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DECODING THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT

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Abstract

The Protection of Children from Sexual Offences Act, 2012 was a path-breaking piece of legislation enacted for the protection of children. The Act mandated the setting up of special courts and a child-friendly atmosphere for adjudication of cases involving child victims. Furthermore, in its zeal to protect children and deter potential offenders, the legislation did away with judicial discretion in sentencing and statutory minimum punishments was prescribed. However, it is common knowledge that conviction rates are still low and crimes against children are on the rise, although reporting has increased. The paper examines the legislation in light of some cases especially the controversial 'skin to skin touch' judgment which created a national outrage and the apex court had to step in.

I Introduction

CRIMINAL LAW undoubtedly is the strongest condemnation of the conduct of any person by society and continues to be a significant tool in the hands of governments to declare misconduct and prescribe appropriate punishments. Since misconduct is visited by punishment, criminal law is both censuring and stigmatizing. Because of this, Andrew Ashworth, a leading criminal law philosopher, argues that there must be a principled development of criminal law, recognizing the essential link between procedure, enforcement, and sentence. He argues that without this kind of principled approach, criminal law is "likely to remain something of a lost cause". Ashworth clarifies thus:[1]

> From the point of view of governments, it is clearly not a lost cause: it is a multi- purpose tool, often creating the favourable impression that certain misconduct has been taken seriously and dealt with appropriately. But from any principled viewpoint there are important issues of how the criminal law ought to be shaped, of what its social significance should

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1 Andrew Ashworth, "Is the Criminal Law a Lost Cause" 116 *The Quarterly Law Review* 225(April 2000).

be, of when it should be used and when not – which are simply not being addressed in the majority of instances.

In light of these observations, this paper attempts to decode the provisions of a crucial legislation aimed at protecting children – the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO), and pits it against the fundamental principles of criminal law *vis-à-vis* the accused. The paper then engages with some important decisions of special courts, high courts, and the apex court to fully understand the implications of the provisions of POCSO and the judicial process.

II The background

The United Nations Convention on the Rights of Child (hereinafter UNCRC) to which India is a party, significantly expanded the focus on children and the "best interest" of the child and mandated, *inter alia*, that states must protect every child from all forms of sexual exploitation and sexual abuse,[2] and other forms of exploitation prejudicial to any aspects of the child's welfare.[3] The UNCRC while dealing with the category of "child in conflict with law" stressed the need to establish laws, procedures, authorities, and institutions specifically applicable to children.[4]The overarching framework of the UNCRC emphasised the privacy and dignity rights of children and a child-friendly approach in legal matters. India enacted its juvenile justice laws in sync with this mandate.[5]

While children in conflict with the law were being taken care of by the juvenile justice administration, children who were victims of sexual abuse, in its varied forms, were at the mercy of the routine criminal process which was not always sensitive towards them. Added to this was the fact that cases of sexual abuse against children were on the rise as per the statistics of the National Crime Records Bureau[6] which was further

2 United Nations Convention on the Rights of Child, 1989 art. 34.

3 *Id*., art. 36.

4 *Id*., art. 40.

5 "The Act envisioned adopting a child friendly approach in adjudicating and disposing matters in the best interest of children and for their ultimate rehabilitation. The Act defined a child and a juvenile as ¯a person who has not completed eighteen years of age. It covered two categories of children, *i.e*., juveniles in conflict with law' and children in need of care and protection'. The Act transformed the way how the two categories of children were received by the system. Juveniles in conflict with law were housed in observation homes while children in need of care and protection were housed in children's homes during the pendency of proceedings before the competent authority." See Ministry of Women and Child, "History of Juvenile Justice" Living Conditions in Institutions for Children in Conflict With Law Manual (March, 2017)

6 According to the National Crime Records Bureau Report 2005, there had been a rise in cases against children since 2002 –the cases of rape of children rose from 2532 in 2002 to 4026 in 2005 and overall 14,975 cases of various crimes were reported against children in 2005, a steep rise from 5972 in 2002!

