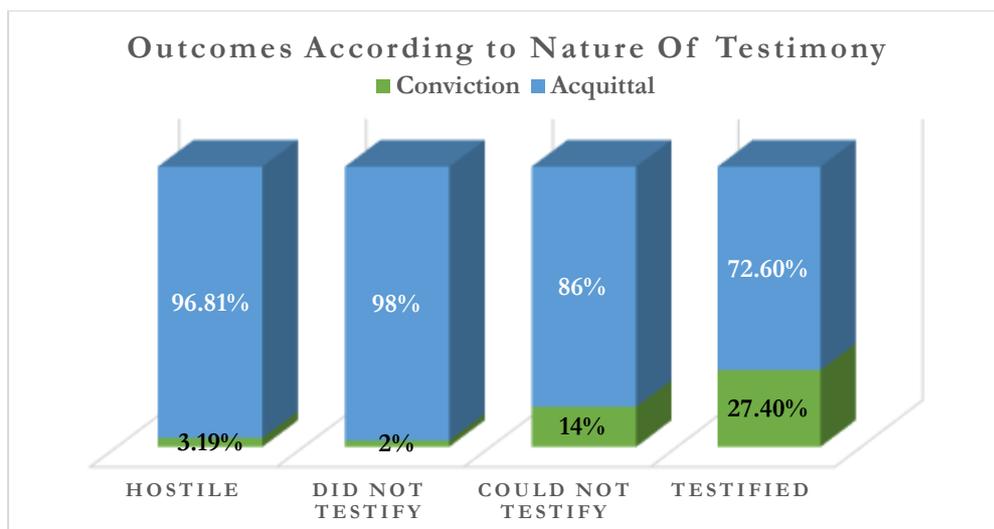
time of the incident, and therefore, unable to understand the consequences of her actions. The accused, on the other hand, was 35 years old, a mature man, capable of understanding that he should not have had sexual relations with the victim. The fact that the victim did not tell anyone that she was being raped was considered irrelevant, as the burden lay on the accused to not engage in such an act.

### 3.12.2. Acquittal because victim turned hostile

- In 201 out of the 248 cases (80.04%) in which the accused was acquitted, the victim had either turned hostile, had not testified against the accused, or did not testify at all.
- The victim turned hostile in a total of 157 cases, out of which 152 cases resulted in acquittals.
- In seven cases, the victim could not testify against the accused because she was dead (four), or untraceable (three). Six of these cases also resulted in acquittals.
- In 44 cases, although the victim did not turn hostile, she did not testify against the accused, because the matter had been compromised outside of the court, or the prosecution had not produced her as a witness, or for other reasons not discussed in the judgements. Only one such case resulted in a conviction.
- In six cases (12.24%), the accused was acquitted despite DNA evidence proving that the accused was the biological father of the minor victim’s child.<sup>163</sup>



<sup>163</sup> See, for instance, State v. Pappu @ Chandrakant Vinayakrao Ghuge, S. T. No. 44 of 2015 (Akola); State v. Vijay Sukhdeo Sonune Special Case No. 24 of 2015, decided on 10.9.2016 (Mumbai).



### 3.12.3. Acquittal based on victim's behavior or consent

Of the 273 romantic cases, in 50 cases (18.31%), the testimony of the victim was held to be either wholly or partly unreliable. Of these, 47 (94%) cases resulted in acquittals. Of the three cases in which convictions were recorded, one was a conviction under the IPC and ITPA, since the testimony of the victim was found unreliable only insofar as the charges under POCSO Act were concerned. There was DNA evidence proving that the accused was the biological father of the victim's child in one case, and in the other, the Special Court applied the presumption under S. 29.

A trend in romantic cases is that the Special Court often ignored the statutory mandate that any sexual contact with a child below the age of 18 is illegal, and focused, instead, on the capacity of the minor to consent. In *State v. Akshay Balu Bacchar*,<sup>164</sup> the victim had admitted in her statement to the police under Section 161, Cr.PC, to having a love affair with the accused. While she was below the age of 18, and therefore, her consent ought not to have mattered, it was observed that the prosecution had failed to prove that she was below the age of 16, even though the age of consent is 18 years. Thus, it was held that the accused could not have been faulted for believing that she was above the age of 16. Similarly, In *State v. Sachin Gotiram Kedar*,<sup>165</sup> the Court held that though the victim was below the age of 18 years, she was above the age of 17, and therefore, mature enough to understand the nature and consequences of her actions.

In *State v. Rupesh @ Banti Bajirao Mokal*,<sup>166</sup> the Court observed, "... the evidence on record goes to show that on the date of the incident she has completed 17 years and 8 months, and therefore, I have to say that she has attained **puberty** on the date of the incident." (Emphasis added). On this line of reasoning, it was held that the victim was mature enough to understand the consequences of her actions, even though she had not attained majority, and therefore, her consent was valid. A lot of girls attain puberty by 10 or 11 years of age (since puberty is attained as soon as a girl has her first menstrual cycle). But this may not necessarily be a sign of sexual maturity, nor a sufficient ground to find that the victim was capable of consenting.

<sup>164</sup> Sessions Case No. 338 of 2015, Decided on 03.09.2016 (Nashik).

<sup>165</sup> Sessions Case No. 25 of 2015, Decided on 25.04.2016 (Nashik).

<sup>166</sup> Sessions Case No. 302 of 2015, Decided 20.10.2016 (Nashik).

In *State v. Rajendra Bhaskar Bagul*,<sup>167</sup> the prosecution had failed to prove that the victim was below the age of 18 years. While the victim testified that she had been threatened by the accused, and lured into accompanying him on the promise of marriage, the Special Court felt that the material question was whether she had consented to the intercourse or not. It found that the accused and the victim had previously been meeting and having sexual intercourse, and that the victim in her statement to the police, had admitted to having a romantic relationship with him. The Special Court observed that the natural conduct of any girl who had been abducted and subjected to forceful intercourse would be to tell people and seek help. The victim, on the other hand, had willingly accompanied the accused, and had not complained or raised an alarm at any point, even though she had the opportunity to do so. Therefore, it was held that the testimony of the victim was unreliable. Her conduct showed that she had consented to sexual intercourse with the accused and the prosecution had failed to prove any element of force.

#### ***3.12.4. Acquittals because of compromises or marriage with the accused***

In *State v. Akhilesh Harichandra Mishra*,<sup>168</sup> the victim was 15 years old when she eloped and married the accused and had a child before the trial was completed. The accused was acquitted because the informant stated that the couple was married and he had no grievances. The Special Court noted that the matter had been compromised. The Special Court rejected the PP's argument about consent being irrelevant under the POCSO Act, and mentioned the ratio of certain judgements of the High Court of Bombay, without citing them:

“Our Hon'ble High Court in the recent cases took a view that if the girl is enough mature to understand the consequences of her consensual physical relations with the partner then the boy cannot be held alone guilty of having sex with the girl though not attained majority. Considering the particular fact of this case in which the lover couple got married with each other irrespective of their age hurdle I find no propriety to punish them for their act when they are enjoying their happy marital life with each other. Moreover the family members of both the families are also having no grievance about their act at this stage.”

#### ***3.12.5. Acquittal based on problematic understanding of rape/sexual assault***

In several cases, an acquittal was recorded because some Special Courts held a very problematic understanding of rape/sexual assault, often running contrary to established tenets of the Supreme Court. In *State v. Vijay @ Subas*,<sup>169</sup> the minor victim was being stalked by the accused for several months before allegedly being forced into sexual intercourse in a shed, on the pretext of marriage. On the same night, the victim had also eloped with the accused, and the mother of the accused stated that she would be willing to accept the victim as her daughter-in-law once she had attained the age of majority. The Special Court noted that there was a love affair between the victim and the accused, evident from the fact that the victim had eloped with him, and that the couple had once attempted to commit suicide together when the victim's parents did not accept their relationship. The victim, however, categorically testified that the accused had raped her in the shed, and that she had not consented to sexual intercourse with him. The Special Court dismissed her allegation, observing that in a case where two people are in a romantic relationship, there can be no question of rape: **“More particularly, when it has been proved that there was love affair developed between two young members of opposite sex. It goes without saying that the charge of rape cannot stick to the accused.”** In this case, the victim is clearly testifying that she did not consent to the sexual intercourse. However, the Court chose to dismiss her testimony based

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<sup>167</sup> Sessions Case No. 24 of 2015, Decided on 28.01.2016 (Nashik).

<sup>168</sup> Spl. C. No. 165 of 2015 decided on 28.01.2016 (Thane).

<sup>169</sup> Special (Child) Sessions Case 94 of 2013 decided on 12.09.2014 (Pune).

on a problematic understanding of consent, contradictory to jurisprudence which requires for a person to consent to each and every act, regardless of the relationship between the victim and the accused.

Alternatively, some Special Courts fell back on the requirement of physical force to evidence rape, despite it not being a material factor in cases of statutory rape and penetrative sexual assault. In *State v. Vijay Sukhdeo Sonune*,<sup>170</sup> the accused allegedly gagged the victim's mouth and had forced sexual intercourse with her at her father's cattle shed. When she started weeping, he promised to marry her. The court noting that the cattle shed was surrounded by houses, observed,

**“Had it been a rape, victim should have resisted and cried for the help. No neighbour around said they heard any screams of the victim. The victim also does not say that she has shouted for help. On the contrary, the victim has admitted that she had not suffered any injury in said sexual assault.” (Emphasis Added)**

### ***3.12.6. Acquittal because victim's age not established***

The failure to establish the victim's age conclusively was noticed in most 'romantic' cases.

In *State v. Vishal Ananddas*,<sup>171</sup> there was no evidence adduced to show that the victim was below 18 years of age, despite the prosecution stating that she was studying in Class 10. This, in conjunction with the fact that the victim had turned hostile, led to an acquittal. In *State v. Santosh Mangal Savla*,<sup>172</sup> the victim was 16 years and three months as per the school record and between 16 and 17 years as per the medical certificate. The Special Court, however, held that her age was not conclusively proven because at the time of admission to school, her birth certificate had not been obtained. The basis of the entry in the school register was not established. It also considered the margin of error of two years and held that there is a possibility that she was more than 18 years. Similarly, in *State v. Sunil Arjun Bhoi*,<sup>173</sup> where the accused had been charged with kidnapping and raping the victim, the Special Court found that the prosecution had been unable to prove that the victim was below the age of 18, because it had produced nothing but oral evidence, even when documentary evidence was available. Therefore, her consent could not be dismissed as being irrelevant. And since it was clear from her testimony that she had willingly gone with the accused out of love, the accused was acquitted.

### ***3.13. Special Courts response to delays in filing FIR***

The condonation of delay by Special Courts was an exception, rather than the rule. In majority of cases, delay in filing of FIR was considered fatal to the case of the prosecution without any appreciation of the special circumstances that prevent prompt filing of FIRs in sexual offences.

The Supreme Court in *State of Andhra Pradesh v. M. Madhusudhan Rao*,<sup>174</sup> summarised the established position on delay in filing an FIR,

“Delay in lodging FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. A delayed report not only gets bereft of the

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<sup>170</sup> Special Case No. 24 of 2015, decided on 10.9.2016 (Mumbai).

<sup>171</sup> Special (Child) Sessions Case 75 of 2013 decided on 18.09.2014 (Pune)

<sup>172</sup> Special Case No. 81 of 2013 decided on 05.08.2015 (Thane).

<sup>173</sup> Sessions Case No. 146 of 2015, Decided on 22.04.2016 (Nashik).

<sup>174</sup> (2008) 15 SCC 582.

advantage of spontaneity, the danger of the introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberations and consultations, also creeps in, casting a serious doubt on its veracity. Thus, FIR is to be filed more promptly and if there is any delay, the prosecution must furnish a satisfactory explanation for the same for the reason that in case the substratum of the evidence given by the complainant/informant is found to be unreliable, the prosecution case has to be rejected in its entirety.”

However, in sexual offences, particularly against children, immediate filing of an FIR may not be possible for several reasons. *First*, the child victim may not wish to mention the incident out of shock or shame because of the stigma attached to such offences, fear because she may be under threat, or a lack of vocabulary or understanding to explain the abuse. As a result, in some cases, the offence may be discovered only when the victim shows signs of pregnancy. Consider, for instance, *State v. Sanjay Popat Aghane*,<sup>175</sup> in which the FIR was lodged when it was discovered that the 15-year-old victim was four months pregnant. The explanation given for the delay was that the victim had no support at home, and that she resided with her old grandparents, as her parents had both remarried and lived separately. Therefore, she had been unable to tell her grandparents when the incidents of rape occurred, especially since the accused, being her landlord, was in a position of power over her, and had threatened to kill her if she told anyone. When her mother came to visit her, the victim revealed the incident to her, and she was immediately taken to a doctor. Her medical examination revealed that she was pregnant. The defence attempted to argue that the delay was unexplained, and therefore, the FIR was tainted by concoction. However, the Special Court found that the reasons given for the delay were perfectly understandable. Considering that the other circumstantial and medical evidence also supported the case of the prosecution, it was held that the delay would not be fatal to the case. Therefore, the accused was convicted.

*Second*, the victim might be unable to speak of the incident because the perpetrator is a relative, or in a position of power over her. *Third*, even if the victim discloses the incident, she may be dissuaded by relatives, society, as well as the police, from lodging the FIR. These social realities have also been acknowledged by the Supreme Court in *State of Himachal Pradesh v. Prem Singh*,<sup>176</sup> wherein it observed,

“So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR.”

### ***3.13.1. Condonation of delay by Special Courts***

In several cases, the Special Court showed sensitivity to factors that led to the delay in lodging the FIR. In *State v. Rajesh Bagde*,<sup>177</sup> the accused had molested the 13-year-old victim when she was staying at her neighbour’s house while her mother was away. The mother of the victim had left town to visit her ailing father. The victim asked her to return after the incident occurred, and the FIR was filed the next day when her mother came back. The Court observed:

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<sup>175</sup> Sessions Case No. 232 of 2014, Decided on 29.10.2015 (Nashik).

<sup>176</sup> AIR 2009 SC 1010.

<sup>177</sup> Special Case No. 33 of 2013, decided on 01.22.2015 (Gondia).

**“One is required to understand the psychology of the victim at the relevant time, who would not only feel shame and guilt, but also be afraid of disclosing the incident to others, especially when the culprit is known to the family. Under such circumstances, the victim will generally share her agonies to a close relative or someone she has confidence in.” (Emphasis Added)**

Since it was understandable why the victim did not lodge an FIR immediately after the incident, without talking to her mother about it first, the delay was condoned by the Court, and it did not affect the case of the prosecution. The accused was convicted.

