

PROTECTING THE CHILDREN IN THE REGIME UNDER PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012

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There are so many myths regarding the commission of sexual offences upon children. Myths help us in denying the fact the child sexual abuse is very real, very personal. They help us brush child sexual abuse under the carpet, in falsely believing that our own children cannot be abused and the abuser will almost always be unknown to us. The sociological fact is that, in a majority of cases up to 85 percent, the abuser is from child's relatives, family persons, friends or someone known and trusted by the child and is rarely a stranger. An overwhelming majority of those who sexually abuse children are men and only a small minority of women has been reported to have abused children. Child sexual abuse cuts across classes, caste, religious and educational barriers and occurs irrespective of what the background of the abuser and the child is. Most times, children are unable to disclose or talk about abuse for several reasons, like, being afraid that no one will believe them, they are afraid that the abuser may harm or kill them or their loved ones, they are afraid they will lose the love of their parents and near and dear ones, more often they do not have a language to disclose abuse. Children are experts at hiding their pain so it is difficult to say from external appearance if the child is sexually abused.

Keeping inter alia these facts in consideration, the Protection of Children from Sexual Offences Act, 2012 (hereinafter the Act) has been enacted by the Parliament of India for addressing the offences regarding sexual exploitation and sexual abuse of children. Main highlights of the Act are:

- The Act defines a child as any person below the age of 18 years and provides protection to all children under the age of 18 years against the offences of sexual assault, sexual harassment and pornography.

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- This is the first time that an Act has listed aspects of touch as well as non touch behaviour (e.g., photographing a child in a obscene manner) under the ambit of sexual offences.
- The Act incorporates child friendly procedures for reporting, recording of evidence, investigation and trial of offences
- The attempt to commit an offence under the Act has also been made liable for punishment up to half the punishment prescribed for the commission of the offence.
- The Act also provides for punishment for abetment of the offence, which is the same as for the commission of the offence. This would cover trafficking of children for sexual purposes.
- For the more heinous offences of Penetrative Sexual Assault, Aggravated Penetrative Sexual Assault, Sexual Assault and Aggravated Sexual Assault, the burden of proof is shifted on the accused.
- The media has been barred from disclosing the identity of the child without the permission of the Special Court.

Section 43 of the Act recognizes the presence of myths and unawareness amongst general public, children as well as their parents and guardians and therefore warrants the duty of Central and State Governments to make them aware with the provisions of the Act. The Indian Penal Code (hereinafter referred to as the IPC), the Criminal Procedure Code (hereinafter referred to as the CrPC) and the Indian Evidence Act have been amended recently in respect of the offence of sexual assault and rape by enacting the Criminal law (Amendment) Act, 2013. For effective implementation, periodic training of officers including police officers is also sought to be envisaged by the Act. It is observable that police officers, specially the revenue police officers are not acquainted with the provisions of the Act and this situation has to be addressed.

When the children, the general public and the police who set the criminal law in motion are unacquainted with the relevant provisions of the newly enacted law, the Judges and Magistrates are therefore required to play an active role, both in implementation of the provisions of the Act, and in generating public awareness of the same through Legal Literacy programmes. The Special Courts are designated for the trials of offences

falling under the Act and there is no role of Magistrate except for recording the statements of a child victim u/s 25 of the Act. Section 33(1) of the Act reveals that cognizance may be taken by the Special Courts upon receiving a complaint of facts which constitutes such offence, or upon a police report of such facts, without the accused being committed to it for trial. The phrase "without the accused being committed to it for trial" renders that remand could not be entertained by the Magistrate.

However it is being observed in practice that remand is requested by Investigating Officer (IO) and charge sheets are being forwarded to the Magistrate on facts colouring the offence as being one under the IPC, what actually constitutes an offence under the Act. The offences under the Act are to be met with more severe punishment as compared to the IPCs, and almost all offences under the Act require presumptory evidence. This presumption against accused can be rebutted by proving beyond the reasonable doubt and not merely establishing a preponderance of probabilities. Although more girls are reported to be sexually abused which is estimated to be one in every four, however, research indicates that one in every seven boys world over are also abused. The analogous provisions of the Act with other laws are mostly regarding the offences regarding girl child. In case of the IPC the procedure would be traditionally time-taking and the evidence that would be required would be cogent. Empathy on such analogy of laws would defy the very object of the Act.

What could be done if the police station registers a report under the IPC and not under the Act and seek remand for the accused? In such a situation section 167(2) of the CrPC is applicable for the Magistrates. This provision empowers the Magistrate to order the accused be forwarded to a Magistrate having such jurisdiction even when the prior have no jurisdiction to try the case or commit it for trial. But the considerations should be well founded and explained that the facts constitute the offence under the Act and not under the IPC so that the Special Court can proceed to authorize the detention of the accused. Similarly the report under section 173 of the CrPC can be forwarded to the Special Court for taking cognizance.

Section 42 of the Act postulates that, where any offence is

punishable under the Act and also under any other law, if the offender is found guilty of such offence than the offender shall be punished under such law which provides greater punishment. Such a many provisions of the Act show the anguish and concern of the Parliament towards grave offences and the intention of the Parliament that offenders do not escape. For example, if there is accusation for outraging modesty of woman under section 354 of the IPC, the exact offence is of sexual assault under section 7/8 of the Act in case the victim is a child. Sections 29 and 30 of the Act mandate the presumption as to offence under section 7 of the Act and culpable mental state of accused respectively. Similarly if there is accusation for sexual harassment on girl child under section 354A of the IPC than the exact offence is sexual harassment under section 11/12 of the Act. Furthermore, the harassment in the nature of making sexually coloured remarks or showing pornography falls under section 354A(2) of the IPC which is a bailable and non cognizable offence as against being a non-bailable and cognizable offence under section 11/12 of the Act. Likewise there are reasons for all offences under the Act being preferred to be reported under the IPCs and other laws. So the stage of remand is very important for following the correct path according to the wish of the Legislature enshrined in the Act. Hence till awareness is created among people, a pro-active approach towards the Act is required from the Judges and Magistrates.

SOCIOLOGICAL REFERENCES & EXCERPTS FROM:

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