

‘Challenges faced in ensuring compliance with the Goa Children’s Act, 2003 and the POCSO Act, 2012’

Towards a new dawn...

Purpose of the POCSO Act

- Provide protection to all children from the offences of sexual assault, sexual harassment and pornography
- Provide protection to all children from sexual offences by adult abuser
- For proper development of the 'child' that his or her right to privacy and confidentiality be protected and respected by every person, by all means and through all stages of a judicial process
- For operation of law in a manner that the best interest and well being of the 'child' are regarded as being of paramount importance, at every stage, to ensure healthy physical, emotional, intellectual and social development of the 'child'

Object of the POCSO Act, 2012 and the Goa Children's Act, 2003 (GCA,2003)

- **Object of the POCSO Act, 2012**, is towards securing that the tender of children is not abused and their childhood and youth is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity
- This Act came in to force on 14.11.2012

AND

- **Object of the GCA, 2003**, to protect, promote and preserve the best interests of children in Goa and to create a society that is proud to be child friendly
- This Act came in to force on 08.07.2003

Who is 'child'

- 'Child' means any person below the age of 18 years [*Section 2(d) of the POCSO Act*]
- 'Child' means any person, who has not completed 18 years of age [*Section 2(d) of the GCA*]
- But under the *proviso to Section 2(d)* of this Act, as far as the offence of 'rape' is concerned, 'child' shall mean any person, who has not completed 16 years of age
- 'Child' in case of 'child labor' is a person, who has not completed his 14th year of age [*Section 2(e) of the GCA*]
- Under Clause 'Sixthly' of Section 375 of IPC also it is 'sexual intercourse by a man with a woman with or without her consent, when she is under eighteen years of age'.

The first challenge is about 'Age determination'

One of the defence, generally taken is 'Age of Victim'

- ❖ Relevant provisions of law:
- Where any offence under this Act is committed by a 'child', it shall be dealt under the JJ Act, 2000 [[Section 34 \(1\)](#)]
- If any question arises whether a person is a 'child' or not, it shall be determined by the Special Court [[Section 34\(2\)](#)]
- No order made by Special Court shall be invalid merely by subsequent proof of age [[Section 34\(3\)](#)]

- ❖ Procedure to be followed in determination of Age is prescribed under [Rule 12 of the JJ Rules, 2007](#)
- Relevant documents under Rule 12 (3) (a) are;(i) the matriculation or equivalent certificates, (ii) the date of birth certificate from the school (other than a play school) first attended; (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;
- Rule 12 (3)(b) - 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

Case Laws on the issue of 'Age Determination'

- In the case of ***Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584***, it is said that it is difficult to lay down a law, as to whether in a case the lower or upper age or the average age should be taken into consideration and it is held that each case depends on its own facts.
- On this count of determination of age and while dealing with the issue of procedure to be followed in determination of age by the Juvenile Justice Board or the Court, as the case may be, under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, it is observed by the Hon'ble Supreme Court in the case of ***Shah Nawaj Vs. State of U.P., (2011) 9 SCR 859***, that under Rule 12 (3) (b) of the said Rules, the Board is entitled to seek medical opinion from a duly constituted Medical Board, which will declare the age of the juvenile and in case, exact assessment of 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.

Case Laws on the issue of 'Age Determination'

- In the case of ***Rajinder Chandra Vs. State of Chhattisgarh, (2002) 2 SCC 287***, it is held that while dealing with the question of determination of age of the accused for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. In fact, this is the ratio laid down by the Hon'ble Supreme Court in the case of ***Amit Das Vs. State of Bihar, (2000) 5 SCC 488***.
- ***As per the oral judgment, dated 18.12.2015, in Criminal Revision Application No.80/2015***, passed by the Hon'ble High Court of Bombay, at Goa, in the case of ***Nasmul Hussain @ Shaikh v/s State***, the accused was directed to be referred to the Medical Board for determination of his age and after obtaining the Report and this Court was directed to examine the issue of juvenility of the accused afresh, thereafter, since it was earlier decided on the basis of Age Assessment done by a single Medical Officer and not by duly constituted Medical Board, as required under Rule 12 of JJ Rules, 2007.