In *State v. Shakil*,<sup>178</sup> the accused was the neighbor of the victim and coerced her to sit in his car and drugged her with a sweet. He showed her pornographic videos and committed sexual assault on her. He also took naked pictures and videos of her, which he used to blackmail her into engaging in sexual relations with him on multiple occasions. This repeated assault began to take a toll on the victim's body and mind, eventually leading to a breakdown in her tuition classes. The FIR was lodged two days after the victim's mental breakdown. The delay was explained by the fact that the victim was so mentally disturbed that she was unable to explain her predicament. After two days, when her family realised what had happened, they filed the complaint. The Special Court condoned the delay, stating that it was natural for the victim to be disturbed, and that a two-day delay could be explained in such circumstances.

Longer delays were also occasionally condoned, depending on the explanation given for them. In *State v. Rajratna Navghade*,<sup>179</sup> the FIR was lodged nearly a year after the alleged rape. The 13-year-old victim had become pregnant because of rape by her first cousin and another person who was a child in conflict with the law. The matter came to light only after her pregnancy was noticed. On learning about it, her mother confronted her brother and her brother's son. They asked her to abort the pregnancy and refused to take any responsibility. The delay in lodging the FIR was because the victim's brother passed away in an accident and her mother had gone into depression. The FIR was lodged two months after the child was born. The delay was condoned by the Special Court and the accused was convicted.

**Delay condoned in case in which victim was assaulted in 7<sup>th</sup> Standard, but reported when she turned 18 years**

In *State v. Samji Isarya Gavit*,<sup>180</sup> the prosecutrix had filed an FIR in 2014, complaining of rape on multiple occasions by her father when she was in the 7<sup>th</sup> standard. She had become pregnant as a result, and had been made to undergo abortion. When the abuse continued, she had complained to her mother, but her mother was also threatened by her father, and thus, the victim had found no reprieve. Unable to bear the abuse, she had left home and started residing with a lady she claimed was her maternal aunt. On attaining majority, she made an application to the court for an order to allow her to reside with her maternal aunt, which was granted. Her father kept threatening to kill her, prompting her to finally lodge a complaint against him. She was already an adult at the time of filing the complaint, but according to the Special Court was below 15 years when the abuse happened. The Special Court displayed sensitivity while dealing with the arguments raised by the accused against the prosecutrix. To the allegation that her version is doubtful because she did not go to the houses of her relatives nearby, the Special Court stated that this would have been because she feared that no one

<sup>178</sup> Sessions Trial No. 328 of 2013 decided on 26.08.2016 (Aurangabad).

<sup>179</sup> Spl.C No. 10 of 2013 decided on 22.04.2016 (Nanded).

<sup>180</sup> SESSIONS CASE No.16/2015 decided on 03.09.16 (Nandurbar).

would have believed her. With respect to the delay in reporting, the Special Court accepted her explanation that she was afraid of tarnishing her reputation and that of her father and was thus avoiding the lodging of the complaint. The Special Court observed, **“delay in lodging the complaint in the cases like this is inconsequential as no daughter would like to rush to the police station immediately to lodge complaint against her own father alleging sexual intercourse by him unless that stage is reached.”** Even though none of her family members were examined by the prosecution, the Special Court noted that “in case like this an attempt is always made to cover up the act” and their non-examination is therefore not fatal to the case. The accused was convicted.

In *State v. Nallareddy Chabwadi*,<sup>181</sup> the 4-month delay was explained by the fact that the mother of the victim had forgiven the accused, her husband, on multiple occasions. The complaint was lodged only when he continued to molest their daughter. The accused relied on the case of *Thulia Kali v. State of Tamil Nadu*,<sup>182</sup> to show that delay in filing the FIR would be fatal to the case of the prosecution. However, the prosecution distinguished this case, and showed that the Bombay High Court in *Bhiku Tukaram Jadhav v. State of Maharashtra*,<sup>183</sup> had condoned delay in a case where the accused and victim were closely related. The Special Court agreed with the prosecution and condoned the delay.

### ***3.13.2. Non-condonation of delay based on victim’s behaviour***

In *State v. Ramakant Tribhuvan Shrivastav*,<sup>184</sup> the victim was being sexually abused by her step-father for over two years before she reported it to the police. There was a gap of a week between the last incident of penetrative sexual assault and the FIR. In her statement to the police, she had mentioned that her step-father had threatened her, while compelling her not to speak of what he did to her. She had disclosed the abuse to her mother, who had then confronted her step-father. He had apologised and promised not to repeat it. However, he had resumed abusing her two months later. She told her mother, but her mother stayed quiet, and therefore, finally, she lodged the FIR herself. The Special Court observed:

“The delay has not been explained by the victim or any other witness including the investigating officer, who has not been examined. Therefore, it creates doubt and does not inspire the judicial confidence in view of the fact that the accused being step father was repeatedly committing rape or penetrative sexual assault on the victim. **Though he was threatening to the victim not to disclose the incident to anyone but she had ample opportunity to escape and approach to the various police stations for lodging the FIR.**” (Emphasis added)

The Special Court failed to account for the power dynamics within the family, and the complications that typically arise in a case of incest. It showed no consideration for the fact that the victim and her mother, being dependent on the accused, could not have easily mustered the courage to report to the police. While it was clear from the testimony of the victim that she received no support from her mother, and may in fact, have faced resistance from her, these nuances were not appreciated.

In *State v. Sonu @ Shabbaz Shabbir Khan*,<sup>185</sup> there was gap of 23 days between the alleged incident of harassment and the lodging of the FIR. Not only was this delay found to be inordinate, the Court also

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<sup>181</sup> Special (Child) Sessions Case 256 of 2014 decided on 18.05.2016 (Pune).

<sup>182</sup> AIR 1973 SC 501.

<sup>183</sup> 2012 Cri.L.J 1129.

<sup>184</sup> Special Case No. 100 of 2015 decided on 19.12.2016 (Thane).

<sup>185</sup> Spl (C) S.C. No. 289 of 2014, decided on 22.01.2016 (Pune).

held that the explanation did not inspire confidence. The victim testified that she had kept this information to herself for several days because she was afraid of mentioning it. The Court held that this was not believable, especially given the fact that the victim had been going about her daily chores as usual, and had not shown any change in behaviour during this time to suggest that she was in a state of fear. The Special Court did not appreciate that it is normal for a victim of stalking to feel threatened and choose not to speak of it immediately, particularly since there is a tendency in Indian society to blame the victim and restrict her movements. That she was going about her daily chores normally does not, in any way, indicate that she could not have been in a state of fear.

In *State v. Vijay Pawar*,<sup>186</sup> the Court refused to condone the delay in filing the FIR stating that in a joint family, it was not possible that the victim's pregnancy went unnoticed for 8 months. Similarly, in *State v. Akabar Babu Sakhani*,<sup>187</sup> the FIR was lodged 6 months from the date of sexual assault and 5 days after it came to the knowledge of the victim's parents. The prosecution explained the delay by suggesting that the victim was crying and unwell, and that the family had feared disrepute since the accused was a relative. However, the Court refused this explanation, noting that there appeared to be no change in the behavior of the victim girl and she continued to do well at school.

### **3.13.3. Minor delays not condoned**

In *State v. Sachin Ashok Ghuge & Anr.*,<sup>188</sup> the alleged incident of sexual harassment had occurred at 8.00 p.m. and the FIR had been lodged in the morning of the following day. The explanation given by the prosecution was that the parents of the victim felt that it was too late on the date of the incident, and therefore only took the victim to the police station in the morning. On the other hand, the defence contended that public transport was available from the place of residence of the victim to the police station, and an overnight delay created doubt of fabrication. The Special Court agreed with the accused, and, rejecting the explanation given by the prosecution, held that the delay made the case of the prosecution unreliable.

Similarly, in *State v. Prakash Babasabheb Bankar*,<sup>189</sup> the accused, a 50-year-old man, was charged with sexually assaulting a three year-old victim and there was a two-day delay in filing the FIR, which had been explained by the prosecution. Despite the sensitive nature of the case, the delay was seen to be fatal to the case of the prosecution. The Special Court held that the delay made the evidence collected from the house of the accused unreliable, because it appeared unlikely to the Special Court that anyone would have kept a bottle of oil (used to massage the victim) and a mattress (on which the victim was laid down) even after two days.

### **3.14. Consideration of medical evidence**

Medical evidence was available and referred to in 117 (45.52%) out of 257 cases in which convictions were recorded. It formed the basis of conviction in eight out of 10 cases (80%) in which convictions were recorded, even though the victim had turned hostile.

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<sup>186</sup> Special (Child) Sessions Case 369 of 2014 decided on 22.12.2015 (Pune).

<sup>187</sup> Special Court No. 105 of 2015 (J)\* decided on 5.02.2016 (Greater Bombay).

<sup>188</sup> Sessions Case No. 41 of 2015, Decided on 02-05-2016 (Nashik).

<sup>189</sup> Spl. Case [Child] No.05 of 14, decided on 10.08.2016 (Jalna).

### ***3.14.1. Convictions based on corroborative medical evidence***

Corroboration of the testimony of the victim with medical evidence resulted in several convictions. In *State v. Ankuash*,<sup>190</sup> the victim said that the accused took her behind the temple and disrobed her and then she felt pain in her hands and legs, before her father found her (without her knickers) with the accused (who was naked). Medical evidence reported abrasions on both sides of the labium minor as well as on the genitals. The victim was examined by the doctor soon after the incident, who opined that the injuries were suggestive of an attempt to force sexual intercourse. This was held to corroborate the testimony of the victim, and the accused was convicted.

In *State v. Ganesh @ Vastad Gulab Wankhade*,<sup>191</sup> the victim, aged 12-13 years, was repeatedly raped by the two accused on two different occasions and then once only by accused no. 1 (aged 45 years), over a period of about 10 days. The victim's parents only found out when she subsequently started showing signs of pregnancy, and by the time the report was lodged, the victim was in the ninth month of her pregnancy. Before the trial, she had already given birth to a baby girl, whose DNA tests conclusively showed the victim and the Accused no. 2 (aged 33 years) as her biological parents and thus Accused no.2 was convicted and Accused no.1 was acquitted.

Similarly, in *State v. Bhagwan Punjaji Jadhav*,<sup>192</sup> the medical examiner's report was one of the key pieces of evidence, based on which the Court convicted the accused. The report stated that there was a scratch on the junction of the three-year-old victim's labia majora and labia minora, which was indicative of sexual assault. While the defence attempted to argue that the hymen was intact, and therefore, no penetration could have taken place, and that the scratch could have been caused while washing the genitals as well, the Court was unwilling to accept the argument. It was held that established medical jurisprudence had found that the hymen is rarely ever torn in children because the small size of the organ prevents actual penetration. Sexual assault ordinarily takes place on the vulva or between the thighs. Further, as the child is often unaware of what is happening, he/she is unable to offer any resistance, and therefore, no overt injuries are caused. Based on this, the Court found that the testimony of the father of the victim, who had witnessed the assault and rescued her, was corroborated by medical evidence. This was held to be sufficient ground to convict the accused.

Medical evidence was relied on even in cases where the victims turned hostile. In *State v. Laxman Namdeo Gangurde*,<sup>193</sup> the victim in her examination-in-chief testified that the accused, under the guise of promising her work in his agricultural field, took her to the said field, dragged her inside a hut nearby, removed her clothes and raped her. Though she tried to scream, no one was around, and therefore, no one could help her. When the accused left, she immediately told her friend, and even went to the parents of the accused. Her clothes were stained with blood. However, in her cross examination, the victim stated that no such incident had ever happened. The report of the medical examiner indicated that her labia major and labia minora were bruised and scratched, there was tenderness in her cervix, a reddish discharge was flowing from her vagina, and her hymen had recently been torn, indicating recent sexual assault. A quilt was found in the hut of the accused, on which there were blood and semen stains. The Court held that since the hut was not used for residential purposes, the burden was on the accused to explain why there were blood and semen stains on the blanket there. It was also observed that the medical examination proved clearly that the victim had been sexually assaulted. The version of the incident presented by the accused

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<sup>190</sup> Spl. Case [Child] No.01 of 2013, decided on 02.09.2013 (Jalna).

<sup>191</sup> Special Case No. 76 of 2013, decided on 01.08.2016 (Buldana).

<sup>192</sup> Sessions Case No. 178 of 2014, decided on 26.06.2015 (Nashik).

<sup>193</sup> Sessions Case No. 106 of 2014, decided on 30.09.2015 (Nashik).

was contradictory and improbable, and the testimony of the victim during her examination-in-chief was fully supported by the medical evidence, other witnesses, as well as by circumstantial evidence. Therefore, the accused was convicted by the Special Court.

In *State v. Dilip Kacharu Salunke*,<sup>194</sup> the accused had repeatedly been raping his step daughter, and though the victim turned hostile in Court, DNA evidence was used to prove that he was the father of the victim's foetus. Though the case resulted in a conviction, the Special Court observed,

“DNA technology has proved helpful in implicating an offender in a crime by establishing his identity. Similarly, it works as an exculpating factor, proving innocence of persons who are falsely implicated. The technique of DNA test helps in identifying the wanted person with the help of blood and semen stains, hair root, saliva or perspiration with absolute certainty.”

In *State v. Manoj Jaibhim Chabande*,<sup>195</sup> the testimony of the victim withstood cross-examination, and she was able to identify the accused in Court. She cogently narrated the entire sequence of events, with details of how the accused had attempted to rape her. The medical evidence indicated that there had been no sexual intercourse as the hymen of the victim was intact, and there were no injuries on the labia or surrounding regions. The report of the Chemical Analyser, however, indicated that there were semen stains on the skirt of the victim, which the accused was unable to explain. The Court concluded that even though there was no indication of penetrative intercourse, the accused could have touched his penis to the vagina of the victim, attempted to penetrate, and ejaculated in the process, which would be sufficient to make out the offences of penetrative sexual assault and rape.

### ***3.14.2. Acquittal despite medical evidence***

While medical evidence has sometimes been a ground for conviction despite victims and other prosecution witnesses turning hostile, in some cases, oral testimony was given precedence, or the age of the victim was not established, or other factors were considered due to which the accused was acquitted.

In *State v. Vilas Balkiram Susar*,<sup>196</sup> an 8-year-old victim was raped by her uncle in the fields, after being lured with Rs.2/- and some chocolates. The victim was found bleeding and then taken to the hospital where the medical reports suggested injuries on right labia/majora and left labia / minora and also perianal and torn hymen. However, the victim and her parents turned hostile in the court by stating that the cause of the injury was due to a fall and not sexual assault. Based on this, the Special Court acquitted the accused.

