



## LEGAL IMPLICATIONS OF POCSO ACT, 2012 – AN ANALYSIS

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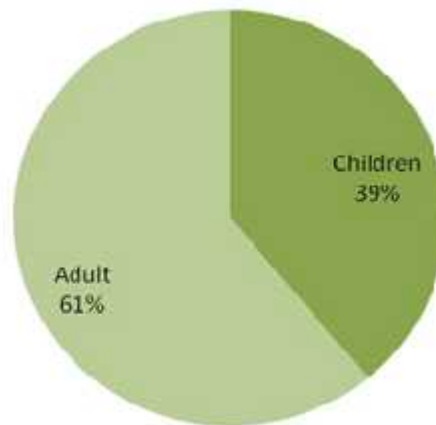
### **Abstract**

Children are the most vulnerable sections in the society. The problem of children is presently a global problem and exists throughout the world. A child can succumb to any sort of pressure as he/she is immature, weak and dependent on others. The child is exposed to issues like health, educational opportunities; sexual exploitation etc., the future of all nations depends upon the sound development of its children. Among the Indian population, children constitute about 39 percent. Hence, the issues related to child care, child welfare and child developments have always been getting the attention of the Government of India. This paper analyses the relevant provisions of the Constitution of India and legislative measures to protect the rights of children in India and also to assess and evaluate the contribution of the (POCSO) Act, 2012 to this and how the children, the future India to be educated.

**Keywords:** (POCSO) Act, 2012, Child Abuse, Physical Effects of Sexual Assault, Punishment for Offences, Educating the Children.

### **Introduction**

The Constitution of India recognizes the vulnerable position of children and their right to protection. The framers of the Constitution of India have also become fully aware of their responsibility towards children. This awareness is reflected in the constitutional provisions which are intended for protecting the rights of children. It guarantees in Article 15 special attention to children through necessary and special laws and policies to safeguard their rights.



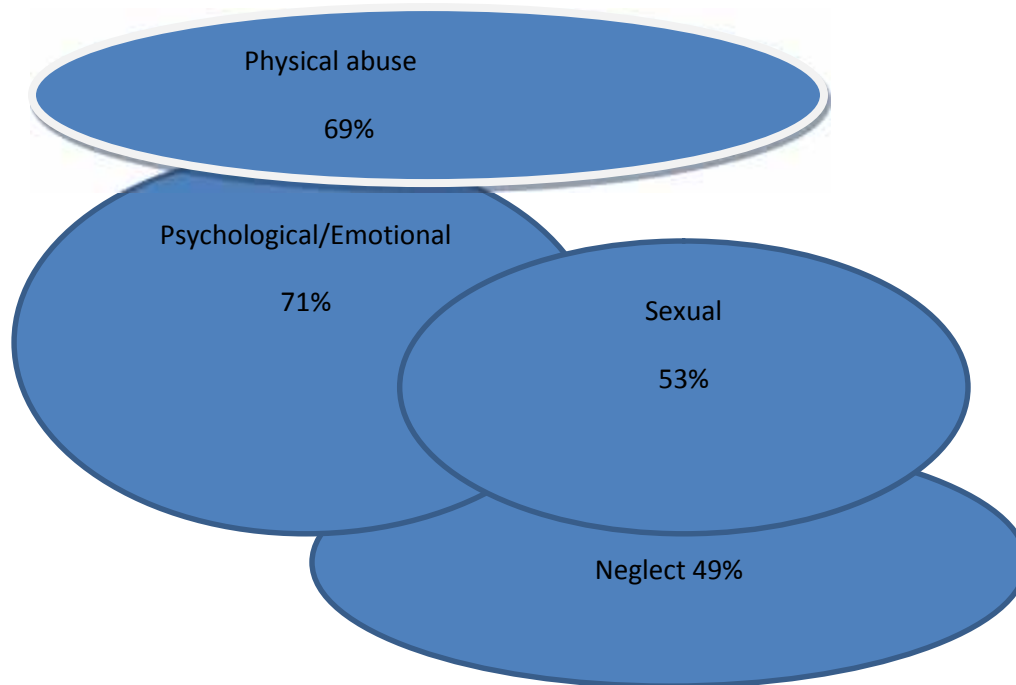
The Right to Equality, Protection of Life and Personal Liberty and the Right against Exploitation are enshrined in Articles 14, 15, 15(3), 19(1) (a), 21, 21(A), 23, 24, 39(e) and 39(f) of the Constitution and India's commitment to the protection, safety, security and well -being of all its citizen. In spite of all this, Children are still at risk. They are exposed to most inhuman cruelties and endure the worst forms of abuse. India with 1.29 billion (as on Jan 02, 2016) people out of which children represents 39% of total population.