7 The Protection of Children from Sexual Offences Act, "Statement of Objects and Reasons"

corroborated by the *Study on Child Abuse: India 2007* conducted by the Ministry of Women and Child Development.[7] Therefore, the government enacted a very comprehensive piece of legislation with the aim of providing protection to children from all sorts of sexual assault, sexual harassment, and pornography. The paramount consideration of the legislation was the well-being and interest of the child and in that endeavour the legislation incorporated child-friendly procedures. A careful examination of POCSO would reveal that the safeguards which are otherwise available for defendants are not available in this legislation. The public law character of criminal law demands that certain protections be given to the defendant. This is, *inter alia*, due to the fact that the state which has far greater power and resources than the individual defendant is bringing the case! This is not the case in POCSO and in many other pieces of strict liability legislation.[8] And perhaps this is justified as childhood is a stage of innocence, and we as a state and as a polity are duty-bound to protect and safeguard that innocence. If any abrasion occurs, a very tough stance needs to be taken. However, one still needs to examine the Act to ensure that its provisions are tightly drawn, practicable and enforceable, and also that they are legally sound not only in terms of the *vires* of the Act but also in terms of the fundamental principles of criminal jurisprudence.

III Unpacking the procedure in POCSO

Children are our national asset and childhood is a stage of innocence, dependency, and evolving capacities. The avowed objective of POCSO is to protect children from offences of sexual assault, sexual harassment, and pornography and provide for a special child-friendly procedure for the prosecution of such offences—starting from the stage of reporting to the recording of evidence, investigation, and trial. The Act mandates the establishment of special courts for the trial of offences. The corollary of such a provision is that the committal proceedings, which form a part of the ordinary criminal procedure, are done away with. This ensures a speedy trial. The Act is self-sufficient and sets out an elaborate procedure and powers of the special courts, and for the recording of evidence.[9]

Agency of the child-victim

The entire procedure in POCSO is tailored keeping the agency of the child-victim in mind starting from the recording of the offence, and the special juvenile police unit or

8 *For example*, The Narcotic Drugs and Psychotropic Substances Act, 1985.

9 POCSO Act, Chps VII and VIII.

Where the Act is silent, the provisions of the Code of Criminal Procedure are applicable and s. 31 states thus: Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure,1973 (2 of 1974), (including the provisions as to bail and bonds) shall apply to the proceedings before a special court and for the purposes of the said provisions, the special court shall be deemed to be a court of sessions and the person conducting a prosecution before a special court, shall be deemed to be a public prosecutor.

10 POCSO Act, s. 19.

the local police are required to follow the procedure and ensure that the matter is reported to the child welfare committee within a period of 24 hours.[10] The statement has to be recorded at the residence of the child or at a place of his/her choice.[11] The recording of the statement of a child under section 164 of the Code of Criminal Procedure. 1973 (hereafter Cr PC) by the magistrate should be "as spoken by the child".[12] The Act places a lot of reliance on the "innocent" child and no interpretations of or embellishments to the words of the child are permitted.[13] The Act also gives clear-cut instructions to the media when it comes to the reporting of cases involving children so that the privacy and dignity of the child are maintained, and any contravention of this provision is met with penal consequences.[14]

Statutory presumptions

The words and statement of the child are given so much credibility that the special court shall presume that the accused has committed the offence if the offence is in the nature of penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, or aggravated sexual assault as defined under sections 3,5,7 and 9 of the POCSO Act, respectively. Hence there is a reversal in the burden of proof and the contrary will have to be proved by the defendant.[15] The physical element and the fault element of the offence of sexual assault are defined in the Act. The physical elements are touching of the vagina, penis, anus or breast, or any other physical contact without penetration. The fault element is "sexual intent". The concurrence principle of criminal law requires "the fault element of a crime to coincide in point of time with the physical elements in order for the accused to be convicted of the crime charged".[16] This is reflected in the famous maxim *actus non facit reum nisi mens sit rea*, meaning that the act alone does not make the person guilty unless accompanied by a guilty intention. The same is reflected in the definition of sexual assault. However, the prosecution (unlike in most IPC offences) need not prove the sexual intent as there is a statutory presumption contained in section 30 (1) of the Act which reads thus:

> In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for

11 POCSO Act, s. 24.

12 POCSO Act, s. 25.

13 UNCRC.

14 POCSO Act, s. 23(4): "Any person who contravenes the provisions … shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both."