Similarly, in *State v. Vijay Laxman*,<sup>197</sup> though DNA evidence established that the accused was the father of the child of the victim, he was acquitted because all the material witnesses including the prosecutrix and her parents turned hostile. The judge held that in the absence of any other evidence against the accused, he could not be held guilty merely because of a DNA test. The victim and the accused had been married in the interim, and the accused was providing for the victim and their child.

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<sup>194</sup> Sessions Case No. 153 of 2015, decided on 18.11.2016 (Nashik).

<sup>195</sup> Sessions Case No. 322 of 2015, Decided on 20.12.2016 (Nashik).

<sup>196</sup> Spl.Case (Child) No.22 of 2014, decided on 25.11.2014 (Buldana).

<sup>197</sup> Special Case No. 17 of 2015, decided on 18.04.16 (Ratnagiri).

In *State v. Tanaji Kale*,<sup>198</sup> the medical evidence conclusively established that the accused was the father of the victim's child. However, the prosecution was unable to prove the minority of the victim, who, in her testimony, stated that she was a major and had consented to the intercourse. Therefore, the accused was acquitted.

In *State v. Bhagwan Keshavrao Deshmukh*,<sup>199</sup> the victim's father filed an FIR stating that his 13-year-old daughter had been kidnapped. On investigation, it was found that the victim had been having a love affair with the accused, and on getting pregnant, she had eloped and married him. In Court, however, the victim denied both the affair and the marriage. The evidence proving the sexual offence was the medical report and the DNA test. The medical report showed that the hymen was torn, the vagina admitted two fingers and that the uterus was bulky due to pregnancy (20 to 22 weeks). The DNA test showed that the accused was the father of the child. However, there was no record of the collection of blood for the DNA tests or its refrigeration as per the prescribed procedure. The Special Court relied on the decision of the Supreme Court in *Rajiv Singh v. State of Bihar*,<sup>200</sup> where it was held that if the DNA evidence is not accompanied by the necessary authorization, and the relevant expert is not examined in relation to it, it would not be held against the accused. Thus, the Court held that while there was strong suspicion against the accused, this was not sufficient to convict him.

Similarly, in *State v. Amol Sonkebamble*,<sup>201</sup> the 13-year-old victim, who was married and estranged, became pregnant as a result of sexual intercourse with her first cousin. He agreed to marry her, but abandoned her at CST Railway Station, Mumbai. She was noticed by the Railway Police and brought to a Children's Home. The FIR was lodged after she narrated her story to a social worker. The DNA test confirmed that the accused was the biological father of the child born to the victim. However, the victim and her father turned hostile in court. The Special Court relied on *Premjibhai Bachubhai Khastya v. State of Gujarat & Anr.*,<sup>202</sup> in which the High Court had observed, "Positive D.N.A. report can be of great significance where there is supporting evidence. However, such report cannot be accepted in isolation i.e. as sole piece of evidence to record conviction in rape case." Based on this, the accused was acquitted.

In *State v. Amol Munjaji Jire*,<sup>203</sup> the medical evidence showed that the victim's hymen was ruptured, but there were no signs of "recent" sexual intercourse. The Court noted that the medical test was conducted three days after the incident because of the delay in filing the FIR, and that the use of the term 'recent' in the medical report was ambiguous and that such a doubt must be resolved in favour of the accused.

### **3.14.3. Acquittal because of absence of medical evidence among other grounds**

In some cases, the accused was acquitted because the medical evidence did not corroborate the testimony of the victim or the offence alleged. In *State v. Kishan Dadarao Ghode*,<sup>204</sup> the accused lured the 11-12-year-old victim to a dilapidated building by giving her money, and attempted to rape her. When she cried, people rushed there and stopped him. As the medical evidence indicated that there had been no penetration, he was acquitted of the charges of penetrative sexual assault and rape. He was, however, convicted of sexual assault and sexual harassment.

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<sup>198</sup> Special (Child) Sessions Case 39 of 2013, decided on 12.05.2015 (Pune).

<sup>199</sup> Special (POCSO) Case No. 10 of 2015, decided on 02.12.2016 (Beed).

<sup>200</sup> 2016(1-2) SBR 273.

<sup>201</sup> Spl. Case (POCSO) No. 44 of 2014, decided on 17.11.2015 (Latur).

<sup>202</sup> 2009, Cri.L.J. 2888.

<sup>203</sup> Special Case (Under POCSO Act) No. 08/2013 decided on 28/08/2015 (Beed).

<sup>204</sup> Special Case (POCSO) No. 2 of 2016, decided on 25.08.2016 (Parbhani).

In *State v. Ramchandra Rangnath Choure*,<sup>205</sup> the 17 year-old victim filed an FIR stating that her father-in-law had been repeatedly raping her over an extended period. At the trial, the victim, her brother and even some *panch* witnesses turned hostile. The medical evidence showed no signs of rape, no semen, no blood stains etc. The hymen tears were old, and since the victim had been married for two years before filing the FIR, they were attributed to marital sex. Therefore, the accused was acquitted.

## Chapter IV: Challenges & Issues

### 4.1. Gaps in age-determination

#### 4.1.1. Failure to apply JJ Rules and Supreme Court's rulings on age-determination

Most Special Courts in Maharashtra did not apply the JJ Model Rules, 2007 with respect to the determination of the age of the victim before the JJ Act, 2015 came into force. Where documentary records were unavailable, no Special Court exercised its power under Section 34(2) to order an ossification test, or apply Section 94, JJ Act, 2015 or Rule 12(3), JJ Model Rules, 2007.

In *State v. Atish Suresh*,<sup>206</sup> the victim stated her date of birth, while her father merely stated that she was 12 years old and her sister stated that she was born in 2000. They were not questioned in chief about the exact dates. A Municipal Council clerk was examined to determine the age of the victim. He produced the birth registration register which contained the date of birth – same as that stated by the victim. However, it was not paginated, the births were not recorded chronologically and there was no proof to show that the birth register was maintained by the Department of Municipal Council. The birth certificate had been issued in 2007 although it should have been issued within 30-90 days of birth. The Village Development officer had not prepared the birth certificate and did not have any actual knowledge about the entries. The defence relied on *Sandeep Janaji Konde v. State of Maharashtra*,<sup>207</sup> wherein the Bombay High Court held that the date of birth should be proved and an entry in a school register will have little evidentiary value in the absence of the material on which the age was recorded. No ossification test was done in this case. Owing to the poor maintenance of the register, the Special Court concluded that it could not be said that the “birth extract was made by public servant in discharge of his official duty and it is a public official book register or record”. The Special Court concluded that the prosecution had failed to prove that the victim was a child.

In many cases where school leaving certificates were available, the Special Court rejected them as well as the testimony of the Headmaster, because the prosecution had not proved the basis on which age was recorded by the school. In *State v. Sunder Tukaram Shejul*,<sup>208</sup> the victim stated her age to be 17 years, and her school headmaster stated the same in his deposition. He also produced the school admission extract from the school records to corroborate the same. However, the Special Court did not accept them because the victim's birth certificate or the documents based on which her date of birth was recorded in the school records was not produced in court.

Two rulings of the higher judiciary on age-determination are relevant in this context. The Supreme Court in *Ashwani Kumar Saxena v. State of Madhya Pradesh*<sup>209</sup> has held:

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<sup>205</sup> Special Child Case No. 3 of 2014, decided on 01.09.2014 (Beed).

<sup>206</sup> Spl. Case No.-91/2014 decided on 19.9.2016 (Thane).

<sup>207</sup> MHLJ (Cri) 2016 (3) 766.

<sup>208</sup> Spl. Case [Child] No.04/14(J), decided on 21.11.2016 (Jalna).

<sup>209</sup> AIR 2013 SC 553.

“...Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination.”

While the above ruling is in the context of age determination of a child in conflict with the law under the JJ Act, it is not clear whether it can be extended to the age-determination of a child victim under the POCSO Act. It however begs the question whether victims can be denied relief under the POCSO Act based on a hyper-technical approach towards age-determination or whether a lenient approach would interfere with the rights of the accused.

#### **4.1.2. Interpretation of margin of error in favour of the accused**

The Special Courts have invariably interpreted the margin of error in ossification tests in favour of the accused. If victim's age as per radiological examination was above 14 years and below 16 years or above 16 years and below 18 years, based on margin of error of  $\pm$  two or three years, many Special Courts added two or three years to the upper age to conclude she was not a child, while few gave the benefit to the victim. One respondent from the judiciary explained that this was in line with principles of criminal justice and interpretation of statutes as per which, if two views are possible, the one in favour of the accused should be preferred.

This view, however, should be read along with the Supreme Court's view in *State of Karnataka v. Bantara Sudhakara*<sup>210</sup> that “...merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the upper age limit is without any foundation.”<sup>211</sup> Further, the spirit of the POCSO Act will be diluted if child victims between 14 and 18 years are deprived of protection under the law by adding two years to the upper range.

#### **4.2. Need for sensitive appreciation of testimony of victims**

The Special Courts have been mandated to be child friendly<sup>212</sup> and to always bear in mind the best interest of the child.<sup>213</sup> However, there are cases that illustrate that the testimonies of victims are rejected by the Courts based on far reaching presumptions, or erroneous interpretations of the law. Such disregard of established evidence standards and the deployment of personal bias can be detrimental to the premise of the Act, and demoralise victims who sum up enormous courage to testify in court.

##### ***4.2.1. Consent, when there may be a romantic relationship between the victim and the accused***

The provisions of the POCSO Act establish that consent of a person under 18 years of age is irrelevant. However, the Special Courts often take into consideration consent and question the lack of consent when there is a doubt of the accused and the victim being romantically involved.

In *State v. Vijay Siddharam Wagbmare*,<sup>214</sup> the 16-year-old victim clearly testified that the accused had sexual intercourse with her without her consent and against her will. However, the court challenged the veracity of her testimony because she was “deeply in love” with the accused and held that there was insufficient

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<sup>210</sup> State of Karnataka v. Bantara Sudhakara, (2008) 11 SCC 38; State of U.P v. Chhoteylal, (2011) 2 SCC 550.

<sup>211</sup> State of Karnataka v. Bantara Sudhakara, (2008) 11 SCC 38; State of U.P v. Chhoteylal, (2011) 2 SCC 550.

<sup>212</sup> POCSO Act 2012, Section 33.

<sup>213</sup> POCSO Act 2012, Preamble.

<sup>214</sup> Spl. Case No. 18/2014, decided on 14.03.2016 (Kolhapur).

evidence to convince the court that she offered resistance and raised a hue and cry. Besides, even if the victim is not a child, consent is crucial and should be explicit every time, regardless of the past relationship between the victim and the accused.

Similarly, in *State v. Ravidas Hiranman Bhangare*,<sup>215</sup> the Court dismissed the testimony of the 16-year-old victim that the accused had allegedly forced her into sexual intercourse and threatened her. The prospect of a love affair between the victim and the accused was so overwhelming for the Special Court that it refused to acknowledge the likelihood that the victim may not have consented to having sexual intercourse with the accused, even if she had accompanied him to the spot willingly.

#### **4.2.2. Victim's character**

The POCSO Act expressly prohibits character assassination of the child by the Special Courts. Additionally, the Criminal Amendment Act of 2013 states “where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent”.<sup>216</sup> Yet, there are judgments in which Special Courts have called into question the character of the victim and deemed her testimony unreliable based on it.

In *State v. Ramkishor Sharma*,<sup>217</sup> the Special Court chose to draw conclusions about the victim and her mother's character from their habits, which were used to discredit their testimony. The Special Court indulged in the public exposition of private details such as an abortion by the mother, that this was her second marriage, all facts which had no bearing on the case at hand. The private life of the victim was also scrutinized with the Special Court determining that the victim framed her step-father as retaliation for his interference in her personal relationships.

In *State v. Hanumant Narayan Giri*,<sup>218</sup> the victim had allegedly been touched inappropriately by her brother-in-law and had been set on fire by him a few days later. The Special Court was of the view that the fire was accidental, as, had the accused set her on fire, he would not have arranged an auto to take her to the hospital. It also made the following observation:

“On going through the C.D.R. (call details record), it seems that number of calls are received to the victim by outsiders. All those things indicates that she was not behaving properly. She was having contact with number of outside people.”

Such an inference seems to suggest that a girl with many friends has a lesser claim to protection.

When the court rules based on the “character” of the victim, it becomes problematic, regardless of the outcome of the case. In *State v. Sagar Manoj Sarwan*,<sup>219</sup> while the Special Court accepted the testimony of the victim, both in terms of her age, as well as the alleged offence, the reason given by the Court for doing so was counterintuitive. It was observed that the victim, being a girl of good character, would have no reason to fabricate a charge of sexual harassment. Such a viewpoint disadvantages victims who are viewed, for whatever reason, as victims of poor character.

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<sup>215</sup> Sessions Case No. 148 of 2014, Decided on 18.08.2015 (Nashik).

<sup>216</sup> S. 25, Criminal Amendment Act 2013.

<sup>217</sup> Special (Child) Sessions Case 84/2013 decided on 27.02.2015 (Pune).

<sup>218</sup> Special (POCSO) Case No. 01/2014 decided on 31/10/2014 (Beed).

<sup>219</sup> Sessions Case No. 309 of 2015 decided on 12.05.2016 (Nashik).

### **4.2.3. Adverse inference in case of absence of resistance**

Pursuant to the Criminal Law Amendment Act, 2013, absence of physical resistance by itself cannot be construed to mean consent to sexual activity.<sup>220</sup> Yet, the Special Courts have time and again considered evidence of physical resistance as a prerequisite to indicate lack of consent, despite the age of the victims.

In *State v. Kailas Jayram Karawanje*,<sup>221</sup> the victim was allegedly raped by her cousin when no other family members were present in the house. One of the grounds for her testimony to be rejected was that the Special Court doubted that she made any noise or put up a struggle during the incident. Bearing in mind that the accused was known to the victim, it seems probable enough that the victim did not realise what was happening, until it was too late and then that she was too terrified or shocked to make sufficient noise that people outside could hear. As no one else was at home, she may not have made a noise, knowing that there was no one else in the home to hear her,. The trauma and the psychological state of a victim allegedly raped by a family member needs to be considered in such type of cases.

In *State v. Mangesh @ Kalya Ashok Salve*,<sup>222</sup> the Special Court, knowing that the victim had 80% mental retardation, made the following observation “Obviously, victim girl did not resist when accused allegedly unclothed her or when he penetrated his penis in her vagina and this circumstance is itself highly suspicious which raises considerable doubt about the authenticity of version of victim girl.” The Special Court appears not to have considered the lack of mental capacity of the victim to comprehend the alleged sexual assault and to react immediately.