### **What is Child Abuse?**

**Child abuse** is the physical, sexual or emotional maltreatment or neglect of a child or children

**Types of child abuse in India:** Child abuse can take several forms: The four main types are:

- Physical abuse
- Sexual abuse
- psychological/emotional abuse, and
- Neglect abuse.



- **Physical abuse:** is when a child has been physically harmed due to some interaction or lack of interaction by another person, which could have been prevented by any person in a position of responsibility, trust or power.
- **Emotional abuse** can be seen as a failure to provide a supportive environment and primary attachment figure for a child so that they may develop a full and healthy range of emotional abilities. Emotional abuse is the act of causing harm to a child's development, when they could have been within reasonable control of a person responsible for the child. (**Examples are restricting movement, threatening, scaring, discriminating, ridiculing, belittling, etc.**) In India the pressure is laid on the children to perform well in school and college examinations, which can be seen as a form of emotional stress and abuse.
- **Sexual abuse** is engaging a child in any sexual activity that he/she does not understand or cannot give informed consent for or is not physically, mentally or emotionally prepared for. Abuse can be conducted by an adult or another child who is developmentally superior to the victim. This includes using a child for pornography, sexual materials, prostitution and unlawful sexual practices.
- **Neglect abuse or negligent treatment** is purposeful omission of some developmental needs of the child by a caretaker with the intention of harming the child. This includes the failure of protecting the child from a harmful situation or environment when feasible.

#### **Protection of Children against Sexual Offences (POCSO) Act, 2012**

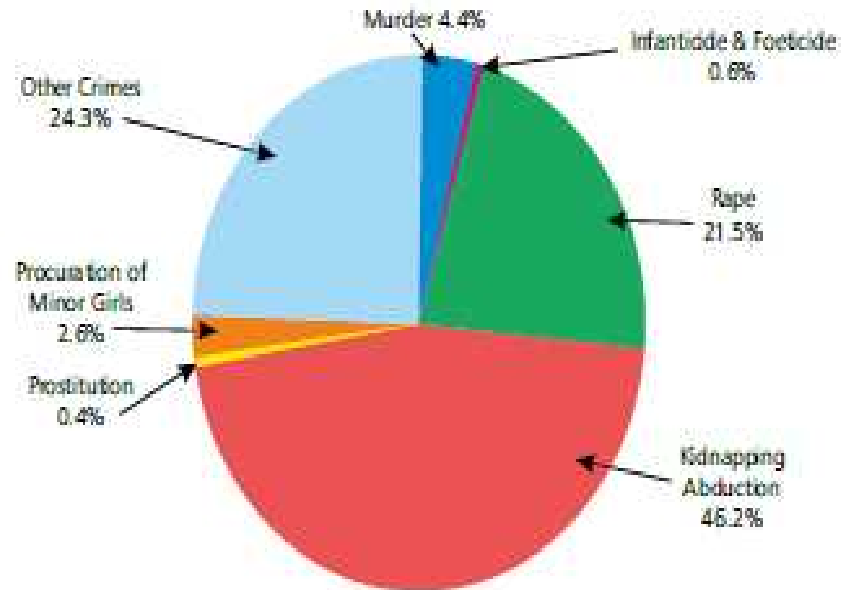
A special law has been passed to address the issue of sexual offences against children. The Protection of Children from Sexual Offences Act (POCSO), 2012 has been drafted to strengthen the legal provisions for the protection of children from sexual abuse and exploitation. According to POCSO Act, 2012 a "child" is a person who has not completed the age of 18 years.

The POCSO Act prescribes five sexual offences against children: -

- penetrative sexual assault,
- aggravated penetrative sexual assault,
- sexual assault,
- aggravated sexual assault,
- Using a child for pornographic purposes.