The Second Challenge is that 'Child Abuse' is not reported easily – Some reasons are shortlisted as under;

- Children are afraid that they may be disbelieved.
- Children feel a sense of guilt that perhaps it is indeed 'their own fault' that the abuse occurred.
- Every time a child talks about the incident of abuse they may be remembering and reliving the trauma.
- Children are afraid that the person who groomed and abused them will stop loving them or get in trouble because of them. This is because of manipulations during the 'grooming' process and is also true in cases where the offender is a family member.
- The child may have been manipulated by the offender into believing that their relationship is normal. Sometimes the child does not realize that it is being abused.
- Fear of retaliation and further abuse also forces a child to keep silent.
- Generally, children are not encouraged to talk about their feelings and when they do... adults do not listen or believe.
- Social stigma

Outcome of not reporting timely is 'Delay'

- ❖ This is another defence generally taken by the accused.
- This issue is set at rest by the Hon'ble Supreme Court in the case of State of Punjab Vs. Gurmit Singh, AIR 1996 SC 3093 and many other cases.
- It is held that since the offence of rape or abusing child sexually is a grave offence, any delay in lodging the FIR by the victim or the parents of the victim to the police should not be blown out of proportion to doubt the veracity of the victim in a rape case.
- The Police Should also be vigilant in such matters when reported and should be registered without any delay.

Third challenge is on the count of recording statement and deposition of a 'child witness' / 'victim'

Procedure for recording of Statement by Police in brief

- Recording in simple language
- Assistance of translator / interpreter / special educator as the case may be
- Recording statement of child at the residence of child or at the place of his choice
- Statement to be recorded in the presence of parents or in whom child has confidence

Precautions to be taken by Police in brief

- Police officer not to be in uniform
- Child not to come in contact with the accused
- No child to be detained in police station in night
- Identity of child to be protected from media
- Recording by audio-video electronic means

Procedures and powers of Special Court and recording of evidence

Sections 33 to 38 –

- Cognizance to be taken without accused being committed
- Cross examination of the child through Special Court
- Frequent breaks for child during trial
- Presence of parents/ guardian/ friend/relative of child
- Child not to be called repeatedly to testify
- No aggressive questioning or character assassination of child
- Identity of the child not to be disclosed
- In addition to punishment, direct payment of compensation or immediate rehabilitation of 'child'
- Evidence of 'child' to be recorded within 30 days from cognizance
- Completion of trial by Special Court within a year
- Child not to see the accused at the time of testifying
- "In-camera" trial of cases
- Special Court may take assistance of interpreter/ translator/ special educator

Procedural difficulties faced in general & Steps suggested to overcome

- Register of Interpreters, translators and special educators is required to be maintained by DCPU in each district, under Rule 3 of the POCSO Rules, 2012, for the use of SJPU, local police, Magistrate or Special Court
- There is need of Victim Assistance Unit to provide all necessary assistance to the 'child victim' and family
- Regular training need to be imparted to the police officers regarding salient features of this Act, by taking in to consideration the likelihood of transfers of trained officers, which can be organized through District Legal Service Authority
- Even the defence lawyers need to be sensitized with the very object of these Special Enactments, which could be done right from the initial stage, by involving Law students in such case studies through some projects, by setting up 'child Clinics' etc.
- Special Courts to be less burdened with other cases to enable timely recording of evidence of 'victim' and disposal of POCSO cases
- Proper linkage to be established between Special Court and CWC for the 'best interest' of the 'child'

Procedural difficulties faced in general & Steps suggested to overcome

- Repeatedly questioning the 'Child' about the incident by the NGO, Police, Medical Officers, Magistrate and finally before Court needs to be reduced to make the 'child' re-live the incident (This point is kept open for suggestions)
- Effective prosecution is possible only through an able and competent Special Public Prosecutor, as against an experienced and competent defence lawyer
- Directorate of Prosecution to sensitize Special Public Prosecutor by holding regular Workshops
- To conduct training programs in association with Judicial Academies
- To include the representatives of NGOs actively involved in the protection of women and children
- To involve professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development
- They will play a vital role in assisting the 'child' during trial and pre-trial stage
- Psychological Counselors' need to be appointed to assist the 'child victim' in overcoming pre-trial and post-trial trauma

Infrastructural Difficulties faced in general & Steps suggested to overcome

- The term “child-friendly” has been defined in the Juvenile Justice (Care and Protection of Children) Act, 2015 to mean “any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child”.
- At least one Court room per district can be specially designed to suit the requirement of Special Court, with a waiting room, small pantry, washroom facility, separate entrance for the ‘victims’ and a ‘child friendly’ ambience with tools like curtain or one sided mirrors etc.
- That will reduce the expenses and it can be used in turn by the Special Courts dealing with POCSO cases or cases in which ‘child witnesses’ are involved.
- Victim Compensation Scheme and funds should be made effective
- Tools of audio-visual recording of statements to be made available to the Investigating Agency. The system has to be mechanized in such a manner that there are no Doubts in mind of the Witness as well as the Accused and the Defense in relation to transparency.