In *State v. Akeel Yusuf Sayyed*,<sup>223</sup> one of the grounds on which the Court dismissed the testimony of the victim was that, since her house was surrounded by several other houses, if the accused had indeed come into the house at night and raped the victim, she would have raised a hue and cry, which would have been heard by someone. This assumption is particularly troublesome because, as per the case of the prosecution, the accused had bound and gagged the victim, which would have made it impossible for her to ‘raise a hue and cry’.

Many judgments resulted in acquittals due to non-appreciation of the social stigma associated with sexual assault, the psychological and physical trauma that the accused subjects the victims to, the threats and fear, as well as the tender age of the victims which render it unlikely for them to raise a hue and cry or visibly resist. Such inferences by the court contradict established precedents laid down by the Supreme Court of India, as well as the express terms of the Indian Penal Code, which provide that absence of physical resistance by the victim by itself does not mean consent and also the POCSO Act, which renders consent of persons below 18 years irrelevant.

### **4.2.4. Behaviour of the victim post the offence**

The Special Courts have repeatedly considered the behaviour of the victim soon after the offence to determine whether the accusation is fabricated. This can be tricky as people express themselves differently, and the external manifestation of the disturbing trauma that the victim has endured can be

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<sup>220</sup> Section 9 of the Criminal Amendment Act 2013 amends Section 376 of the Indian Penal Code to state “Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”

<sup>221</sup> Special Case No. 47 of 2014, decided on 26.08.2015 (Ratnagiri).

<sup>222</sup> Special Case No.17/2013 decided on 20/09/2014 (Buldana)

<sup>223</sup> Sessions Case No. 115 of 2015, Decided on 01.06.2016 (Nashik).

subjective. Such presumptions generalise human behavior, assuming there is a 'natural conduct' in any given situation, particularly in a traumatic situation like sexual assault. While it could seem that the natural conduct of a person who is sexually assaulted ought to be to physically resist, shout for help, or tell people, a child victim may be prevented from doing any of these things out of concern for her/his physical safety, reputation, and shock and also the fear that she/he might not be believed.

It is apparent from several cases that there is a script of child sexual abuse, in which a victim necessarily shows certain behavioral characteristics- such as immediately disclosing the incident to friends and family, or becoming very withdrawn, or not paying attention in class. Any deviation from this forms the basis of the assumption that the alleged abuse did not take place, rather than the fact that all children process abuse differently. Judges need to appreciate the shame and stigma of sexual abuse, which prevent a child from speaking of it, or the urgent need to get over the trauma, which forces the child to fall back on routine activities.

In *State v. Mohan alias Falkya Shamrao Pavar*,<sup>224</sup> the 22-year-old accused allegedly took the 7-year-old victim from his house to a spot behind a temple, where he allegedly penetrated his penis into the victim's anus and had forced anal sexual intercourse with him. The victim admitted that he went to play with his friends after telling his grandmother about the incident, which was held against him, since **"he should not have stayed cool and calm and gone to play with his friends if he had suffered bleeding due to forced carnal intercourse"** (emphasis added). The Special Court further stated that the victim should have gone home weeping whereby other villagers would have noticed him, and should not have gone home silently like he did. The judge observed that **"it is quite improbable to perform carnal intercourse against a child of 7 years single handedly."** (emphasis added) The Special Court failed to understand the psyche of a 7-year-old boy who would have barely comprehended the alleged offence. The child would have also probably repressed the trauma that he was subjected to, and after telling his grandmother what had happened, could have fallen back on his daily routine.

In the case of *State v. Kailas Jayram Karamanje*,<sup>225</sup> another reason for the court to reject the testimony of the victim was that she did not tell her grandmother about the incident and that there was no evidence to indicate that the victim was 'sad and quiet', subsequent to the incident. This approach undermines the victim's trauma and neglects to appreciate how private and humiliating the experience would have been. It is recognised behaviour for victims of sexual offences not to disclose what has occurred and to repress the memory and the trauma that they have been put through, moreover so when the accused is a family member as in such a case.<sup>226</sup> Bearing in mind that the victims are of a tender age and are often not fully capable of comprehending what they have endured, it is a disturbing precedent to hold that lack of overt, public and glaring expression of "sadness" is a prerequisite to ascertaining the veracity of the allegation.

In one case<sup>227</sup> perjury proceedings were ordered against the victim under a misinterpretation of the law. The 17-year-old victim alleged that her father had raped her on five occasions. Her inability to recall the exact dates of the offence was apparently evidence to the court that she was fabricating the charges, as according to the Special Court **"any such incident would definitely leave an indelible memory in the mind of any daughter."** The Special Court considered it "striking" that she did not inform her mother about it first and informed her grandparents instead, despite the facts clearly stating that she was closer to

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<sup>224</sup> Special Case No. 28/2015, decided on 4/19/2016 (Buldana).

<sup>225</sup> Special Case No. 47 of 2014, decided on 26.08.2015 (Ratnagiri).

<sup>226</sup> Rebecca J. Whitcombe, Child Sexual Abuse: Adult Survivors, Repressed Memories, and Stories Finally Told, 2001, UCLA Women's Journal, 11(2) available at <http://escholarship.org/uc/item/3721b6td>

<sup>227</sup> Spl. C. No. 146/2014 decided on 22/12/2016 (Thane).

her grandparents and had barely any contact with her mother. The Special Court entertained an application from the D.G.P under Section 193, IPC to initiate perjury proceedings against the complainant. Citing a provision of the POCSO Bill, that was actually never passed, the Special Court erroneously directed her to the JJB for remedial action.

Adherence to the gendered script of the ‘natural conduct’ of a child victim of sexual offences is a victim unfriendly and biased approach that runs counter to the object of the POCSO Act.

### 4.3. Investigation Lapses

Respondents from the police highlighted infrastructural hurdles faced by them. According to them, the absence of technological support, budgetary constraints, and absence of adequate and trained manpower, impedes effective investigation of cases. However, several investigation lapses were noticed by the Special Courts and the common ones were as follows:

#### 4.3.1. Failure to collect documents that establish age or initiate ossification

In *State v. Ramesh Sukedeo Ahire*,<sup>228</sup> the Special Court noted that the only proof of age brought forth by the prosecution was the testimony of the victim and her mother. No documentary evidence, in the form of a birth certificate or a school certificate was brought on record, even though the victim was studying in the 12<sup>th</sup> standard. In the absence of documentary evidence and given the fact that the defence brought out material contradictions and omissions in the cross examination of the victim regarding her age, the prosecution was unable to prove that the victim was below the age of 18.

In *State v. Rajendra Bhaskar Bagul*,<sup>229</sup> though the victim had been sent for a medical examination, no ossification test or other medical procedures were carried out to determine her age. This, in the absence of any documentary evidence or independent testimony, meant that there was no evidence to show that the victim was below the age of 18. Interestingly, such “lapses” were commonly observed in “romantic” cases.

#### 4.3.2. Failure to seize relevant property or prepare panchnama correctly

In *State v. Atul Pendam*,<sup>230</sup> the Special Court noticed that relevant objects such as the cycle of the victim were not recovered and the *panchnama* was not properly drawn. In *State v. Ramzan Pathan*,<sup>231</sup> the Special Court reprimanded the IO for not recovering the mobile phones and video recordings, which were essential to the case of the prosecution. In both these cases, the accused was acquitted.

In *State v. Vicky Raju*,<sup>232</sup> it was alleged that the accused entered the victim’s house through the window and untied the string of her salwar and touched her breast. The police constable who visited the scene of the offence could not state at what height the window was situated. The IO deposed that he had not taken the measurement of the height of the window from outside and could not state its approximate height. The IO did not deny the defence suggestion that it was 8 feet from the floor. No sketch map of the scene of offence was drawn. The spot *panchnama* did not mention whether the window from which

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<sup>228</sup> Sessions Case No. 202 of 2014, Decided on 27.07.2016 (Nashik).

<sup>229</sup> Sessions Case No. 24 of 2015, Decided on 28.01.2016 (Nashik).

<sup>230</sup> Special (Child) Case 33/2013 decided on 02.12.2016 (Wardha).

<sup>231</sup> Special (Child) Sessions Case 41/2013 decided on 13.11.2014 (Pune).

<sup>232</sup> Special Case No.90/2013 decided on 12.04.2016 (Thane).

the accused entered had a grill. According to the Special Court, in the absence of clear evidence about the height of the window from the floor and its location, it would be difficult to believe that the accused could have entered the house from the window.

In *State v. Sandesh Brahma Dongare*,<sup>233</sup> there were discrepancies between the testimony of the IO and the spot *panchnama*, as well as the arrest form, causing the Special Court to remark that the IO had “no knowledge about it and he entered in the witness box in most casual manner.”

#### **4.3.3. Discrepancies in the records**

In *State v. Manoj Kolte*,<sup>234</sup> the statement of the father of the victim was dated five days prior to the date on which the FIR was purportedly filed. This lapse diminished the case of the prosecution, and was one of the grounds on which the accused was acquitted.

In *State v. Suresh Keshav Kathmode*,<sup>235</sup> it was unclear as to who typed the notes of the complaint in the station diary prior to the registration of the FIR. The notes were placed before the court but they did not bear any signature. There were also discrepancies about who registered the FIR. The FIR was initially not registered under Section 4 of the POCSO Act. The IO also testified that he did not obtain rough notes from the officer who registered the offence, nor did he receive rough notes with the investigation papers. This created doubts regarding the accuracy of the FIR, and was one of the grounds on which the accused was acquitted.

In *State v. Sarjerao Rankhamb*,<sup>236</sup> there was a discrepancy between the statement of the complainant and the IO with respect to the seizure of the victim’s clothes. While the complainant stated that he produced the victim’s clothes on the next day, the IO stated that he seized it when he visited the spot. The Chemical Analysis report was negative. The doubt created by this contradiction was interpreted in favour of the accused.

#### **4.3.4. Failure to record the statement of independent witnesses**

In several cases, failure on the part of the police to record the statement of independent witnesses has been considered fatal to the case of the prosecution. In *State v. Kumar Ashok Khakurde*,<sup>237</sup> the Special Court observed that the alleged incident had taken place in a crowded slum. As per the victim and her aunt, the victim had shouted for help. The Special Court found it highly suspicious that no other person came out to help the victim, nor were any independent witnesses produced to corroborate the testimony of the victim and her aunt. Since the police failed to find or examine any independent witnesses, doubt was cast on the veracity of the testimony of the prosecution witnesses, leading to acquittal. Similarly, no independent witnesses were examined in *State v. Sachin Chavan*.<sup>238</sup> The victim’s mother stated that she had complained about the conduct of the three accused persons who were stalking and teasing her daughter to their parents and other respectable persons in the village. None of these other persons were examined.

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<sup>233</sup> Special Case No. 122/2014 decided on 18.04.2016 (Thane).

<sup>234</sup> Special (Child) Case 54/2014 decided on 27.06.2016 (Wardha).

<sup>235</sup> Special Case No. 2/2014 decided on 20/06/2016 (Hingoli).

<sup>236</sup> Special Case (POCSO) No. 31/2014 decided on 14.07.2016 (Latur).

<sup>237</sup> Sessions Case No. 113/2015 decided on 11.7.2016 (Nashik).

<sup>238</sup> Spl. (POCSO) C.No. 09 of 2014 decided on 25.11.2015 (Nanded).

In *State v. Maqbool Fakir Kapadi*,<sup>239</sup> it was alleged that the accused caught hold of the victim's hand and uttered certain lewd words in Marathi, thereby sexually harassing the prosecutrix. The incident occurred in a busy market road through which the child was passing by to buy a notebook. The judge pointed out that failure to record the statement of any of the independent witnesses and to seize the notebook in question were serious investigative gaps. Consequently, the accused was acquitted.

Although independent witnesses may be available, they are often unwilling to become part of the legal process, due to a general distrust of investigating authorities, a fear of the court system, or, in some cases, apathy towards incidents which do not directly affect them. Therefore, the Special Court ought to be circumspect about making this a ground for considering the case of the prosecution untenable. This was the view taken by the Special Court in *State v. Sonu Gore*,<sup>240</sup> where it was held that failure to examine independent witnesses does not imply that the incident did not take place. In this case, the Special Court found the victim's testimony reliable, but acquitted the accused, because the ingredients of the offence were not made out. The prosecution relied on *Hemraj v. State of Ajmer*,<sup>241</sup> in which the Supreme Court observed,

“Generally people are insensitive when a crime is committed and the Court instead of doubting the prosecution case for want of independent witness, must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused.”

#### **4.3.5. Failure to hold Test Identification (TI) parade**

In *State v. Rizwana @ Rano Hamid Sheikh*,<sup>242</sup> seven people were accused of kidnapping the victim girl and selling her to be married to Accused no.4. One of the prosecution witnesses testified that the accused had paid a sum of Rs. 1, 20,000/- to someone for a trafficked girl, and exchanged certain stamped papers evidencing her marriage to him. However, no such papers, or any other evidence of this testimony was recovered or produced. Moreover, there were improvements in the testimony of the witness, as he had not mentioned any of these details in his statement to the police. Further, it was noticed that no TI parade had been carried out to prove that the accused were indeed the persons that the witness claimed to have seen making the aforesaid deal. Therefore, it was found that there were no links to establish the chain of events claimed by the prosecution and the accused were therefore acquitted.

In *State v. Durgaprasad Balchand Sobankar*,<sup>243</sup> it was found that the TI parade had not been conducted as per the guidelines laid down by the Bombay High Court and that the identification of the accused could not be relied on. The Nayab Tahsildar admitted during cross-examination that he had not inquired with the witness whether the suspect or his photograph was shown to the witness before the identification parade. He also admitted that the dummy persons were not of the age group of the suspected person. The Special Court concluded that the offence could not be proved against the accused based on the identification parade as the guidelines for a TI parade had not been followed.

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<sup>239</sup> Special Case No.19/2015 decided on 26/09/16 (Ratnagiri).

<sup>240</sup> Spl. (POCSO) Case No. 12 of 2014 decided on 29.11.2016 (Nanded).

<sup>241</sup> 1954 SCR 1133.

<sup>242</sup> Sessions Case No. 354 of 2015, Decided on 03.10.2016 (Nashik).

<sup>243</sup> Sessions Case No. 220 of 2014, Decided on 09.04.2015 (Nashik).