#### **Crimes against Children in India**

Pendency rates for child rape cases have actually increased from 20594 in 2010 to 37519 in 2014 a massive increase of about 84% this pendency persists in the face of increased reporting. While the judicial process dawdles along, eight cases of child sexual abuse continue to be reported every day.



The number of registered child rapes rose to 151% from 5,484 in 2009 to 13,766 in 2014. Over the last two years, 6,816 cases that were registered as FIRs under the POCSO Act, only 555 made it to court and 166 convictions have been made, while 389 accused have been acquitted. The conviction rate under the act, therefore, is a paltry 2.4%.

### The common mental effects of sexual assault and rape on children

#### PTSD

**Post-traumatic stress disorder (PTSD)** is a mental health condition that is triggered by a terrifying event. Common symptoms associated with PTSD are flashbacks, nightmares, severe anxiety and uncontrollable thoughts about the event. Many people who go through traumatic events have difficulty adjusting and coping for a while. But with time and support, such traumatic reactions usually get better.

#### Depression

Depression is more than common feelings of temporary sadness. Symptoms can include prolonged sadness; feelings of hopelessness, unexplained crying, changes in appetite with significant weight loss or gain, loss of energy or loss of interest and pleasure in activities previously enjoyed. Depression can affect a person's outlook, which can lead to feelings of hopelessness. This, in turn, can impact his or her thought process and ability to make decisions. In extreme cases of depression, people may even experience suicidal thoughts and/or attempt.

#### Dissociation

Dissociation usually refers to feeling like one has "checked out" or is not present. In some instances of dissociation, people may find themselves daydreaming. But in situations where dissociation is chronic and more complex it may impair an individual's ability to function in the "real" world, such as not being able to focus on work-related duties or being able to concentrate on schoolwork.

#### How a person is physically affected after a sexual assault or rape

- Bruising, Bleeding (vaginal or anal)
- Difficulty walking
- Soreness
- Broken or dislocated bones

#### Prolonged physical effects of sexual assault

- **Sexually transmitted infections and diseases:** There is a risk of sexually transmitted infection or disease, especially if the perpetrator didn't use protection during the assault. Medical aftercare may be necessary to ensure that any infections and/or diseases are treated.



- **Pregnancy:** Approximately 5% percent of the cases, rape results in pregnancy. Before the commencement of this act, all such cases which involved sexual offences against child were to be dealt with the Indian Penal Code. But the increasing rate of offences against children and the loopholes that were found under IPC paved way for developing and introducing provisions that could exclusively deal with sexual offences against children and overcome the shortcomings of the Indian Penal Code with respect to such offences been made punishable under this Act.

#### **To whom it shall get reported?**

According to the latest surveys, more than 50-60 percent of children in India face such kind of sexual abuse. This shows that the POCSO Act, 2012 makes it obligatory for every person, who has knowledge about such an offence being taken place with a child, must report to the Special Juvenile Police Unit or the Local Police station.

**According to Section 19(1) of the act.** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has an apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-

- a. The Special Juvenile Police Unit; or
- b. The local police

**II. Section 19 (7):** No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

**III. Rule 4 (3) :** Where the SJPU or local police receives information under sub-section (1) of section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or known person for the child, or the child is living in a child care institution and is without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned **Child Welfare Committee (CWC)** within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of section 19 of the Act, and with a request for a detailed assessment by the CWC **The Juvenile Justice (Care & Protection of Children) Act 2000.**

#### **Failure to Report Child Abuse**

The POCSO Act, 2012 provides under Section 21(1) that any person, who fails to report the commission of an offence or who fails to record such offence shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

#### **Reporting False Information**

The POCSO Act, 2012 makes it an offence to report false information, when such report is made other than in good faith. It states that any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both. Where such information is provided against a child, the punishment may extend to one year.

#### **Judicial proceedings**

Sexual offences against children are very sensitive issues and thus dealt with complete sensitivity. Normally, it was observed that when a Children or women got raped or sexually abused, they were re-victimized and re-traumatized by the apprehensive and offensive questions that they had to face during the judicial proceedings. Thus, special care had to be taken during the judicial proceedings for the children.