(Some common challenges in analyzing evidence in such cases)

1. Admissibility of testimony of 'child witness'

- ❖ This is one of the defences commonly taken by the accused
- This issue is set at rest by the Hon'ble Supreme Court in the case of *Golla Elugu Govindu Vs. State of Andhra Pradesh*, AIR 2008 SC 1842 and many other cases
- Firstly, in regard to the evidentiary value of a 'child witness', Sec.118 of the Evidence Act is clear.
- Secondly, it is held that a child of tender age can be allowed to testify, if he or she has psychological capacity to understand questions and give rational answers thereto. Therefore, the evidence of a 'child witness' is not required to be rejected per se. The only caution to the court is that such evidence of a child must be scrutinized with care and caution.

2. Non-Corroboratorion of the version of the prosecutrix by an independent witness

- ❖ This is another defence commonly taken by accused. Moreover sufficient interval should be given for the Witness deposing to state that facts clearly and the fact must be recorded in the Deposition so as to show the conduct, confidence and any aspect of trauma which may be reflected.
- This issue is also set at rest by number of Judgments.
- It is well settled that corroboration is not a rule of evidence but a rule of prudence. There is no legal inhibition for the court to convict the person accused of rape on the uncorroborated version of the prosecutrix, if the same inspires the confidence of the court and appears to be absolutely trust worthy.

3. Absence of proper medical evidence to connect the allegations of rape

- ❖ This is another defence of accused
- This issue is also set at rest by number of Judgments.
- It may be also remembered that medical evidence is only an opinion however the same may differ from case to case.
- It is well settled that medical evidence indicating the presence of semen of the accused on the body or garment of the victim and rupture of hymen and some scratch marks on the back of the victim or bite marks on the face, lips and breasts of the victim are good evidence in regard to the allegation of rape or sexual abuse of a child. But the presence of these is not an absolute requirement. Presence of medical evidence further strengthens the case of the prosecution.

(Some suggestions)

1. Making use of Section 6 of Indian Evidence Act in such cases

- Section 6 of the Evidence Act deals with res-geste is to be considered in proper perspective. Section 6 is an exception to the rule of admissibility of hear-say evidence.
- For bringing hear-say evidence within the ambit of Section 6 of the Evidence Act, it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication.
- This is most relevant provision that can be properly used by the prosecution in such cases, where the 'child victim' confides in mother or parents or any other person in whom he/she has trust about the occurrence of incident.

2. Making use of the provisions of Burden of Proof under POCSO and GCA

❖ Under POCSO

- *Burden of proof* is on the accused in case of commission, abetment or attempt to commit serious offences under Sections 3, 5, 7 and 9 (*Section 29 POCSO*)
- *Presumption of existence of culpable mental state* in case of offences that require a culpable mental state, burden on accused to disprove (*Section 30 POCSO*)

❖ Under GCA

- *Burden of proof* is on the accused in case of any offence against 'child', if the 'child' was in his custody at the time of offence or rescue [*Section 32(I) GCA*]

(Suggestion in general)

Co-ordination for effective Implementation and compliance of Procedural aspects of POCSO

- For effective implementation of the provisions of this Act, a coordinated effort is required by the Investigation Agency, Prosecuting Agency and the Criminal Courts, dealing with the matter.
- Several provisions in this act are based on the guidelines given by the Hon'ble Supreme Court in *Sakshi's Case reported in AIR 2004 SC 3566* and in *State of Punjab v/s Gurmit sing's case reported in AIR 1996 SC 1393*, which guidelines need to be adhered

Role of Children's Courts

- The Children's Court to have all the powers of Sessions Court [*Section 30 (1)*]
- ❖ Procedure laid down under *Section 33*
- Avoidance of harm to sensitivity of 'child'
- Principle of Best interest of 'child'
- Principles of non-waiver of rights of 'child'
- Principle of equality of 'child'
- Principle of right to privacy and confidentiality of 'child'
- Principle of Fresh Start to 'child', by ensuring eraser of past records
- The 'child' shall not be exposed to the presence of the accused

Thank you !!