

Mandatory Reporting Under The Protection of Children From Sexual Offences Act, 2012

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Abstract-

One of the major sociological change introduced by The Protection of Children from Sexual Offences Act, 2012 (hereinafter “POCSO”) is the addition of the said provision of ‘the Mandatory Reporting’ under this statute. Although the child sexual abuse is still one of the most common crimes, in most of all societies around the world, because of various causative factors, these cases go unreported. Therefore, in order to over-come such situations, and with the view to provide justice to each and every victim of these heinous crimes, the legislators introduced the provision of ‘the Mandatory Reporting’. Although under the said Act, the term ‘mandatory reporting’ is nowhere mentioned, but the nature of this obligation to report such cases evidently depicts it to be a mandatory obligation. The provision is clear that the upon having knowledge of the commission of a sexual offence as well as upon knowledge of the future happening of an offence, the person having such knowledge must report to the police or the special juvenile police unit. Further, S. 21, POCSO Act, 2012, also provides the punishment for the failure to report about the commission of such sexual offence. By reading the bare provision, of the statute, it can be considered to be a good change, as it will aid the victims to get justice (who are not in a state/position to report about the commission of such act); also by creating an obligation on the other people who have knowledge that such an offence has been committed or have apprehension that such an offence could be committed, to mandatorily report about the same to the police.

Keywords: Mandatory reporting, Child Sexual Abuse, Special Juvenile Police Unit, Child Rights.

I. INTRODUCTION

Child Sexual Abuse is still one of the most drastic and a very common crime committed against the most vulnerable section of the society. It is evident that, the children are the soft

targetsofsexualviolence,whicheventuallymakesthemextremelyvulnerable.Aspertthereport by National Crime Records Bureau (NCRB), sexual abuse is more often committed against the children at large. Since the children are presumed to be weaker section of the society, both emotionally and physically, which makes the perpetrator even more strong to commit the crime against them, without having any traces of fear.

It is proven that, the children are unable to protect themselves becauseof the varioussociological factors which create fear in the mind of the child, which ultimately results in non- reporting of the cases. Most of the times, because of the following **reasons** as well the children do not speak up about the abuse committed againsthim/her¹:

- The existence of taboo in the society about discussing sexuality andsex.
- No ‘sex-education’ being provided to the children in the schools, or in any othereducational institutions.
- The childrenperhapsareunaware,therefore,misinterpretandfeelthatitistheir own fault.
- The fear of retaliation and further commitment of such an act against them, forces a child to remain silent.
- Discussing or sharing the incident with anyone might lead to reliving the mentaltrauma.
- Generally, children are distrusted and are not encouraged to share about their feelings, etc.

Therefore, the POCSO Act was brought forth in order to safeguard the children from such sexual assaults², penetrative sexual assaults³, sexual harassments⁴pornography⁵ etc.As most of the time either the child or the parents/relatives of the child due to the social stigma do not report the matter to Police, which conduct the detailed analysis, the framers of this statute added one of the major provisions under this statute which is widely known as “Mandatory Reporting”, which create the*mandatoryobligationoneveryperson to reportthematter immediatelytothepolice*,about the commission of the said act of child sexual abuse or even on such apprehension that the said act is likely to committed⁶, the informant in such a case is duty-bound to inform the matter. The said obligation where *all* persons are duty-bound to report has been brought only because it is evident that child sexual abuse is widely prevalent, and therefore, is accepted as a means to

¹ User Handbook on “*Protection of Children from Sexual Offences Act, 2012*”, National Commission for Protection of Child Rights, www.ncpcr.gov.in

² Section 7, The POCSO Act,2012.

³ Section 3, The POCSO Act,2012.

⁴ Section 11, The POCSO Act,2012.

⁵ Section 13, The POCSO Act,2012.

⁶ Section 19, The POCSO Act, 2012.

prevent the continuation of the saidcrime.⁷

The whole idea behind mandatory reporting has been explained in the Model Guidelines under Section 39 of the POCSO Act, 2012. These guidelines sufficiently declare that reporting is the first step towards detection and prevention of the crime. If such offences are not reported then the offence may be repeated again. The victim shall carry the scars all his/her life. Timely intervention is possible only after timely reporting about the offence, or about the future likelihood of commission of such an offence.⁸ Therefore, keeping in mind the same objective the provision of Mandatory Reporting was enacted by the legislators or the framers of the proposed legislation.