The POCSO Act, 2012 make provisions for avoiding the re-victimization of child at the hands of the judicial system and thus, it provides for special courts which conduct the trial in-camera and without revealing the identity of the child that is as child-friendly as possible. Hence, the child may have a parent or other known person present at the time of testifying and can call for assistance from an interpreter, special educator, or other professionals while giving evidence. Above all, the Act stipulates that a case of child sexual abuse must be disposed of within one year from the date of the offence when it is reported, providing speedy justice to these issues.

The Act requires every State Governments in India to designate a special court in each district to try offences under the Act. Presently, Mahila court in every state try such types of offences under this Act; the increased rate of sexual offences against children is a parameter to judge what the level of implementation of laws is. But POCSO Act, 2012 still remains an alien in the society is probably due to lack of awareness amongst the common people.



### **Punishment for offences under in the Act**

The act provides protection to all children under the age of 18 years from the offences of sexual assault, sexual harassment and pornography. It provides for stringent punishments, which have been decided as per the gravity of the offence. The punishments range from simple to rigorous imprisonment of varying periods along with fine.

### **Punishments for offences covered in the Act are**

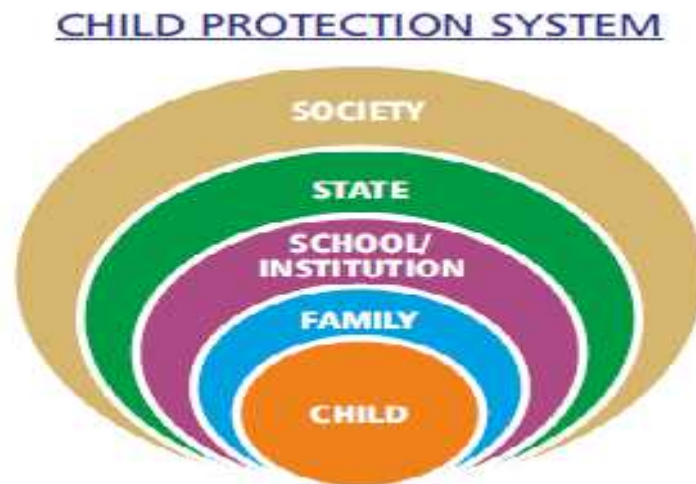
- Penetrative Sexual Assault (Section 3) - Not less than seven years which may extend to imprisonment for life, and fine (Section 4)
- Aggravated Penetrative Sexual Assault (Section 5) - Not less than ten years which may extend to imprisonment for life, and fine (Section 6)
- Sexual Assault (Section 7) - Not less than three years which may extend to five years, and fine (Section 8)
- Aggravated Sexual Assault (Section 9) - Not less than five years which may extend to seven years, and fine (Section 10)
- Sexual Harassment of the Child (Section 11) - Three years and fine (Section 12)
- Use of Child for Pornographic Purposes (Section 13) - Five years and fine and in the event of subsequent conviction, seven years and fine (Section 14 (1)).

### **The State Commission for Protection of Child Rights (SCPCR)**

The State Commission for Protection of Child Rights (SCPCR) has been empowered with the responsibility of monitoring the implementation of the provisions of POCSO Act, to conduct inquiries and to report the activities undertaken under the POCSO Act 2012, in its annual report. Depends on the vulnerability and innocence of children, for offences under this act the burden of proof is shifted on the accused.

- To prevent misuse of the law, punishment has been provided for false complaints or false information with malicious intent.
- Media has been barred from disclosing the identity of the child without the permission of the special court.

### **Child Protection system followed in India**



### **Preventive guidelines to be followed to protect the Children from Sexual Offences**

- Self-defense training of girls, camps on sensitization of girls on health and sanitation issues, apart from programs for empowerment of girls should be conducted regularly.
- Gender sensitive learning material under the Continuous Comprehensive Evaluation (CCE) Scheme. Modules based on life skills that have been prepared for trainers to give an insight in the increasing gender and social issues besides other issues of discrimination, managing emotions, etc.
- A new elective subject on 'human rights and gender studies' is also being introduced for Class XII to reinforce gender equality and harmony.