15 POCSO Act, s. 29.

16 Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 153 (Lexis Nexis, 2012).

17 Emphasis added.

> the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

The provision further mandates that the burden has to be discharged beyond reasonable doubt. Section 30(2) of the Act reads thus:[17]

> For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and *not merely when its existence is established by a preponderance of probability*.

In the case of general defences in the Penal Code, it is enough for the defendant to establish the defence on a preponderance of probabilities. But here there is a double blow; first, there is the statutory presumption, and then there is a huge burden to discharge, that of proving the absence of culpable mental state beyond reasonable doubt. A tall order indeed! But this is not the only penal legislation where such an onerous provision exists. The Narcotic Drugs and Psychotropic Substances Act, 1985 NDPS Act, for example, has a very similar provision.[18]

What makes POCSO different is the fact that neither the Act nor the Rules[19] give any indication as to when the presumption would arise or what ingredients need to be satisfied before the judge of the special court can invoke the presumption. In the NDPS Act, for example, once possession is found, the accused is presumed to be in conscious possession, and so on.[20]In dowry death cases, a presumption is raised after essential ingredients are satisfied, namely unnatural death within seven years of marriage, cruelty soon before death related to the demand for dowry, *etc.*[21] But in the case of POCSO, there is no indication whatsoever to the judge when this presumption is to be applied. The provision to my mind is not legally tenable as it simply mentions that a presumption will arise when a person is prosecuted for a category of offences! The accused against whom the presumption operates has now to disprove the presumption beyond a reasonable doubt and he is expected to do so with the Special Court *inter alia* ensuring section 33(6) of the Act which mandates thus:

> The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

This is a very welcome provision because a child who has been victimized cannot be subjected to further victimization in the courts of law. The child needs to be protected. But what if there is a malicious or false prosecution—maybe schemed and scripted by the manipulative caregivers of the child? If at all this is the case and the provisions of

18 NDPS Act, s. 35.

19 The Protection of Children from Sexual Offences Rules, 2020.

20 NDPS Act, s. 15.

21 Indian Penal Code, 186, s. 304-B.

the Act are followed strictly, then it would be almost impossible for the accused to prove his innocence unless he can prove that he was present somewhere else and was not in the vicinity of the crime scene. Cross-examination is a very important tool in the hands of the defence and it is an art developed by lawyers over the years. The questions that are raised come out of the responses being given by the witness and if one has to submit the questions in advance, the cross-examination loses its edge. This aspect needs serious engagement as the accused has to prove his/her innocence beyond reasonable doubt within the confines of legislation in whose imagination, every child is innocent[22] and all children are asexual!

Mandatory minimum sentencing

Increasingly, the laws dealing with sexual offences, has restricted the discretion of judges and prescribes mandatory minimum punishments.[23] In the pre-2013 IPC, the provision on rape had mandatory sentencing in section 376 but was qualified by a proviso that "the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence for a term of less than seven years." In POCSO, there is no such proviso, and once the accused is found guilty, the mandatory punishment will have to be given. The fact that the Cr PC envisages a pre-sentence hearing, which forms an integral part of the principles of a fair trial, showcases the importance of hearing the accused before passing the sentence. It is one last chance for the accused to plead a mitigating circumstance or show some infirmity in the case which may appeal to the judge, who may pass the sentence accordingly. Section 235(2) Cr PC reads thus:

> If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

What the judge is left with is to either defy the legislative mandate and come under heavy media scrutiny and vilification or to somehow try to get the accused out of the POCSO provision and in the process, sometimes come up with bizarre justifications.[24]

If one were to holistically engage with the provisions of POCSO (as discussed in the preceding paragraphs), it will be clear that despite the fact that the provisions are

22 It is ironical that the two major pieces of legislation regarding children, namely, the Juvenile Justice Act, 2015 and the POCSO Act, 2012 do not speak to each other. The 2015 Act doubts the innocence of the child and acknowledges child sexuality given the fact that the Act demands a preliminary assessment in heinous offences (which include rape) whereas the 2012 Act imagines the child to be innocent and asexual. It is also important to keep in mind that the category of 'child' covers ages from 0 to 18 years.

23 IPC S. 376(1): Whoever,…, commits rape, shall be punished with rigorous punishment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and hall also be liable to fine.

24 *Infra* section IV.

framed so stringently, in practical application, they have proved to be not so tight, and therefore even in point of effectiveness it is low.[25] The whole purpose of having statutory presumptions, reverse burden of proof, and mandatory minimum sentencing (deviating from the fundamental principles) was to deter sexual offences against children but sadly that objective is yet to be realized, and it is high time the provisions were revisited.

IV Reflections on recent cases

In light of the challenges (as discussed in the preceding sections) that the POCSO Act may throw at the courts, this section engages with cases that captured media attention and were hotly debated. Starting with the infamous High Court of Bombay judgments in *Libnus* v. *State of Maharashtra*[26] (hereinafter *Libnus*) and *Satish* v. *State of Maharashtra*,[27] (hereinafter *Satish*) dealing with sexual assault punishable under POCSO, this part discusses the subsequent correction of the law by the apex court of the country in a three-judge-bench decision in *Attorney General* v. *Satish*.[28] The section ends by highlighting a very significant judgment by District and Sessions Judge Dharmesh J., Sharma in Delhi.[29]

It is relevant to mention that *Libnus* and *Satish* were both decided by the same lady judge in single-bench decisions. The prosecution case in *Libnus* was that the accused had entered the house of the victim aged 5, and had unzipped his trousers. The mother of the victim, who was a prosecution witness, also testified that her daughter informed her that the accused removed his penis from his trousers and asked her to come to bed. It was the testimony of the mother that she saw the zip open. The special court held the accused guilty of aggravated sexual assault as the victim was less than 12 years old—in fact, was just five years old—and sentenced him to imprisonment for five years—the mandatory minimum prescribed under section 10 of POCSO for aggravated sexual assault. The high court, in appeal, in para 9 of its judgment discussed the essential ingredients of section 7 dealing with sexual assault, and stated thus:

> (i) Act must have been committed with sexual intention.
>
> (ii) Act involves touching the vagina, penis, anus, or breast of the child.

25 See Centre for Child and the Law, NLSIU, implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues, Ch. 3, "Though the rate of reporting has increased from the 2007 baseline of 3%,2 the CCL-NLSIU studies reveal a high acquittal rate indicating that the POCSO Act is ineffective in justice-delivery." 31(Feb. 2018).

26 (2021) 2 Bom CR (Cri)237, decided on Jan. 15, 2021.

27 (2021) 2 Bom CR (Cri)142, decided on Jan 19, 2021.

28 2021 SCC OnLine SC 1076, decided on Nov. 18, 2021.

29 Decided in Aug, 2021.

> Or makes the child touch the vagina, penis, anus or breast of such person or any other person or does any other act with sexual intent which involves physical contact without penetration.