#### **4.3.6. Lapses with respect to collection of samples and medical reports**

In *State v. Durgaprasad Balchand Sobankar*,<sup>244</sup> the medical examiner's report stated that the hymen of the victim had been torn, and opined that the possibility of sexual intercourse/assault could not be ruled out. However, it was also mentioned that a final opinion could only be given after considering the report of the chemical analyst (C.A). The Court noted that, given these circumstances, it was the duty of the IO to collect the C.A.'s report, which was not done. Therefore, there was not enough evidence to link the accused to the offence.

In *State v. Ananda Baraku Yedage*,<sup>245</sup> the Special Court observed that the police officers had behaved negligently and not followed due procedure. They had not collected sufficient proof to prove the victim's minority, the victim's and the baby's blood samples had not been collected as per the procedure, records about these were not maintained and relevant witnesses' statements were not recorded. While the DNA report indicated that the accused was the biological father of the victim's child, certain certificates by the medical officers cast doubts on the manner the samples had been collected from the victim, the accused and the baby. The Special Court held that since the prescribed procedure had not been followed when collecting the samples, the DNA report was not reliable. Therefore, due to these lapses in the investigation, as well as the fact that the victim and her father turned hostile, the Court acquitted the accused.<sup>246</sup>

#### **4.3.7. Investigation lapses**

In *State v. Dr. Pradip Balvant Gothaskar*,<sup>247</sup> the FIR was lodged by the Director of an educational institution, against a teacher in the school who had allegedly sexually assaulted 22 girl students studying in the fifth standard. The teacher's contract had been terminated, after issuing a notice to him to furnish an explanation. The complaint was lodged 21 days after the matter was brought to the Director's notice, after obtaining consent from the parents of the children and in consultation with a NGO about the obligation to report. The Special Court remarked that the investigation was done "casually" as the IO did not collect the list of the girls who complained, the inquiry report of the incident, minutes of the meeting to show there was a parents meeting, nor did he examine relevant witnesses. The defence highlighted the failure of the IO to record the statement verbatim and through audio-visual means. Only 14 girls were interrogated and only three were examined at trial. The accused was acquitted based on these lapses and the defence's plea that a false story was concocted because the Director did not want the accused to continue in the school, which was accepted by the Court.

In *State v. Kisbor Rupanwar*,<sup>248</sup> the Special Court chastised the IO for conducting an informal investigation. The IO arrested a person who was not named by the victim and proceeded to build a case completely contradictory to the victim girl's complaint. The IO had also refused to lodge the FIR for a long period despite the victim girl wanting to do so.

In *State v. Atish Suresh*,<sup>249</sup> the case ended in an acquittal because of the prosecution's failure to establish that the victim was a child and owing to lapses in the investigation. The following gaps were noted:

- Victim's statement was not recorded by lady police staff, even though it was recorded two days after the incident.

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<sup>244</sup> Sessions Case No. 220 of 2014, Decided on 09.04.2015 (Nashik).

<sup>245</sup> Spl. Case No. 48/2015, decided on 07/20/2015 (Kolhapur).

<sup>246</sup> Spl. Case No. 48/2015, decided on 07/20/2015 (Thane).

<sup>247</sup> Special (Child) Sessions Case 1/2013 decided on 09.01.2015 (Pune).

<sup>248</sup> Special (Child) Sessions Case 3/2013 decided on 20.02.2015 (Pune).

<sup>249</sup> Spl. Case No.-91/2014 decided on 19.9.2016 (Thane).

- Victim's sister's statement was recorded after five days.
- No medical report or witness stated that rape was committed when the FIR was lodged.
- IO did not verify whether the accused person's vehicle passed through the toll plaza.
- Statement of family member of defence witness was not recorded. The accused was the brother of the victim's cousin's wife. The wife was a defence witness.
- The seizure *panchnama* did not mention that the accused opened his vehicle by taking the key from his mother. The rape had allegedly been committed in the vehicle.
- Station diary did not indicate that the accused was arrested within one hour from the same taluk although he resided in Mumbai. No evidence was collected to establish his presence in the area of the incident.

In *State v. Mahasagar Jadhav*,<sup>250</sup> the accused, a teacher in a hostel, allegedly inserted his finger into the victim's anus. The case resulted in acquittal because of several investigation lapses:

- IO did not collect the CCTV footage even though CCTV cameras were in the hostel.
- IO did not examine other students in the hostel.
- The victim's father reached the police station at 12 noon, but the FIR was registered only at 9.30pm. The Special Court pinned this on the complainant instead of the police and observed – "It clearly shows that, even the complainant was not interested to narrate the incident to police nor he insisted the police to write the complaint according to his narration. His act of visiting the police station in the afternoon, not giving the FIR immediately and producing the self-prepared complaint at about 09.30 p.m., creates doubt about the truthfulness of the complaint."
- The *panchnama* was not useful as it did not depict the two sites of the hostel in which the incident had happened. It merely indicated the location of the hostel.

#### **4.3.8. Breach of prescribed procedures**

A private advocate shared that the statements of the victim are being recorded in the police station and that the statement is not recorded in the exact words of the child. Further, "charge-sheets are a cut-copy-paste job and rarely reflect information in addition to what is contained in the FIR."

In *State v. Balasabeb Kerba Maind*,<sup>251</sup> a male officer, who was below the post of Sub-Inspector, recorded the statement of the 13-year-old victim. The officer was also in uniform at the time. As a result, the Special Court held that he had violated Section 24 of the POCSO Act, which was a mandatory provision and found his testimony unreliable. A similar conclusion was drawn in *State v. Bhimrao Sabebrao Shinde*,<sup>252</sup> where a male police officer recorded the statement of the victim.

In *State v. Pravin Chandrakant Jachak*,<sup>253</sup> the complainant was asked to return the following day to lodge the FIR because a lady police officer was not present at the police station. The lady IO admitted during cross-examination that she was in uniform when the statement of the child was recorded. While the Special Court noted that this was an irregularity, it held that the prosecution's case would not be affected by this.

<sup>250</sup> Special Case (POCSO) No. 17/2015 decided on 18.06.2016 (Latur).

<sup>251</sup> Special Child Act Case No. 04/2014 decided on 25/11/2014 (Beed).

<sup>252</sup> Special Child Case No. 16/2014 decided on 16/01/2015 (Beed).

<sup>253</sup> Spl.(C) SC. No. 8/15 decided on 22.06.2016 (Pune).

“There are a few who are child friendly, but 90% have rigid body language, let alone them speaking in harsh tones. They don’t do anything child friendly. In one of the cases, the police had kept the victim in the police station for 4 hours. They took the CV’s statement with the male police personnel. The police in urban area are trained and they are exposed to the law. [In] the rural districts ...the police term the POCSO cases as family matters. They want to settle it.”

- Support Person

“WPC asks the girl to remove all her clothes and show what happened. We informed Childline in a case that CSA is happening. Childline, went with a scale and touched her private parts asking where the accused touched her. The girl screamed and said she didn’t want to go anywhere.”

- Private lawyer

#### 4.5. Inconsistent application of aggravated grounds or special laws

As stated in Section 3.8.1, in 51.24% cases, the charges framed against the accused did not reflect the aggravated nature of the offence. There were also cases in which aggravating factors were considered under Section 376(2), IPC, but not under the POCSO Act.

Another set of cases indicated the failure to include all applicable provisions in the charge-sheet. For instance, in four out of five cases involving elements of trafficking, Section 370, IPC was not applied. Similarly, Section 67B of the IT Act was not applied even though the victim stated that the accused had shown her pornography or had filmed the abuse. In *State v. Amar Maruti Kamble*,<sup>254</sup> although the accused allegedly took video recordings when he had sexual intercourse with the victim and threatened to publish them on Whatsapp, Facebook, and the internet in general, the mobile of the accused was not inspected by the police, and no offence was registered under the IT Act either.

This underlines the need for intensive training on elements of sexual offences, especially the aggravated grounds, for the police, prosecution, and Special Courts. **Selective filing of or framing of charges, based either on oversight or inability to appreciate the nature of the offence, deprives the victim of the protection available to them under the law and makes it impossible for the judiciary to hold the accused fully accountable for their crimes against the victim.**

#### 4.6. Need to Strengthen Prosecution

The Special Courts in Maharashtra do not have designated Special Public Prosecutors exclusively trying POCSO cases. Public Prosecutors are overburdened and rarely interact with the child ahead of the evidence or inform them about the court procedures. The need to understand child psychology was dismissed by one prosecutor who felt that having one’s own children gives one sufficient skills to interact with children. The need to prepare a child for trial was also not considered a responsibility of prosecutors.

If the prosecution fails to produce evidence on record to establish the victim’s age to be below 18 years, then this inexorably results in an acquittal. In many cases, the Public Prosecutors failed to bring to the Special Court’s attention presumptions under the POCSO Act and provisions and rulings relevant to age-determination.

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<sup>254</sup> Spl. Case No. 30/2015, decided on 12/01/2015 (Kolhapur).

In *State v. Rajeshkumar Fulchand Jaiswal*,<sup>255</sup> the Special Court found that the only proof of the age of the victim was her school leaving certificate which mentioned her birth date. This date of birth had been entered on the basis of an affidavit sworn to by the parents of the victim. However, the prosecution did not examine the parents nor the person who had made the entry in the register regarding the age of the child, and therefore, it was held that the document had not been proved. This contributed to the acquittal of the accused.

In *State v. Tarikul Aminul Mandal*,<sup>256</sup> the accused, aged 22 years, had allegedly pulled the victim girl, aged 12 years, into his room, by holding her hand and then bolting the door of the room. The accused was charged under Sections 8 and 12 of the POCSO Act, but was acquitted. Despite the fact that the aunt of the victim had publicly yelled at the accused in front of the crowd assembled outside his house and that the house was located in a very densely populated area, the prosecution failed to bring forth independent witnesses. Secondly, there was no mention of where the 6-7 other men who resided in the same room with the accused were, when the accused allegedly dragged in the victim. Gaps in investigation also contributed to the acquittal as the police failed to seize the accused's phone with which he allegedly took pictures of the victim and failed to send it for forensic analysis.

In *State v. Rehman Saakir Khan*,<sup>257</sup> a translator had been engaged to record the statement of the victim because she was not conversant with Marathi or Hindi and could speak only Kannada. The translator was not examined by the prosecution and there was no document on record to show that the translator was conversant with the victim's language or that she was conversant with Kannada or Marathi. The IO also did not collect any documentary evidence to prove that she knew both languages. Her credibility was called into question by the Special Court.

In *State v. Vijay Pimpale*,<sup>258</sup> the Special Court observed that the prosecution had not examined the IO despite having sufficient notice and time to do so, and this significantly damaged the case of the prosecution. In *State v. Kailas Jayram Karawanje*,<sup>259</sup> the court pointed out that the grandmother of the victim, being a material witness, should have been examined in court by the Prosecution, as well as her statement should have been recorded under s.164 of Cr.P.C. The grandmother was best placed to fill in the gaps in the prosecution's case and could have corroborated the statement of the victim as to her mental state subsequent to the incident.

The prosecution failed to examine a *panch* witness and the officer who prepared the *panchnama* in *State v. Gorakh Mahadeo Babre*.<sup>260</sup> In this case, the other *panch* witness turned hostile. The Special Court thus found that the prosecution failed to prove the *panchnama*. The prosecution also failed to examine the officer who wrote the FIR and the officer in whose presence it was recorded. As a result, the FIR was not considered verified. The prosecution's failure to examine the investigating officer and several eyewitnesses, along with the fact that the victim turned hostile resulted in an acquittal.

#### 4.7. Gaps in Compensation

The award of compensation by Special Courts is an exception as elaborated in Section 2.6 and Special Courts have not gone beyond Section 357, Cr.P.C. Neither Section 33(8), POCSO Act nor Section 357A, Cr.P.C was considered by majority of the Special Courts.

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<sup>255</sup> Sessions Case No. 210/2014 decided on 18.03.2016 (Nashik).

<sup>256</sup> Special Court No. 325/2015 (J)\* decided on 11.04.2016 (Greater Bombay).

<sup>257</sup> Special Case No.133/2014 decided on 07.05.2016 (Thane).

<sup>258</sup> Special (Child) Sessions Case 108/2013 decided on 30.09.2015 (Pune).

<sup>259</sup> Special Case No.47/2014 decided on 26/08/15 (Ratnagiri).

<sup>260</sup> Special Child Case No. 16/2015 decided on 16/05/2016 (Beed).

The Manodhairya Scheme, an innovative measure introduced in 2013 to provide immediate relief to victims of rape and penetrative and aggravated penetrative sexual assault underwent a drastic change during the period of the study. The revisions are recent and its implementation will have to be studied to arrive at any conclusion about the effectiveness of the scheme. It is also not clear if the revised scheme should be read in addition to the original scheme.

Under the original scheme, compensation was payable within 15 days of receiving information about rape or child sexual assault. If the offence was committed by fraud, false promise of marriage or luring the victim in any other manner, 50% of the amount of Rs.2,00,000/- was to be given immediately after filing the FIR and the balance through cheque after the charge-sheet was filed. If the FIR revealed commission of an aggravated offence, the affected woman or child or their legal heir were supposed to be awarded Rs.3,00,000 immediately. Under the revised scheme, interim compensation of Rs 25,000 or 25% of the sanctioned amount should be sanctioned by the DLSA/SLSA after the FIR, MER, and statement under Section 164, Cr.P.C is received. Instead of plugging the delays in disbursal, the revised scheme has prolonged it by tying payment to the recording of the statement under S. 164, Cr.PC. The final compensation can be sanctioned after the charge-sheet is filed.

A hurdle faced in the implementation of the original Manodhairya Scheme was the tracing of victims and their families, as many would relocate following the incident. Under the SOP for the Scheme, the DWCDO was required to seek the assistance of the police to find the victim's new address. A respondent from a CWC was of the view that the implementation of the scheme should be monitored and a tracking system should be put in place to verify and ensure that the amount sanctioned is received by the victim. The revised scheme has missed the opportunity to institutionalize such a tracking scheme. Instead, it provides that if the victim's address cannot be located after "maximum efforts" for three months, the DLSA/SLSA may pass an order to deposit the compensation amount in the State Treasury.

The revised Manodhairya Scheme, however, will not affect the powers of the Special Court under Section 33(8), POCSO Act and Rule 7, POCSO Rules to order compensation and focus should be on ensuring that Special Courts proactively exercise this power.