II. LITERATURE REVIEW

The researcher while conducting the research on the said topic, have devoted sufficient time in reviewing of research already undertaken on related problems. Thus, researcher referred to the various distinguish works of different authors/researchers, some of the literature related to the research proposal are mentioned as follows:

- Jagadeesh N, Padma Bhate-Deosthali, Sangeeta Rege, “*Ethical concerns related to mandatory reporting of sexual violence*”-In this article, the author was concerned majorly about the challenges and the consequences which are faced by doctors including paediatricians, gynaecologists, while practicing their profession because of the said provision of mandatory reporting..
- “*Protection of Children from Sexual Offences Act, 2012*”, National Commission for Protection of Child Rights – This report have the comprehensive and the detailed information regarding the ‘Child Sexual Abuse’. Further in this report the major ingredients of the “POCSO Act, 2012” are discussed along with the provision of ‘Mandatory Reporting’. This report shared the data of child sexual abuse by various authorized government agency which subsequently aid in the enactment of “POCSO Act, 2012.”

Rekha Menon, “*Mandatory Reporting and the Best Interest of the Child*”– This article

⁷ Rekha Menon, “*Mandatory Reporting and the Best Interest of the Child*”, Master of Studies Dissertation, University of Oxford (2015).

⁸ Ministry of Women and Child Development, Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act, 2012, September 2013, <https://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf>

elaborately analysed the provision of “mandatory reporting” and subsequently mentioned that such obligation to report creates a person to be duty-bound to report which ultimately is proof of the fact that child sexual abuse is a serious and much prevalent problem, and therefore is accepted as a means to prevent the continuation of the said crime. However, the author also added that many a times, such blanket obligation led to the misuse of the act indeed, still it majorly helps in curbing the offence and deter the perpetrator as well as the society.

RESEARCH OBJECTIVES

The purpose of this research is to find out and discover the answers to questions by analysing the law of the land. The main object of the research is to discover the truth or to solve the loophole present in the present law. Since, every research has its own specific purpose, likewise following are the research objectives for this research paper:

- To obtain familiarity with the ‘mechanism of mandatory reporting’.
- To determine the working and challenges faced by the said provision.

RESEARCH GAP

The POCSO Act, is a fairly new Act and because of the same a lot of areas have still not been discussed upon. Also in the cases of mandatory reporting there are judgments of different High Courts and on the same there is no judgment of the Supreme Court yet which leads to different interpretations of the same. Therefore, the views of the different High Courts only have been discussed in the paper.

III. METHODOLOGY

The research has been done under the process of proper doctrinal research. The main idea of this research is to analyse the concept of Mandatory Reporting under POCSO Act. . The scheme of idea is explained through proper resources, case laws, articles and prior research done by the legal experts and activists. This research project initially starts with a basic overview of the topic and then the research is done mostly through the source of internet and books.

The method of data collection is purely in SECONDARY form.

IMPLEMENTATION CHALLENGES: PROVISION OF MANDATORY REPORTING

While discussing the POCSO Bill, the reluctance came surprisingly from the Standing Committee which scrutinized the provision on mandatory reporting.⁹The National Commission for Protection of Child Rights (NCPCR) viewed that this obligation to report should not be mandatory rather optional. Further, the Standing Committee also observed that universal mandatory reporting is not very much feasible.¹⁰The Standing Committee also recommended that this obligation of mandatory reporting should be compulsorily imposed on certain people belonging to certain specific professions such as “*child care custodians, medical practitioners, child protection agency employees such as Childline, Juvenile Justice functionaries, commercial film and photographic print processors and any establishment employing person below 18 years of age.*” However, this recommendation was not accepted by the Ministry of Women and Child Development, and the POCSO Bill got passed, with no further guidance.