The court engaged with the expression "any other act", since the opening of the zip did not specifically fall within acts proscribed under the definition of sexual assault. Applying the principle of *ejusdem generis*, the court came to the conclusion that the act of "holding the hand" or "open[ing] zip of the pant" did not fall within the definition of sexual assault. The court, however, was convinced that the act was criminal and so brought it under the lesser offence of outraging the modesty of a woman under section 354 IPC and sentenced him to imprisonment already undergone. My argument is that perhaps the judge was convinced of the guilt of the accused but was not convinced of the proportionality of the sentence and so tried to bring the case out of POCSO![30]

The same judge had to grapple with and give judgment in yet another POCSO case (*Satish*) within four days of this judgment. In *Satish*'s case, the accused, on the pretext of giving a guava, called the child victim aged about 12 to his house and pressed her breast, and asked her to open her *salwar*. Eyewitness had seen the child victim with the accused and the mother found the victim crying in the room—the accused had left the room and the child narrated the ordeal to her mother. Charges were framed against the accused and he was found guilty of sexual assault and other offences. The Special Court gave the mandatory minimum punishment for sexual assault, which is 3 years. In appeal, the high court again engaged in a post-mortem of sexual assault to reduce the sentence perhaps unconvinced by the punishment prescribed, as in *Libnus*. And this becomes very clear if one were to read para 19 closely. It states thus:[31]

> Evidently, it is not the case of the prosecution that the appellant removed her top and pressed her breast. The punishment provided for the offence of 'sexual assault' is imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine. *Considering the stringent nature of punishment provided for the offence, in the opinion of this Court, stricter proof and serious allegations are required*. The act of pressing of breast of the child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside the top and pressed her breast, would not fall in the definition of 'sexual assault'.

The judge, as is clear from the emphasised portion, was not comfortable with three years of punishment. I am willing to assume (by reading between the lines) that had the mandatory minimum punishment not been prescribed, the judge in all likelihood,

30 Given the fact that POCSO offence would have entailed mandatory minimum of five years.

31 *Emphasis added.*

given her judicial acumen,[32] would have held the accused guilty of sexual assault(as the definition is clear) and passed a sentence based on her judicial discretion. In *Libnus*'s case, the facts were not so explicitly stated such as 'touching the breast" and so the judge used the *ejusdem generis* principle to conclude that the act does not fall under the definition of sexual assault. But *Satish*'s case was different—the accused engaged in acts explicitly proscribed by section 7, and the judge in order to justify her stand of not convicting the accused under POCSO, resorted to over-explanation that was bizarre, to say the least. The judge observed: "it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such there is no direct physical contact *i.e., skin to skin* with sexual intent without penetration."[33]

The judgments sparked outrage, and the Attorney General for India, the National Commission for Women, and the State of Maharashtra filed appeals before the apex court. A three-judge bench of the apex court dealt with both cases in the same judgment.[34]The judgment was written by Bela Trivedi J, with a separate concurring opinion by Ravindra Bhat J. In *Satish*'s case, the court analysed section 7 of the POCSO Act, dealing with "physical contact" and "sexual intent" mentioned in the section, and endorsed the argument presented before it that the very object of enacting the POCSO Act was to protect children from sexual abuse and if a "skin to skin" interpretation is given, it will, for example, leave out touching the sexual or non-sexual parts of the body with gloves, condoms, cloth, etc. even though done with sexual intent and the same will not get covered by the sexual assault provision of the POCSO Act![35] The court rightly emphasised that the fault element is sexual intent which brings the case under Section 7 and not "skin to skin" contact. Trivedi J, held that the high court, though accepted the version of the victim and her mother, fell in error by insisting on "skin to skin" contact for a POCSO offence under section 7 and by holding the accused guilty under a lesser offence under section 354 IPC.[36]

In *Libnus*' case, the court on similar reasoning and given the tender age of the victim, held the accused liable for aggravated sexual assault and punished him under section

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32 Flavia Agnes, in "Bombay HC Judgment is a Hair-splitting Exercise that Restricts Scope of POCSO" while critiquing the judgment in *Satish* had this to say about Justice Pushpa V. Ganadiwala: "These comments were deemed as 'insensitive' by many activists, some of whom have commented that the judge, who was elevated to the high court in 2019, lacks exposure to the letter and spirit of the POCSO Act. I beg to differ. Lawyers and activists engaged with the RAHAT project of Majlis Legal Centre have closely observed the manner in which she conducted the trials in cases of child sexual abuse even before the enactment of the POCSO Act, when she was the trial judge for sexual offences against women and children in the Bombay City, Civil and Sessions Court." *The Indian Express* Feb. 1, 2021.