- Apart from training for teachers on adolescence-related issues, education programs and special activities that promote gender equality and sensitivity along with programs, including folk dance, poster competitions, debate, and exhibition should be organized.
- Counseling of students in residential schools, personal care and guidance to girl students.
- School Complaints Committee to redress complaints, improved response system, alert administrative machinery, complaint or suggestion box for students, CCTV cameras at all strategic places along with warning in schools, monitoring and identification close monitoring of academic performance and psychological behavior particularly in cases of sudden decline in performance, lack of interest, depression and loneliness, informal conversations with the students.
- Toll free number and child helpline, display of names of teachers designated to handle such cases, display of centralized child helpline number-1098 at prominent places in the schools are also recommended by the board.



#### Principles to be followed in the administration of these guidelines

The Government, the Juvenile Justices Board, the Child Welfare Committee, the School Management Committee, or other competent authorities or agencies, as the case may be, while implementing these guidelines, shall abide and be guided by the following principles enshrined in the sub-rule(2).

- **To consider the Interest of the Child:** In all actions, processes and decisions taken to prevent Child Sexual Abuse, the best interest of the child shall be the primary consideration.
- **Safety:** For ensuring safety of children, restrictive and coercive measures and processes shall not be resorted to in the name of care and protection. Non stigmatizing decisions & actions: All decisions and actions taken should be in the best interest of the child. In furtherance of this, all initiatives should strive to reduce the stigma and taboo around child abuse and sexual abuse related issues and the language used should be child friendly and inclusive.
- **Empowering Children:** Children's participation in peer to peer sharing and learning shall be promoted in all settings and children shall be assisted by all possible means to be able to effectively participate in such exercises. Any disability, which might prevent a child from his or her participation in such sharing and expressions, shall be specifically addressed. Children shall be recognized as rights-bearing individuals, guaranteeing them, as appropriate to their evolving capacity, the right to make decisions and participate in society. These decisions can include those involving their own protection and every effort.
- **Simplicity:** All measures to prevent abuse must be practical and it should be easily replicable by concerned stakeholders. There are a number of institutions and spaces where children spend time and all such institutions should be able to absorb and implement these guidelines easily and within a short span of time, without requiring complicated training and rules.
- **Zero Tolerance:** Child Sexual Abuse is perpetuated within the contours of the larger community and hence all actors within the community should be used to ensure that potential abusers and hazardous situations do not fester. There will be zero tolerance of child abuse.
- **Family Responsibility:** All precautions must be taken to ensure that the family environment is safe, comfortable and peaceful and parents fully comprehend and have the necessary tools, ability and resources to keep their children safe.





## Conclusion

The POCSO Act, 2012 is an excellent legislation and it recognizes almost every known form of sexual abuse against children as punishable offence, a few challenges remain to be answered. A multi-dimensional, multi-agency team and multi-tier approach including access to psychosocial support is to be made available to deliver holistic comprehensive care under one roof for victims of child sexual abuse.

There are several constraints which forbid effective implementation of the laws. Due to relatively low success in achieving concrete child development outcomes in India, the condition of underprivileged kids and youth is harsh and needs constant attention. Violation of the rights of children seems to have reached epidemic proportion in our country. There is a need to intensify efforts for children welfare at all levels to implement the policies and programs of the government and contribute to the safety of children.

As crimes against the children are increasing, the future of this nation is at stake. Laws are codified to change the existing situation of society, but negligible difference has been made in the area of sexual offences against children. Rather it would be correct, saying that the situation is getting worse. The list of ones to blame is in exhaustive, as it includes most of the country's judicial officers, advocates and the commoners. It is the lack of awareness about the POCSO Act making it easy for the criminals to escape the punishments they deserve.

## References

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2. POCSO Act – Providing Child-Friendly Judicial Process. Press information Bureau, Government of India. Available from: <http://pib.nic.in/newsite/efeatures.aspx?relid=86150>, accessed on October 13, 2014.
3. K. Muthumariappan v. The State MANU/TN/1611/2015. Child Marriage and the Protection of Children from Sexual Offences Act, 2012.
4. Indian J Med Res 142, July 2015, pg 1-3DOI:10.4103/0971-5916.162084.
5. Arvind alias Chhotu ThakurVs.State of Madhya Pradesh, Criminal Appeal No.2728/2013.
6. P. Shanmugavel Raj v. State and Ors. 2015 (1) Crimes 536 (Mad.) 376, 109, 506 (ii) I.P.C. and Section 5(1) (D) of Immoral Traffic (Prevention) Act, 1956 and Section 4 of POCSO Act.
7. Ministry of Women and Child Development. Model guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012. [Accessed on October 13, 2014].