Therefore, the provision of mandatory reporting mentioned under the POCSO Act, 2012 raises a lot of implementation challenges, some of the major challenges are mentioned as follows:

Reasonable time for institutional inquiry:

There are several open-ended areas, where no clarity has been provided under the POCSO Act, thereby causing a lot of ambiguity, and even the judicial opinions of various High Courts differs while answering such questions. One of the legal controversy is – “*Whether a person can make a reasonable delay in reporting the matter, in order to conduct a local-level institutional inquiry?*”

The Chhattisgarh High Court, in the landmark judgment of ***Kamal Prasad Patade v. State of Chhattisgarh***,¹¹ where the offence of penetrative sexual assault was allegedly committed by the peon of the school against the student of Class-III. The Principal of the School was informed about the incident at 8:00 am. Immediately after receiving the said information the Principal conducted the local-level investigation before reporting the matter, however, before the Principal could complete such investigation and report the matter accordingly, an FIR was lodged at 10:30 am., the very same day. As a result, subsequently, the Principal of the school was arrested for failing to report the matter.¹²

Held—that since Principal is the head of an institution therefore, he being on such a position is expected to

⁹ Department-Related Parliamentary Standing Committee on Human Resource Development, 240th Report on the Protection of Children from Sexual Offences Bill 2011

¹⁰ Id.

¹¹ Kamal Prasad Patade v. State of Chhattisgarh, Writ Petition (Cr.) NO. 8 of 2016 decided on 12th May, 2016

¹² Section 19, The Protection of Children from Sexual Offences Act, 2012

conduct an institutional-level inquiry first, regarding the alleged offence. Also, in order to collect the material and relevant evidences, the reasonable amount of time is required, which should be given to them before charging him for failure to report under S. 21(2), the POCSO Act.

In addition to that, further it was admitted by the Hon'ble Court that such a concept of reasonable time cannot be taken as a general rule, and such liberty cannot be given to each and every individual, but it can only be considered on some specific case based on their facts and circumstances.

Therefore, based on the above-mentioned judgment it can be stated that the persons who belong to such a position in an institutions, automatically get bound by some additional responsibility, especially they are expected to ensure the safety of the child and to work in the best interest of the child while conducting an institutional-level inquiry. And therefore, some cases may require some reasonable amount of time in order to conduct an institutional-level inquiry. Indeed, Principals of schools or such other persons belonging to such a position in an institution have more often than not, been charged under Section 21(2) of the POCSO Act.

Whether can prosecute a person for failure to report if the main offence is not proven?

Another legal question and the implementational challenge, on which the POCSO Act, 2012 is completely silent upon is - "*Whether a person can be tried for failure to report if the principle offence of sexual assault has not been proved?*" And, since the legislation is silent on such legal issue and even the Apex Court of the Country has not interpreted the same, therefore, it again create a lot of discrepancy and so various High Courts have different views on this legal issue.

In **Kamal Prasad Patade v. State of Chhattisgarh**,¹³ along with the above-mentioned issue, this legal issue was also entertained in the court of law. And after analysing the facts and circumstances of the case, the Chhattisgarh High Court:

Held – Keeping in mind the principles of Due process of law, first and foremost, the primary offence wherein sexual assault was committed must be proved to have happened. Subsequently, the matter of failure from reporting can be taken up. Both the matters cannot be taken up at the same time since it would be a grave loss of judicial time and also injustice to the person accused of committing default in reporting the offence.

However, the Bombay High Court in **Balasaheb @ Suryakant Yashwantrao Mane v. State of Maharashtra**,¹⁴ have different view on the same principle and rejected the reasoning of

¹³ Kamal Prasad Patade v. State of Chhattisgarh, Writ Petition (Cr.) NO. 8 of 2016 decided on 12th May, 2016.

¹⁴ Balasaheb @ Suryakant Yashwantrao Mane v. State of Maharashtra, Criminal Revision Application No. 69 of 2017 decided on 22 March, 2017

Chhattisgarh High Court. In *balasaheb case*, a female child had been raped by the cook named as Shahaji Patole, in Shri Sant Gadge Maharaj Madhyamik Ashramashala school at Gondavale, where that child was residing as a student for educational purposes. The director of the trust was informed about the same incident by the victim. However, instead of reporting the matter to the Police, he proposed that the incident be settled casually and not talked about publicly in order to protect the reputation of the Ashramashala.