33 *Supra* note 27, para 30. *Emphasis added.*

34 *Supra* note 28.

35 *Supra* note 28, submission of Siddharth Luthra, para 33.

36 *Id*., para 40.

10 of the POCSO Act and other provisions of the IPC. The highest court, in this case, underlined "the need to interpret a statute in the context of the circumstances that resulted in its birth", and observed that *ejusdem generis* is a rule of construction and cannot be used to defeat the objective of the Act.[37]

Ravindra Bhat J, in his separate concurring judgment, adopted more nuanced reasoning. The judge, in para 61 of the judgment, also skilfully critiqued the offence of outraging the modesty of a woman, showing how it is steeped in patriarchal notions. Paras 67–68 engaged with the proportionality of sentencing, and discussed the justification for the mandatory minimum sentence given the severity of the crime and the autonomy of the child victim. The judge took pains to draw a distinction between "touch" and "physical contact" accompanied by sexual intent. The judgment is also replete with examples from other jurisdictions. The court held the accused in *Satish* liable for sexual assault under section 7 of the POCSO Act punishable under section 8 of the same, and other provisions of the IPC and sentenced him to rigorous imprisonment for three years. The accused in *Libnus*' case was held liable under sections 8, 10, and 12 read with section 9(m) of POCSO, and other provisions of the IPC and sentenced to imprisonment for five years.

Another case of equal importance was decided by the Special Court in Delhi[38] by District and Sessions Judge Dharmesh Sharma in August 2021.[39] In this case, a Dalit man was "falsely framed due to prejudicial disposition of the parents towards the accused who belonged to the Dalit community". The accused was in jail since May 2015 for allegedly committing aggravated penetrative assault on four minor girls—below the age of 12. He was portrayed as a serial sexual offender. The incident took place in 2015, there were delays and then the pandemic struck; the case then came up before the district and sessions judge. The statements of the victims in 2015 and 2018 were scrutinized and discrepancies were pointed out. Furthermore, on the specific date of the alleged offence, the CCTV camera at the place of work of the accused vouched for his presence! Other redeeming factors were a judge who engaged with the case and considered loopholes, as well as that the case had not been fast-tracked in the first instance. It came to the notice of the court that the parties had quarrelled on multiple occasions over the complainant's dog repeatedly defecating outside the home of the accused. The court *inter alia* concluded as follows:[40]

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37 *Id.*, para 41.

38 *State* v. *Ramdas Bansiwal*, SC No. 56595/16 CNR No. DLWT01-002774-2021, decided on Aug.7, 2021.

39 It was also evident in *State* v. *Suman* decided on Aug. 17, 2013, that this was a judge who brilliantly navigates through the difficult terrain of POCSO. Not all judges will be able to engage with the intricacies of POCSO and render justice.

40 *Supra* note 38, para 84.

> [T]he plea of the Ld. Addl. PP for the State that it is not conceivable that the parents of the victim girls would fabricate the entire saga and tutor their children over a petty dispute of defecation and/or beatings by the accused to one or two dogs of PW-3 is impressive but in our society there is constant fight between the 'good' and the 'evil' and we are living in an age where the moral values in the society are degenerating and everything is possible. It is our experience in manning the criminal justice delivery system that people level false accusations for myriad reasons, one of which is caste hatred as exemplified in appreciation of evidence in this case, and they do so without sensitivity about the honour, dignity, life and liberty of their opponents. I have no hesitation in holding that the parents of the victim girls indulged in the sinister act of tutoring their daughters in a most brazen and shameless manner and merely because accusations or charges against the accused are grave, severe or despicable, this Court has done a dispassionate exercise thereby examining, evaluating and appreciating the evidence to come to these conclusions;

This was a brilliant exercise by the judge and a very meticulous job was done dispassionately in this case. The judge while acquitting the accused awarded compensation to him.[41] One dreads the outcome had this case been fast-tracked[42] or CCTV evidence was not available—the accused may have been found guilty and the embellishments in the testimonies may have been missed.