#### **4.8. Need for preparing a child victim for trial**

Most respondents within the criminal justice system did not appreciate fully the need to orient and prepare a child for the trial and courtroom processes. Judges interviewed felt no prior interaction is required with the child before the evidence is recorded. According to one Public Prosecutor,

We do not need to make them understand the court process. We ask them about the incident. If we feel its genuine, then we orient the child. We tell them if you tell the truth the person will get punished. We do not tell anything about the cross-examination. We keep it natural. Otherwise, the child will say, the PP asked me to say this.

In the absence of Support Persons in all cases, most child victims and their families receive no orientation about the court procedures and the courtroom. The little support they receive from their parents or family members is sometimes misconstrued as tutoring. A respondent from the judiciary, for instance, shared that if a child keeps looking at the parent or support person, it could mean that the child has been tutored. An attitudinal shift is necessary for the effective implementation of the child-friendly provisions of the POCSO Act. Memories of very young children have to be refreshed, especially if there is a long gap between the incident and the deposition. The Maharashtra Guidelines acknowledge this and encourage child professionals and experts "to make request so that the child sees or can be briefed on his

statement for the purpose of memory-refreshing before trial.”<sup>261</sup> However, in the absence of legal representation and Support Persons, this guideline is unlikely to be adhered to.

#### **4.9. Need for better linkage between criminal justice system and child protection system**

The police do not send information to the CWC’s within 24 hours in one of the districts under the Study. In the other district, information is reported within 24-48 hours. Information about the appointment of a Support Person is relayed to the police and the Special Court by the Support Person. There were no referrals to the CWC or DCPU by the Special Courts even though the facts suggested that the victim and her family were extremely vulnerable. One respondent from the child protection system was of the view that Special Courts should rely on CWCs for rehabilitation. One respondent from the child protection system felt all child victims of sexual offences should be produced before the CWC. This expectation is, however, contrary to Rule 4(3) of the POCSO Rules which specifies the situations in which production is required.

Linkages are also absent between the criminal justice system and reliefs available under other existing laws. For instance, in the 45 cases in which the perpetrator was a father, the Special Courts had not passed any orders under Section 26, Protection of Women from Domestic Violence Act, 2005 (PWDVA). According to a respondent from the child protection system, the mother’s position in such cases is “like a pendulum...she gives priority to the father to sustain the family.” The need for support to the mother and the victim are extremely crucial in such cases. The criminal courts however, seem largely unaware of the protections available to children under the JJ Act, 2015 and the PWDVA and the need to extend physical and financial safeguards.

#### **4.10. Need to address Support Gap**

Victims turned hostile in 47% case. Most respondents expressed their frustration about this. The response of those within the criminal justice system, however, was largely punitive towards the victims. For instance, some respondents felt that penal action should be taken against the child for turning hostile, ignoring the protection afforded to children under Section 22(3) of the POCSO Act. An erroneous view was held by two respondents within the criminal justice system that the POCSO Act allows proceedings for false complaint against children above 16 years. A respondent from the police was of the view that hostile witnesses should be strictly punished and that “there is no problem of pressuring victims into turning hostile as they can always tell the Judge if they feel pressurized.” Some Special Courts have directed the victim to return the compensation under the Manodhairya Scheme after she turned hostile.

These cases are also contributing to the perception that false cases are being filed under the POCSO Act and that affects the mindset of the police, prosecutor and judge dealing with such cases. However, there is a need for better appreciation of the situations and reasons that prompt a child to retract. Some IOs acknowledged that the delay in the trial frustrates victims and their family. In some cases, the victims get married and relocate and the families are reluctant to disturb her for fear that it may disrupt her marital life. Compromises take place between the victim’s family and the accused, as the criminal justice system offers little support to victims. A respondent from the judiciary felt the trial should commence immediately after the charge-sheet is filed; as longer the gap, greater is the opportunity to pressurize the

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<sup>261</sup> Maharashtra Guidelines, Clause 11(r).

victim. Another respondent felt that courts have failed to appreciate the psychological reasons behind witnesses turning hostile and recorded mechanical acquittals, ignoring the remaining evidence. In the absence of a robust victim protection program, extrapolating that cases are being falsely filed because victims turn hostile, is a misdiagnosis of the problem plaguing the implementation of the POCSO Act.

One respondent was of the view that support should be made available to the victim till the disposal of the matter. An advocate attached to a NGO was of the view that the child should be kept in a Shelter Home under the orders of the CWC till the testimony is recorded. Such an approach, may however, affect the fundamental principle of institutionalization as a measure of last resort under Section 3(xii), JJ Act, 2015. A respondent from the child protection system admitted that this was an ethical dilemma as it is the child's right to meet the mother, but such meeting had been restricted out of fear that the mother may convince the child to retract. Care and caution will have to be exercised to ensure that the care and protection needs of the child are not compromised or conflated with the outcome of the criminal trial.

Unless stakeholders in the criminal justice system and the child protection system can understand and address grooming, the social consequences, and pressures in cases of sexual offences, and institutionalise a robust support system, the rate of victims turning hostile cannot be reduced.

#### 4.11. Challenges posed by romantic relationships

At the time when the POCSO was being debated, the National Commission for Protection of Child Rights (NCPCR) had suggested that the age of consent in the IPC (16 years) prior to the Criminal Law (Amendment) Act, 2013, be retained, so that teenage relationships and consensual sexual activity are not criminalised. It had also recommended "close in age" exemptions, which would protect consensual non-penetrative sexual acts between two children above 12 years of age who are either of the same age or within two years of each other and consensual penetrative sexual acts between children above 14 years who are either of the same age or within three years of each other.<sup>262</sup> The NCPCR Bill also proposed criminalization of non-consensual sexual acts with children between 16 and 18 years under specified circumstances. Such clauses also exist in other jurisdictions, notably Canada, where the age of consent is 16 years, but a 14 or 15 year old can consent to sexual activity as long as the partner is not more than five years older, and there is no relationship of trust, authority or dependence between them.<sup>263</sup> Several states in the United States of America also have these exemptions, called "age-span" provisions or Romeo and Juliet Laws.<sup>264</sup>

However, the POCSO Act rigidly pegs the age of consent at 18 years and does not recognize adolescent sexual expressions or autonomy. As a result, romantic cases present unique challenges before the police, prosecution, and Special Courts. In Maharashtra, the acquittal rate is approximately 10% higher than in other cases under the POCSO. Some respondents within the criminal justice system lamented about the absence of discretion to the police as the FIR should be compulsorily lodged.

The veracity of romantic cases is frequently called into question because it is projected that the case may have been registered by parents who disapproved of the match for various reasons, such as caste or religion, and the victim may have been pressured into testifying against her boyfriend. Victims and their

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<sup>262</sup> NCPCR, Protection of Children from Sexual Offences Bill, 2010, exceptions to Clause 3.

<sup>263</sup> Janine Benedet, *The Age of Innocence: A Cautious Defence of Raising the Age of Consent in Canadian Sexual Assault Law*, 13(4) THE NEW CRIMINAL LAW REVIEW: AN INTERNATIONAL AND INTERDISCIPLINARY JOURNAL 665, 666 (2010).

<sup>264</sup> Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22(2) YALE JOURNAL OF LAW AND FEMINISM 279, 293 (2010).

families invariably turn hostile in such cases because of marriage between the victim and the accused or compromise and leave the Special Courts with no option but to acquit the accused. They also refuse to cooperate with the investigation. For instance, in *State v. Dilip Sukebdeo Gadhave & Anr.*,<sup>265</sup> and *State v. Sachin Raju More*,<sup>266</sup> though the victims had become pregnant, allegedly due to sexual intercourse with the accused persons, they got an abortion done without informing the IOs. Therefore, no DNA examination could be done to ascertain paternity and the accused was acquitted. Similarly, in *State v. Mitbun Jadhav*,<sup>267</sup> there was no medical evidence against the accused because the mother of the victim refused to send her for a medical examination. The Special Court, therefore, acquitted the accused.

Evidence of a marriage or a pregnancy can be an advantage to the accused, in favour of an acquittal, as the victim and her child might be dependent on the accused. Further, once a marriage has taken place, or a pregnancy is discovered, the family of the victim may also become unwilling to cooperate with the investigation and the trial out of concern for the victim's reputation and welfare. The cases in which a conviction is recorded despite a pregnancy, therefore, are usually cases where the accused refused to take responsibility for the child, and/or marry the victim. In 79 romantic cases (28.93%), the victim and the accused were found to be married, the marriage having taken place either before the alleged incident, or during the trial. Only three such cases (3.75%) resulted in conviction. Similarly, in 52 cases (19.25%), the victim became pregnant because of sexual intercourse with the accused. Of these, only 10 cases (19.23%) resulted in convictions. In fact, in five cases (9.61%), acquittals were recorded despite DNA evidence showing that the accused was the biological father of the victim's child.

A respondent from the judiciary remarked, "In many cases the girl falls in love with the boy, the parents oppose, and only for the reputation of the parents they file the report, in such cases the victim turns hostile." A similar view was expressed by a Public Prosecutor,

In romantic cases, or cases where a relative is involved, victims turn hostile most commonly because there is pressure from the community to compromise the matter outside Court. This is the biggest problem for me... I get many cases like this where a love affair comes to the Court because the girl is below the age of 18. They mostly become hostile and it leads to an acquittal.

According to a respondent from a JJB "... the girls in romantic relationship (usually above 15 years) turn hostile or would like to compromise. They turn hostile as they usually settle it before trial. In such cases, the result is usually acquittal." A private lawyer also mentioned, "If the girl is married, they don't want to progress (with the case). You have to let it go." One respondent with experience as a member of the CWC observed, "Usually relatives want to compromise. There was a case where two 12<sup>th</sup> graders were sexually involved and became pregnant. The mother wanted to get them married... They are more concerned about the society and being stigmatised."

In romantic cases, there was usually a tendency to assume that if there was a love affair between the victim and the accused, and more particularly, if the victim agreed to accompany the accused, she would also have agreed to sexual intercourse with him. See *State v. Vijay @ Subas* under 3.16.2 above.

### **Disconnect between the Law and Social Reality**

Several respondents expressed the view that strict criminalization of sexual contact with a child below the age of 18, regardless of the age, maturity, and consent of both parties, is both unreasonable and untenable, given social reality. For instance, one police officer interviewed, stated:

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<sup>265</sup> Sessions Case No. 175 of 2015, Decided on 29.11.2016 (Nashik).

<sup>266</sup> Sessions Case No. 136 of 2015, Decided on 07.12.2016 (Nashik).

<sup>267</sup> Sessions Case No. 180 of 2014, Decided on 29.04.2015 (Aurangabad).

In my personal capacity, I feel that sometimes children genuinely fall in love. They don't know the law, and they make a mistake. They're so young that they cannot foresee the consequences. **This cannot be equated with rape** (emphasis added). We've all been teenagers, we've all seen infatuation, and we know that you cannot deal with these children as criminals... A lot of times there are sexual relations between children who are not mature enough to fully understand the consequences. These days, children are exposed to so much sexual material on television, through internet pornography and otherwise.

Similarly, a functionary within the child protection system, opined, "It is challenging to deal with cases in which both the boy and the girl are minors in a consensual relationship. The system is unfair, it is better if they decriminalize consensual cases for children between 15-18 years." The criminalization of the boy when both are below 18 years was termed unfair by one respondent who felt that consensual relationships of children between 15 and 18 years should be decriminalized.

On the other hand, some respondents felt that lowering the age of consent or creating exceptions for romantic cases would become a convenient escape route for exploiters. For instance, a Public Prosecutor, mentioned,

"It's good that the court takes a lenient view. But, the age difference between the accused and the victim should be considered as well. There are cases where the accused is married and has a child but still entices the victim who is a 17-year-old, and those cases should be dealt with seriously."

Along the same lines, a private advocate, opined, "If I say it (the age of consent) should be 16 years, it will be a good escape clause for those accused who are actually exploiting the victim." While it is true that minors engage in sexual conduct, and criminalisation may often prove both misplaced and ineffective, it is equally essential that a line be drawn somewhere to protect vulnerable children from abuse under the guise of a romantic relationship.

The POCSO Act offers *de jure* "protection" to all persons below 18 years and criminalizes all sexual activity with them. However, its disconnect with the social reality of sexual exploration and normal sexual activity among adolescents has meant that all such relationships are deemed consensual by the courts with little or no inquiry into whether consent was vitiated.

#### **4.12. Structural Gaps and Challenges posed by jurisdiction of the Special Court**

The Special Courts in Maharashtra do not deal exclusively with POCSO matters, and this affects the disposal of cases as well as the judicial mindset. Nearly all respondents were of the view that Special Courts should exclusively deal with cases under the POCSO Act.

Similarly, the absence of designated Special Public Prosecutors to only handle POCSO cases poses a serious challenge as Public Prosecutors are overworked and POCSO matters get delayed or postponed due to this. Moreover, Public Prosecutors lack sensitization and their demeanor towards child victim often comes across as mechanical.

Structurally, the Special Courts require modifications to ensure that they are in line with POCSO Act and the Maharashtra Guidelines whereby the victim should not come in contact with the accused. This requires separate entrances into the Court complex, separate waiting rooms and separate entrances into the court hall. Moreover, the prerequisite of screens so that the victim is not exposed to the accused while testifying is loosely implemented, with flimsy curtains or partitions that do not completely serve the purpose. None of the courts in Pune or Thane had used video-conferencing facilities to record the

victim's testimony. The court halls lack facilities for accessibility for people with disabilities, as well as toilets and drinking water facilities are not easy to locate.

The Rights of Persons with Disabilities Act, 2016 also requires State Governments to ensure that courts and quasi-judicial authorities are accessible to all persons with disabilities.<sup>268</sup> As stated in Chapter I, the courts visited as part of the study are not physically accessible to persons with disability and there is a need for concerted efforts on behalf of the High Court and the State Government to address this structural gap.

### 4.13. Procedural Gaps

The application of the child-friendly procedures is judge-specific. Application of presumptions under the POCSO Act is an exception and most Special Courts have not applied them.

Objections from defence lawyers were highlighted as major impediments in the application of the child-friendly procedures under the POCSO Act. For instances, questions are rarely routed through the judge. The defence lawyers continue to question the child directly and are invariably aggressive with the child and frame the questions in a confusing manner.

Some respondents were of the firm belief that cross-examinations in cases under the POCSO Act have to be conducted differently. Repeating questions, posing insinuating questions, and using an aggressive tone are not permitted under the POCSO Act, as all of these affect the child's testimony. It was suggested that judges should ask for a list of indicative questions from the PP and the defence lawyer. Training is also required for judges on the manner in which young children interpret and respond to questions.