The High Court had adopted the reasoning based on S. 223(d) Cr.P.C.¹⁵. For that purpose, the term “same transaction” has been referred from S. 220(1), Cr.P.C.¹⁶ The court was of the view that sexual offence and the offence of not reporting were no doubt two different offences, but they occurred as part of the same transaction. The court hence ordered joint charge and trial.

Although the Bombay High Court interpreted it as a “*same transaction*”, but the author opines that the hon’ble Court misinterpreted the provision, since Section 223(d), Cr.P.C. talks about *more than one person*, and the definition under Section 220(1), Cr.P.C. is restricted to *only one person* who has committed several offences but can come under “*same transaction*”. Therefore, this cannot be considered as the offence committed by both the perpetrator and the director of an institution who fails to report the matter as the offence done under the same transaction.

Impact of mandatory reporting on doctors and counsellors: conflicts with medical ethics

The ‘Mandatory Reporting’ under the POCSO Act prescribes and make every person to be duty-bound to report the case on commission or even on the apprehension that the act is likely to be committed, irrespective of giving or considering some professionals like doctors and clinical psychologists at some liberty. The doctors and clinical psychologists belongs to such profession, where they have to maintain their patients privacy and confidentiality. They are ethically bound to keep a doctor-patient relationship, where they cannot disclose any material information related to the patient.¹⁷ The objective behind such ethical duty which bound the doctor is not to disclose any relevant information in order to strengthen the doctor-patient relationship, where the patient without any hesitation, freely and openly communicate and share all his problems with the doctor, and the doctor with the best of his knowledge treat the patient.

The compulsions under the ‘Mandatory Reporting’ creates a strict obligation on the health-care

¹⁵ Section 223, The Code of Criminal Procedure, 1973 – What persons may be charged jointly – The following persons may be charged and tried together, namely :-

“(d) persons accused of different offences committed in the course of the same transaction.”

¹⁶ Section 220, The Code of Criminal Procedure, 1973 – Trial for more than one offence – “(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for, every such offence.”

¹⁷ Centre for Child and the Laws, National Law School of India University, Bangalore, “*An analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children*”, 15 June, 2018.

providers because of which they have to face certain ethical and legal dilemmas – where on the one hand, they are ethically bound to provide the care and treatment of the patient without disclosing any of their material information, and on the other side they are legally bound to report each and every matter of child sexual violence to the local police or SJPU, otherwise they have to face stringent legal sanctions against them.¹⁸

Doctors therefore, are bound by law to report the matter. Therefore, in such a situation, the question arises that – *Whether the obligation to report under S.19 of the POCSO Act, 2012 should stringently be imposed on health-care professionals and counsellors especially when the report is made against the will of the patients/clients. Does it not violate the confidential of doctor-patient relationship?*

Following points will elaborate on the challenges faced by the medical professional because of this straight jacket provision of ‘Mandatory Reporting’:

- Barrier to maintain Confidentiality:

The provision of ‘Mandatory Reporting’ imposes the challenge to such assurance of confidentiality. Patients does not want their information to get reveal, or they do not wish the Police to get involve in their matter, they somewhere do not want to disclose about the abuse happened with them, as a result they avoid to visit the doctor, or avoid to get the proper treatment with the fear in their mind that the doctor might report the same to the Police, or he may disclose their personal matter.¹⁹ Most of the time, it happens that the survivors compromise on their health, only to hide the matter from police or from other authorities.

In the primary research conducted by the author, it has been mentioned by the doctor, that firstly the patient does not disclose if they are subjected to any type of sexual abuse, and if during the further medical examination, doctor got to know about such fact and eventually confronts the patient, then the patient take the risk of their health, and get themselves discharge from the hospital and left without taking the complete treatment, only because of the apprehension that the doctor will subsequently inform the police and then they have to further meet the consequences.²⁰

- Violation of prior consent:

¹⁸ Jagadeesh N, Padma Bhate-Deosthali, Sangeeta Rege, “Ethical concerns related to mandatory reporting of sexual violence”, Indian Journal of Medical Ethics, 25th November, 2016, <https://doi.org/10.20529/IJME.2017.027>

¹⁹ Id.