V In lieu of a conclusion

It is with the background of these three cases that we revert to the issue flagged by Ashworth. The fundamental principles within which the criminal justice system operates include "innocent until proven guilty by a court of law",[43] and strict construction of criminal statutes. In strict liability offences, we see a departure from these fundamental propositions of criminal law for the simple reason that the nature of some crimes is such that their detection by criminal law becomes almost impossible if we strictly follow these principles. So, the fault element, *i.e.*, guilty intention is presumed unlike in

41 The *amicus* had raised the point of compensation as the accused was in jail since 2015.

42 A newspaper reported that a special POCSO judge sentenced a man to life imprisonment after finding him guilty of sexual assault of an 8-year-old girl and the case was disposed of in one day! "POCSO Court Hears, Convicts, Sentences Man in One Day" *The Times of India* Nov. 27, 2021, the order was subsequently quashed by the High Court of Patna in *Raj Kumar Yadav* v. *State of Bihar* decided on Apr. 3, 2023.

43 Presumption of innocence has nothing to do with factual guilt or innocence or with the final outcome of the case. It is normative and provides direction to the officials involved in the criminal process on how to deal with the accused. See Herbert L. Packer, "Two Models of the Criminal Process" in *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

other offences where it needs to be firmly established; there is the reverse burden of proof—the accused is presumed to be guilty, and has to rebut the presumption. This is the case in the NDPS, in cases of dowry death, and in many other offences. The POCSO Act also makes an exception to the rule of presumption of innocence. This is fair, as given the nature of the offence, the presumption becomes necessary and the accused can rebut the same. But he has to prove his innocence beyond reasonable doubt and not on mere preponderance of probabilities and that too, without the tools which are ordinarily available in adversarial trials, *i.e.*, aggressive questioning in cross-examination. This is also justified given the vulnerability of the category of victims involved—children.

But let us step back from this position for a moment and reflect on the fact that the category of a child is up to 18 years of age, and the imagination of POCSO (unlike the Juvenile Justice Act, 2015) is that every child is innocent and probably asexual! So, if one were to look at the Act from the vantage point of a "framed" accused, the repercussions may scare us. Adding to this is the mandatory minimum sentence which takes away the judicial discretion that is very important in sentencing. Another fundamental rule which is worth mentioning here is the strict interpretation of criminal statutes. We will have to factor in these difficulties and complexities of the Act, which judges have to grapple with, case after case, before we condemn some judgments and eulogise others. Let us assume hypothetically that the High Court of Bombay was convinced by the prosecution but the version of the accused also invoked some suspicion but not of a degree which could merit the distinction of "beyond reasonable doubt". Further, let us not forget that judges have been trained to uphold principles of fair trial and to punish the person according to his/her guilt, the reformation theory of punishment, and the ilk. The judge was perhaps constrained to drop POCSO charges so that lesser punishment could be given. Had some discretion vested in the judge, the decision, would have been otherwise. And the fallout of this decision was that had it not been corrected by the apex court, it would have drastically limited the scope of POCSO which would have had devastating effects on deterring and punishing child sexual abuse.

But in spite of the course correction by the apex court, the issue remains as to when the statutory presumption can be raised, and also that of the presumption of guilt with a 33(6) mandate coupled with mandatory minimum punishments with no discretion whatsoever to the judge. Thus, it would have been very useful if the apex court, in its very well-reasoned judgment, could have taken us through these difficult areas in the POCSO Act, especially since the bench was also adorned by U. U. Lalit J, a criminal-law expert.