### 4.14. Procedural and Structural Gaps within the JJBs

One JJB lacked the infrastructure to ensure that the child victim is not confronted with the child alleged to be in conflict with the law inside the JJB. There is no separate entrance or waiting rooms for child victims in JJB premises in Thane or Pune. Lawyers on behalf of the accused and the PP are allowed to pose questions to the child victim directly if the child is not very young, or unless the questions make the child uncomfortable. No compensation has been awarded or recommended by the JJBs. In one case, however, the CWC was requested to assist the child victim in accessing compensation under the Manodhairya Scheme.

Two distinct practices appeared with respect to the application of presumptions under the POCSO Act. While one approach was to apply the presumption of innocence under the JJ Act, the other was to apply the presumption of guilt under the POCSO Act. The latter approach contravenes Section 34(1), POCSO Act and Sections 1(4)(i) and 3(i), JJ Act, 2015, all of which collectively state that the JJ Act will be the overriding law if the offence under the POCSO Act is allegedly committed by a person below 18 years. It will follow that the presumption of innocence under the JJ Act, 2015 will have to be applied.

#### Viewpoint

##### 1. Should the 164 statement of the child be admitted as examination-in-chief

Section 164(5-A)(b), Cr.P.C carves an exception from standard procedure and allows a videographed

<sup>268</sup> Rights of Persons with Disabilities Act, 2016, Section 12(1).

statement of a disabled victim of sexual offences to be admitted as examination-in-chief. The victim can be cross-examined based on the statement. Respondents were asked if a similar provision should be introduced to allow statements of child victims under Section 164, Cr.P.C to be admitted as examination-in-chief.

Most respondents from the judiciary were of the view that the statement of the child victim under Section 164, Cr.P.C could not be admitted as examination-in-chief. Some of the reasons given were that the Special Court needs to examine the demeanour of the victim, the manner in which questions are put by the Magistrate are distinct from that put by the court, and that the presence of the accused is necessary when the victim testifies. One respondent felt that it should be considered for victims of tender age, as they should not have to relive the trauma by repeating the statement. One Public Prosecutor was of the view that it should be allowed if the demeanour of the victim can be observed through audio-visual recording.

**2. Where the accused involved include a child alleged to be in conflict with the law and adults, can we consider one statement by the child victim instead of two?**

Most respondents felt that the child would have to testify separately before the JJB and the Special Court, because the purpose and objective of the two systems was very distinct. The JJ Act lays emphasis on rehabilitation of children in conflict with the law and procedure before the JJB is non-adversarial. Whereas, the objective of the criminal justice system is to determine guilt for the purpose of punishment and the procedure is adversarial. One respondent felt that some mechanism needs to be developed so that a child doesn't have to repeat her statement in two forums.

## Chapter V. Recommendations

The foregoing chapters underline the need to significantly improve the structural and procedural compliance of Special Courts with the POCSO Act. While courtroom design can alleviate the anxieties and fears of a child, the manner the functionaries interact with a child can make a positive difference to the outcome, provided they are sensitive, capable of recognizing the special needs of children, and equipped to communicate with children in a developmentally and age-appropriate manner. Mandatory curricula in capacity building programmes for judges, lawyers, prosecutors, Support Persons, police, and Magistrates should include child development, techniques for interviewing children, and unique features of child sexual abuse as well as the POCSO Act that distinguish it from other offences. A comprehensive action plan is imperative to provide a robust support system for victims, staffed by qualified and trained persons, to enable children and their families to navigate through the criminal justice system with ease.

The Hon'ble Bombay High Court and the State Government have an important role to play to ensure the effective implementation and application of the POCSO Act. Members of civil society have an equally important role to play in the development of training and legal literacy materials and also in providing adequate support services to victims of child sexual abuse and to their families. These recommendations are based on this Study, as well as building on those in Delhi, Assam, and Karnataka. It has also benefitted from interactions with judges, CWCs, JJBs, and other stakeholders during training programs conducted by CCL-NLSIU in different States.

### 5.1. Recommendations for the Hon'ble Maharashtra High Court

It is recommended that the Hon'ble Bombay High Court, in consultation with the Maharashtra Government, consider:

1. **Establishment of dedicated Special Courts** to exclusively deal with cases under the POCSO Act, particularly in districts where pendency is high.

2. **Construction of waiting rooms** in all court complexes specifically for child victims of sexual abuse and their families, in a manner that they are not exposed to the accused or to other adult accused persons and the police, with separate entrances. The waiting rooms and toilets should also **be accessible to persons with disabilities** in accordance with the Rights of Persons with Disabilities Act, 2016. Use of the funds made available under the National Mission for Justice Delivery and Legal Reforms for improvement of courtroom infrastructure should be considered, to ensure that the ambience of the court complex is child-friendly.

3. **Allocation of funds** to:

- enable **prior courtroom orientation** for children and their families by trained support persons;
- enable the creation of an **accessible and child-friendly court-complex and pictorial brochures**, explaining the courtroom structure, people present in the courtroom, sequence of events and the procedures that will be followed during deposition;
- ensure that the **JJBs and Special Courts have means available to prevent the exposure of the child victim to the accused, and to provide clean toilets, and drinking water facilities**. Use of cupboards and thin curtains should be avoided as means to prevent exposure.
- invest in an **electronic intimation mechanism**, that will alert victims and their families at least 24 hours in advance, if the hearing is being rescheduled.

4. Creation of a **cadre of trained para-legal volunteers** to support child victims during the entire course of the investigation and trial. CWCs could then draw from this cadre for the appointment of **Support Persons**.

5. The Hon'ble Bombay High Court may consider issuing the following **guidance notes**:

- To Special Courts, on the award of **interim and final compensation** in cases under the POCSO Act, clarifying the respective roles of Special Court in awarding and the DLSAs in disbursing compensation amounts. It should also be clarified that the Manodhairya Scheme will not affect the powers of the Special Court to award compensation under Section 33(8), POCSO Act and Rule 7, POCSO Rules. Special Courts should not avoid exercising their powers by directing victims to seek compensation under the Manodhairya Scheme.
- To Special Courts, on the **procedures** that should be followed and the evidence necessary while **determining the age** of the victim, especially given Section 94, JJ Act, 2015.
- To Special Courts, on **core minimum measures** that should be taken to ensure compliance with the **child-friendly procedures** under the POCSO Act. For instance, children should not be made to wait unnecessarily when they attend the court for recording of their testimony. Exposure of the child to the accused should be avoided even while the child is waiting to testify. The identity of the victim as well as the victim's family members should be suppressed in the text of the judgment, to ensure compliance with Section 33(7), POCSO Act. The identity of the accused should also be suppressed in cases in which he is the victim's father or closely related to her/him.
- **To Magistrates, on core minimum measures** that should be taken to ensure compliance with the child-friendly procedures under the POCSO Act.

6. **Training** of judges and Magistrates **on age and developmentally appropriate techniques of interviewing children and appreciating their statement.** The training should also address preparation of a child victim and how it is different from tutoring

7. Instructions may be issued to the **Maharashtra Judicial Academy** to:

- Seek the **assistance of experts in child development, child psychology, and child psychiatry** to develop **training modules** for judges, prosecutors, advocates, support persons, and court staff on interviewing children and building rapport with them.
- Include **components and methods of age determination, dealing with hostile witnesses, and appreciation of children's testimony** in the training modules for judges and prosecutors.
- Include **aspects of the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act 2015)** to ensure that a Special Court is equipped to deal with a case of a child alleged to be in conflict of law transferred by the JJB, as per Section 19, JJ Act 2015.

8. Introduction of **certificate courses for court staff** attached to Special Courts, to encourage and enable them to acquire the sensitivity and skills required to interact with traumatized children and their families.

9. Urgently request the Maharashtra Government to ensure that a list of **qualified translators, interpreters, special educators and experts** who could assist in the recording of testimony of the child be made available to all Special Courts.

10. Placing of a **suggestion box outside Special Courts**, for seeking suggestions and feedback for improvement from child victims and others, of their experience of testifying before/engaging with the Special Court.

11. Seeking feedback from Special **Courts** on a regular basis on the challenges they face in trying cases under the POCSO Act, measures they have taken to make the courtroom experience child-sensitive, and to solicit suggestions for improvement. The good practices that emerge from the feedback should be collated, analyzed, and disseminated to all Special Courts.

12. Instruct Special Courts to **display data on disposal and pendency** in POCSO cases on their website on a regular basis after having taken care to suppress identifying information.

## 5.2 Recommendations for the Maharashtra Government

The Maharashtra Government should consider:

1. **Appointment of Special Public Prosecutors (SPP)** as mandated under Section 32(1), POCSO Act, to exclusively deal with the POCSO cases

2. Trainings:

- **Periodic trainings of prosecutors** on the POCSO Act as well as on developmentally appropriate techniques of interviewing children and preparing them for trial, the procedure for filing compensation applications, and the process for age determination.
- **Periodic trainings of police** on the POCSO Act, investigation methods, collection of samples, age-determination procedures, as well as developmentally appropriate techniques of interviewing children. The training should also address the protocol in cases in which the victim is pregnant.
- **Joint trainings of police and prosecutors** on the POCSO Act, lapses that should be avoided, and the manner of investigation and prosecution of sexual offences.
- **Periodic training of Chairperson and Members of Child Welfare Committees** on their role under the POCSO Act and Rules.

- **Periodic training of the Principal Magistrate and Members of the Juvenile Justice Board and joint trainings** of the Principal Magistrates along with Members of the JJB, on the POCSO Act.
  - **Periodic training of doctors of government hospitals** on conducting medical examination in accordance with the POCSO Act and on the age determination process.
3. Development of an **Action Plan to address the support gap and to facilitate greater coordination between support persons, lawyers, prosecutors, as well as children and their families.** The Action Plan should indicate measures that will be taken to ensure the availability of competent and sensitive Support Persons immediately after an FIR is lodged, till the completion of trial. The Action Plan should also address the counselling and support services that will be extended to girls who become pregnant because of the alleged assault and the protocol that should be followed to ensure that termination of pregnancies, if desired by the child, are carried out in a timely manner.
  4. Development of Victim and Witness Protection Scheme similar to the Delhi model.
  4. Creation of a **trained cadre of Support Persons with the assistance of Maharashtra Legal Services Authority and District Child Protection Units** under the JJ Act.
  5. Allocation of **funds to enable Child Welfare Committees to provide remuneration and travel expenses to Support Persons** appointed in POCSO cases.
  6. Allocation of **dedicated funds and transport to the police** to enable them to escort child victims for medical examination and to present them before the CWC.
  7. Allocation of **funds to JJBs**, to ensure that adequately opaque curtains or other means are available to ensure that the **child victim is not exposed** to the child alleged to be in conflict with the law.
  8. Direction to **District Child Protection Units, to prepare a list of qualified translators, special educators, interpreters and other experts** to assist the police, Magistrate, and Special Court, with the recording of statement of the child.

#### **Miscellaneous**

9. Ensuring that **sex education** is included in the curriculum for children along with information about offences under the POCSO Act and in curriculum for teachers on recognizing and responding to sexual abuse. Parent Education Programmes should also be launched to enable parents and other family members to talk to children about sex and sexuality at home, and to focus more on sensitizing boys about how to respect girls.
10. Facilitating the **establishment of community level support groups** to create awareness about child sexual abuse, the legal framework, and support services available to all children, particularly children out of school, children with disabilities, children living on the street, and children living in residential institutions.
11. **Collaborating with mass media** to devise and promote awareness about applicable laws and to challenge attitudes and harmful gender stereotypes that perpetuate the tolerance and condoning of violence against children in all its forms; and to also use the media to promote positive attitudes towards children.
12. Developing **safe, well-publicized, confidential and accessible support mechanisms within the community**, for children to report sexual abuse, with specific attention to reporting mechanisms within residential institutions.

13. Developing **guidelines for reporting by professionals** such as doctors and others working directly with children.
14. Ensuring **regular inspections of Child Care Institutions**, by Inspection Committees under the JJ Act 2015, JJBs, and CWCs.
15. **Commissioning research** on evidence-based studies on the implementation of the POCSO Act and on treatment programs for persons at risk of sexually abusing children and on root causes of sexual violence against children.
16. **Organizing quarterly meetings** with police, prosecutors, doctors, CWCs, JJBs, and support persons to understand the problems they face in the implementation or application of the POCSO Act and its linkage with the JJ Act.
17. **Identifying training needs, documenting good practices**, and identifying measures that should be taken to support stakeholders in the discharge of their functions.

### 5.3. Recommendations for Maharashtra Legal Services Authority

1. Ensure that **DLSA's disburse compensation** ordered by the Special Court **within 30 days** of the order being passed.
2. **Designate Legal Aid Lawyers and para-legal volunteers to provide orientation about the legal procedure** and the courtroom to child victims and their families, as well as children alleged to be in conflict with the law, who may have been transferred by the JJB to the Special Court for trial as an adult.
3. Assign **Legal Aid Lawyers** to provide assistance to child victims in filing an **interim compensation** application before the Special Court.

### 5.4 Recommendations for Special Courts

1. Consider the needs of the child as per the child's **developmental age before scheduling testimony**. Judges should verify if the child is hungry, sleepy, or needs to use the toilet, before commencing with the testimony.
2. Care should be taken to ensure that the **child is not kept waiting for lengthy periods of time on the day of the testimony**.
3. **Complete the examination-in-chief and cross-examination on the same day, as far as possible**. Breaks should be allowed, if necessary.
4. **Do not allow the defence or the prosecution to question the child directly**, as required under the POCSO Act.
5. Admit the **statement of a child with disability** recorded under Section 164(5A)(a) Cr.P.C as examination-in-chief.
6. Take the **assistance of a special educator** or a person familiar with the manner of communication of children in every case of a child with an intellectual disability, mental retardation, or any other disability.
7. Take the **assistance of a child development expert** or any other expert or person familiar with the child's communication, when the child is very young.
8. Ensure that the **child is not exposed to the accused** inside or outside the court, by designating a waiting area within the court complex.

9. Proactively consider **awarding interim compensation** and indicate reasons in writing as to why compensation is not being awarded.
10. Direct the **DLSA to file a compliance report within 30 days** of the award of compensation.
11. **Examine the child in the chamber or any other suitable room** in the court complex, if the courtroom is likely to intimidate the child.
12. While **determining age** of the child victim, apply the rulings of the apex court in *Jarnail Singh v. State of Haryana*<sup>269</sup> on the point of age determination and **Section 94, JJ Act 2015. Refrain from adding two years to the upper age** mentioned in an ossification report, in view of *State of Karnataka v. Bantara Sudhakara*,<sup>270</sup> wherein the Supreme Court observed that "...merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the upper age limit is without any foundation."<sup>271</sup>
13. Apply the techniques suggested in Annexure A of this report, while **questioning children**.