²⁰ Sullivan CM, Hagen LA. Survivors’ opinion about mandatory reporting of domestic violence and sexual assault by medical professionals. *Journal of Women and Social Work*. 2005;20(3):346-61

Whenever the patient visit the doctor, there is a implicit contract of “confidentiality of information”, based on what the patient always discloses his/her confidential information. However, when such doctor has to reveal the information of the patient to police, irrespective of patient’s prior consent, the patient/survivor feels cheated. And in such scenario, the already given prior consent become irrelevant, since without patient’s consent, the doctor inform such authority. This create the sense of insecurity in the minds of the patient, and the feeling of discomfort generate in further sharing any information and most of the time patient donot visit the same doctor again.²¹ Therecentlawof ‘Mandatory Reporting’ preventthehealth professionals from keeping their words, by disrespecting the prior consent which is already given by the patient with a lot of assurance.

- **Mandatory reporting: complexities in “romantic relationship”**

The typical socio-cultural Indian background, where talking about ‘sex’ is a taboo or providing ‘sex education’ even in an educational institution is not that prevalent, leads to various devastating effects. Most of the time it happens, that a girl child who is willing a part of a romantic relationship with a guy, and in pursuance of such relationship indulge in doing sexual intercourse with her own consent with a guy, but since she is a minor and her consent in sexual intercourse is irrelevant, therefore it get attracted by POCSO Act along with Indian Penal Code, 1860. Taking the example of a case where **Nupur** who is a 15-year-old-girl, in a relationship with a boy of her class named Mayank. And she when visit a gynaecologist since her periods got due, discloses that she might be pregnant since he had sexual intercourse with Mayank on several occasions. And subsequently she pleaded the doctor to not disclose this information to anyone else, since her family is extremely very conservative and will take strict actions against her. Although here Nupur have entered into an implied contract with her doctor, where she expects her doctor not to disclose any information to anyone else, however, the POCSO Act, 2012 does not provide any exception in such cases indeed for the purpose of reporting the case. The provisions mentioned under the POCSO Act, 2012 does not recognize “consensual” sexual intercourse/sexual relationships between adolescents or even exempt consensual sex within a child marriage. But the POCSO Act, 2012 is very clear that the health professionals inclusive of every other professionals are bound by law to report the matter to the police. And thus, in **Nupur’s** case Dr. Khanna is bound by law to report the matter to the Police, irrespective of her consent, since she is a minor and had sexual intercourse with her boyfriend.

²¹ Supra Note 29

IV. CONCLUSION AND SUGGESTION

The provision of “Mandatory Reporting” was imposed by the legislation with the intention to prevent the happening of “CSA”, and to get all such matters to enter the gate of “criminal justice system”, so that no matter could get unreported and all the victims can reach to justice. But after analysing the said provision (in detail) in the above-mentioned chapters, it is observed by the researcher that the “POCSO Act, 2012” through the provision of mandatory reporting imposes a *blanket obligation or a straight-jacket formula* to report the matter of “CSA” on all persons, without even analysing the health of the matter may be on “CSA” but fact that every case is different based on its exclusive facts and circumstances, therefore it is not feasible to put the straight-jacket mechanism to report the matter. Although the enactment of “POCSO Act, 2012” aided lot many people and deter the perpetrator to commit the act, but on the contrary the *wordings or the stringency of the provision of S.19 and S.21 of the “POCSO Act, 2012”* failed to achieve its actually purpose of the legislation.

In the objective of the POCSO Act 2012, the emphasis has been given on the fact that the identity and the privacy of the child holds paramount significance and thus confidentiality must be observed during the trial as well as during other extra judicial proceedings. But while imposing the blanket obligation on every person including the counsellors, doctors, to report the matter to “CSA” and revealing the confidentiality between them with the children, creates the sense of insecurities in the mind of those children.

It is important to note that, as observed by the researcher, the provision of “mandatory reporting” under the “POCSO Act, 2012” works in two ways: it acts as a “protection measure” to prevent the commission of further offence, but it also control the choices, the sexuality and autonomy of a child. By mandatorily obligating to report the matter to the police, the child and their families irrespective of their will have to enter the process of “Criminal Justice System”, where although it is mentioned about the special court but after referring to the “*working of Special Courts under the POCSO Act, 2012 in five states, by the Centre for Child and the Law, NLSIU*” it is revealed that because of the poor implementation process these special courts hardly able to work in the consonance of the Act.

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