## Appendix: Cases reported & dealt under POCSO act, 2012

### 1. Nishu v. Commissioner of Police, Delhi and Ors. 2014 (3) ACR 2516 (SC)

Petitioner is a minor who was kidnapped on 25.10.2013 by a group of nine persons who had kept her confined up to 8.11.2013. The accused persons, in different combinations, had repeatedly raped her and that one of the accused, named, Pradeep is a constable in Haryana Police. After being recovered, medical examination of the girl was done, but neither the copy of the report was not furnished nor any FIR under Section 376 D of the Indian Penal Code or the provisions of the POCSO Act registered against the accused persons.

Petition under Article 32 has been filed seeking directions from the Court for registration of FIR under above mentioned sections; for the arrest of the accused. Appropriate action have to be taken against the officers of the Delhi and Haryana police by way of departmental proceedings for their refusal/failure to register the FIR under IPC as well as POCSO Act, 2012.

In view of the arguments asserted by the counsels of both the respondents, court held that no order or direction to the first Respondent would be justified in view of the fact that the case has been registered by the Haryana Police and has been investigated by the authorities of the State of Haryana.

**Findings:** The Hon'ble Court also finds that as the charge sheet has been filed against all the nine accused and the trial has commenced in the meantime it will be wholly inappropriate to exercise their jurisdiction under Article 32 of the Constitution.

### 2. Ashish Kumar & others. Vs. State of U.P & others. MANU/UP/0439/2015

FIR was lodged by the victim's father Deesaa Police Station at P.S. Rauja, district Shajahanpur under sections 147, 354 A, 352, 323 and 506 of IPC and Sections 7/8 of POCSO act, 2012. . After investigation, the police laid charge-sheet under Sections 352, 323 and 506 IPC only. As a result, Victim's father filed an affidavit alleging therein that on the date of the incident that is 30th October, 2014, the victim's age was about 16 years and as she had alleged molestation, etc. in her



statement, offences punishable under sections 147 and 354A of IPC and sections 7/8 of POCSO Act were also made out. Upon receiving such affidavit, the learned Magistrate perused the police report and passed the impugned order dated 19.03.2015 thereby directing return of the charge-sheet for being laid before the Special Court constituted under POCSO Act. In the order impugned, it was observed that from the material available in the case diary offences punishable under Sections 323, 353, 354 and 506 IPC and Sections 7/8 of POCSO Act were prima facie made out, but as it was not empowered to take cognizance of the offences punishable under the POCSO Act, therefore, the charge sheet is to be returned for presentation before the Special Court.

Court observed that, as the instant matter arises out of case which is based on a police report and not on the complaint, after submission of the charge-sheet, the matter goes to the Magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial or not. The Magistrate cannot exclude or include any section into the charge-sheet after investigation has been completed and charge-sheet has been submitted by the police.

The same would be permissible by the trial court only at the time of framing of charge under Sections 216, 218 or under Section 228 Cr.P.C as the case may be, which means that after submission of the charge sheet it is open for the prosecution to contend before the appropriate trial court at the stage of framing of charge that on the given state of facts the charge of certain other offences should also be framed.

### **Findings**

The Hon'ble High Court held that in a case which is triable by a Court of Session though the Magistrate could not add or alter a charge but he is empowered under sections 209 and 323 of the Code to commit the case to a Court of Session. Since under Section 31 of the POCSO Act, a Special Court constituted under the said Act is deemed to be a Court of Session, the Magistrate, if he finds that offences triable by a Special Court under the POCSO Act are also made out, he is empowered to commit the case to the Special Court by taking aid of the provisions of section 209 of the Code. But such commitment arises after the Magistrate takes cognizance of the offences laid in the charge sheet.

### **Cases Reported & Dealt under POCSO act.**

3. Gajraj Singh v. State of U.P. 2015 (3) ADJ 350.
4. Avinash v. State of Karnataka MANU/KA/1273/2015.
5. Santhosav. State 2014 (3) KarLJ 251.
6. Letha J. V. State Of Kerala 2015 (1) KHC 234 .
7. P. Shanmugavel Raj v. State and Ors. 2015 (1) Crimes 536 (Mad.).
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