### 5.5. Recommendations for the Maharashtra State Commission for Protection of Child Rights

1. Develop monitoring indicators to assess the State Government's compliance with the POCSO Act.
2. Conduct inspections of Child Care Institutions to assess measures in place to protect children from sexual offences and recommend remedial action.
3. Review the care and protection arrangements available for victims under the POCSO Act in all districts.

### 5.6. Areas of further research

The study has underlined the need for more empirical studies and research on the following areas:

- Challenges faced in the investigation and prosecution of cases under the POCSO Act;
- Quality and nature of support provided by different functionaries available to child victims of sexual abuse;
- Empirical study on the implications of assignment of Support Persons in POCSO cases.
- Evidence-based treatment programs for persons at risk of sexually abusing children;
- Nature of medical evidence sought and its implications on cases under the POCSO Act;
- Ethnographic study of the journey of child victims under the POCSO Act;
- Challenges faced by JJBs in dealing with cases under the POCSO Act;
- Empirical study on the treatment of children alleged to be in conflict with the law in "romantic" cases;
- Challenges faced by CWCs in dealing with cases under the POCSO Act;
- Children's experience of the criminal justice system;
- Implementation of the Manodhairya Scheme.

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<sup>269</sup> (2013) 7 SCC 263.

<sup>270</sup> *State of Karnataka v. Bantara Sudhakara*, (2008) 11 SCC 38; *State of U.P v. Chhoteylal*, (2011) 2 SCC 550.

<sup>271</sup> *State of Karnataka v. Bantara Sudhakara*, (2008) 11 SCC 38; *State of U.P v. Chhoteylal*, (2011) 2 SCC 550.

## Annexure A

### Questioning a Child in Court – Suggested Do's and Don'ts for a Special Court Judge

Extracted from: Centre for Child and the Law, NLSIU, *Law on Child Sexual Abuse in India* (2015), pp. 196-216

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The questioning of children for forensic purposes needs to follow a format so that the children can give accurate information to the best of their ability. Given below are some do's and don'ts for the interview procedure as well as questions that can be posed to child victims or witnesses. These have been adapted from a number of interview protocols including The Cornerhouse Forensic Interview Protocol (Anderson et al, 2010) , Forensic Interviewing Protocol (Governor's Task Force on Children's Justice and Department of Human Services, State of Michigan, 2003), National Institute of Child Health and Human Development Investigative Interview Protocol (Lamb et al, 2007) and the Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act (POCSO) 2012 Ministry of Women and Child Development, Government of India, 2013.

These would apply to interviews by the police in the course of investigation as well as examination and cross-examination during trial.

#### Do's and Don'ts

##### Atmosphere

- The atmosphere must be child friendly and relaxed. This can be done by having a specific room specially designed to interview children. The room should be away from traffic, noise and other potential distractions like phones, fax machines, computers, typewriters, etc. The room should be bright and well lit. It should have a toilet facility. It should have tables and chairs and a cupboard to keep materials out of view. The cupboard can have a few toys and drawing material (such as papers, crayons, colour pencils,) which can be used, if necessary. It should preferably have a one-way mirror and a video recording facility so that the interview can be recorded. The environment should be relaxed but not too distracting.
- Avoid having police personnel in uniform, the accused or any other person in the room when the interview is being conducted

##### Scheduling Interviews

- Interviews must be scheduled after the child has used the toilet and has had something to eat. It should not be scheduled during the child's nap time. It should be scheduled preferably in the morning. If the child is on medication, (for example, anti-seizure medication which can cause drowsiness), the interview should be scheduled for a time when the child is most alert.

##### Interview Guidelines

- The judge/police personnel conducting the interview must introduce themselves. Their tone must be relaxed and easy-going. Sometimes children think that they have done something wrong and are in trouble and therefore are being interviewed by the judge/police personnel. It is important to allay their fears. The following is a brief

example of how one can introduce one's self at the beginning of the interview. "Namaste, my name is Srinivas. I am a judge in this court. Part of my work here is to talk to children about events that have happened to them." Or, - "Hello, my name is Raju and I am a police officer here. I talk to a lot of children in Hoskote (example of name of place where police station is located) about things that have happened to them. We will talk for a while and then I will take you back to the other room where your mother is waiting for you. Okay?"

- If the interview is video-recorded, verbal consent of the child must be taken prior to the interview. A statement such as the following can be made. "I have a video recorder in this room. It will record what we say. It is there so that I can listen to you without having to write everything down. Is that okay?"
- The child's personal space must be respected. By this it is meant that there must be adequate space between the interviewer and the child. More often than not, these children are talking about difficult issues which they may or may not have confided in others, events that are painful, shameful, embarrassing and guilt inducing and thus it can be quite disconcerting to have someone, especially a person in authority staring/looking at them directly at all times. Sitting at an angle of 45 degrees is helpful, as the child can look in front and talk if they don't wish to look at the interviewer, but the interviewer can see the child at all times.
- As these children have been abused in some form or the other (physical, sexual) they often misinterpret touch. It is important therefore not to touch the child. Even if it is a small child, it is important not to tousle their hair, pinch their cheeks or demonstrate affection using touch.
- If the interviewer is unable to hear the child, he/she should not guess what the child might have said. This is important, because if the interviewer has misunderstood the child, in most cases the child is unlikely to correct the interviewer. It is therefore always better to ask the child again as to what he/she had said. For example, "Could you repeat what you just said?" or "I did not hear what you just said, so could you repeat it again please"
- If the child is talking very softly and the interviewer is unable to hear the child clearly, this should be communicated to the child. The interviewer could give the child an explanation such as -"I am unable to hear you, so it would help me if you can look at me and talk a little louder. Thanks" or, - "I have some difficulty hearing, so could you look at me and talk a little louder. Thank you"
- Do not volunteer information that the child has not yet revealed in the interview. For example, if the child has not told you that the father lay down on top of the child it is important not to introduce this information before the child has revealed it himself/herself. For example, "Did he have his pants off or on when he laid down on top of you?" If leading questions have to be asked then it is suggested that the following style be adopted - "Did he have his pants on or off?". Based on the child's answer, the follow up question can be- "Tell me what happened after he took off his pants?," or "Tell me what happened then?"

### **Language and Communication**

- It is important to talk to the child in a language well understood by the child. If the interviewer does not speak the child's preferred language or dialect a translator must be present.
- Do not use baby or childish language while talking to children. Use a normal adult tone and pronunciation. The words that the child uses to describe certain body parts or names of alleged perpetrators or others need to be used when referring to these body parts or

persons.

- Actively listen to the child using minimal encouragers, such as “Go on, I am listening,” or “Hmmm,” or “Then what happened?,” or “Tell me more about what happened.”
- If the child uses a kinship term like “uncle” or “Grandpa” it is useful to clarify their name. For example, “Can you tell me this uncle’s name?” Or, the interviewer can ask- “Do you have one grandpa or more than one grandpa? Which grandpa was this?” Thereafter during the interview the alleged perpetrator’s name must be used. For example, if the child says “Rakesh Mama” or “Dada” then subsequent questions must contain his/her name.
- It is also important not to use the pronouns ‘he’ or ‘she’ as they can be quite ambiguous. For example, “What were you doing when he came home?” Instead the question can be framed as “What were you doing when Rakesh Mama came home?”
- Do not propose feelings by saying things such as- “I know that you probably hate your father”. Feelings that children have for the perpetrators can be rather ambivalent. Sometimes it can be quite confusing for the child. The perpetrator may otherwise be pretty affectionate and caring and the child may have difficulty reconciling the different experiences shared with the perpetrator, both positive and negative experiences including the sexual abuse itself. The above statement regarding whether the child hates her/his father need not be made at all, as it is irrelevant legally to whether sexual abuse has indeed occurred or not.
- Do not make promises such as- “I will lock him up in prison and you will never have to see him again”. This is not ethical, as one cannot predict what is likely to occur during the trial. Making false promises can therefore even result in secondary victimisation.
- Do not ask questions which convey judgements such as -“Why didn’t you tell your mother about it that very night?” It is essential to be non-judgmental, as in all probability, the child is feeling guilty about the same fact and this can make the child more guarded which may impede further evidence gathering by the interviewer.
- Do not use the words such as “abuse”, “rape” or “bad” etc., when asking about the experiences as these are adult interpretations.
- Do not display affection and bonhomie such as “I am like your father, you can tell me anything,” or “We are friends, aren’t we?”. This might be quite confusing for the child whose trust in adults and perhaps in close friends/relatives has been destroyed – which may therefore make him/her more wary and guarded.
- If the interviewer does not understand a particular word or phrase, she/he can ask the child to elaborate by showing it on an anatomical drawing and explaining the same. For example, if the child says “pee pee” for the male/female genitalia, then the interviewer must ask- “Can you tell me what a pee pee is?” or “On this diagram can you show me where the pee pee is? As explained earlier, it is also important that the child’s words be used subsequently in the interview, when referring to the genitalia.
- If there is inconsistency, then the interviewer must ask the child for clarifications in a non-confrontational and non-accusatory manner. At no point should the questioning style suggest disbelief in the story of the child. For example, questions could be framed like this- “You said that your father kissed you on your mouth yesterday and then you said that you had stayed at your uncle’s place yesterday. I am confused. Can you tell me again what happened”.

### **Questioning Children**

- Children are quite concrete in their thinking, and thus open ended questions must be asked. Questions such as “Did he touch you?” are not very good questions as they are misleading. Some children may answer negatively as in their experience, they were kissed

not touched. Children are often literal beings and may be extra careful while answering in an interview of such nature and thus may not equate touch and kiss.

- Questions which are ambiguous must not be asked, such as -“How were your clothes?” Instead, concrete questions such as- “What were you wearing when this happened?” must be asked.
- In the hierarchy of questions that can be asked during an interview of a child victim, open ended questions and prompts are most often preferred. Specific but non-leading questions can be asked for soliciting further details. Closed questions are used to confirm specific details through the use of a multiple choice question or a yes/no question. Leading questions can be asked after certain facts have already been established/revealed by the child.
- Examples for the above mentioned question types are given below.
  - Open-ended questions are as follows. “Tell me everything you can about it,” or “Tell me what you know about what happened”. Open-ended prompts are used in the following manner: If the child stated that the uncle hit her, an open-ended prompt would be- “You said your uncle hit you. Tell me what happened,” or “You said your uncle hit you. Tell me everything about that”.
  - Specific, non-leading questions are as follows. It focuses on details that the child has already mentioned. Questions of this kind are as follows - “You said you were at home alone. Tell me what happened then?” or “You called this person Bittu. Who is Bittu?,” or “You said you were sleeping. Then what happened?”
  - An example of a closed question would be as follows “Where did this happen? In your room, the bathroom or another place?,” or, “Were you wearing your pajamas, or wearing something else?”
- Leading questions must not be asked or, if at all, should be used sparingly, as they assume facts or suggest an answer, which the child has not yet given. Questions such as - “He touched you, didn’t he?,” should not be asked. If a leading question is required to be asked, the question should be framed as follows, “Did Uncle Ravi touch you?,” then follow it up with an open-ended prompt such as - “Tell me everything about that.”
- Do not ask the child to “pretend or imagine”. For example, “Imagine what happened and tell me”. This is not a good practice, as it removes the child from the direct experience and can lead to incorrect or/and inaccurate answers.
- Most children do not understand the concept of time until they are 8-10 years of age. Even if they do understand the concept of reading time, they may or may not be able to relate it to events that have occurred. Children less than 4 years have difficulty with times of the day. Children less than 7 years also do not understand prepositions such as “before” and “after” clearly. It is essential to keep these facts about the developmental stages of children in mind while questioning children. Words such as ‘yesterday’, ‘day after tomorrow,’ etc., should also not be used. Clock times should not be included in questions. Instead, events should to be tied to meal times and other activities in the child’s day, (for example, to the time that he/she goes to school or comes back from school, attends singing class, etc.) which can be used as reference points. For example, - “You came back from school and then what happened?,” or “You said you ate lunch. Then what happened?”.
- Young children also often have difficulty with numbers. Children should not be asked “Tell me how many times it happened?” Instead the question should be framed as “Did it happen once or more than once ?,” followed by questions such as “Can you tell me about the first/last time that this happened?”
- Multiple questions should not be asked at the same time. For example, “Where were you and what were you doing?” Instead, if the child stated previously that the event occurred

after the uncle came home, then the questions must be framed as follows- “Where were you when Rakesh Mama came home?” After the child has answered the first question, the next question can be -“What were you doing when Rakesh Mama came home?” If for instance, the child said he/she was doing his/her homework, then the follow up question thereafter can be -“Tell me what happened after Rakesh Mama came home and found you doing your homework?”

### **Making the Child Comfortable**

- Do not correct the child’s behaviour. For example, if the child rocks in his/her seat, or shakes his/her legs, as long as the interviewer can hear the child and it is not interfering with the interview procedure, it should be allowed, as these are often nervous or soothing behaviours. The child should, in no circumstance, be told to stop acting in these ways or any other such manner, as the range of such self soothing behaviours may not always be known. For example, some children may tap on the desk, hum, make noises with their mouth, rub their hands, sing, etc. An effort should be made to understand such behaviours, (however disturbing they may be to the interviewer), as possibly self- soothing behaviour, which in itself may actually contribute to a conducive and enabling environment for the child to give a clear testimony.
- It is also important to convey a non-judgmental attitude. Do not display shock, disbelief or disgust when the child says something. If a translator is present, try and confine your communication with the translator to understanding the child. Do not engage in conversation beyond this as it could distract and prevent the free flow of thought and the recall of painful memories.
- Do not promise rewards or gifts by making statements such as- “I will give you a chocolate, if you tell me what happened?”
- Do not withhold basic needs as a form of reinforcement, by making statements such as- “I will allow you to go the bathroom/drink water if you tell me what happened?” Children are then not only compelled to concentrate more on holding in their bowel/bladder, rather than answering the interviewer’s questions, which is counterproductive, but also feel disrespected and unimportant.
- Uses of reinforcements as stated in the above two examples are viewed as improper interview techniques, as they tend to coerce and compel the child into stating events and making disclosures in an incorrect manner. This will undermine the quality of the interview and the accuracy of the facts collected which can have negative consequences for the case in court.

Acknowledge the child’s feelings. For example, if the child is demonstrating feelings of being upset, sad, embarrassed or scared, acknowledge these feelings. For example, “I talk to many children about these kinds of things, it’s okay to feel that way, don’t worry. Now, would you like to tell me what happened?”