Problem of Child Sexual Abuse and the Response of Judiciary: an Analytical Study

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Abstract

Child sexual abuse is a tragic reality of every society which has always been tried to hide. However, Child Sexual abuse is a social constriction and its definition and conceptualization are also socially constructed phenomena. Children are the most sensitive and delicate part of every family, society and Nation, hence the risk of their vulnerability are also very high. In such a situation, the increasing incident of sexual abuse against children is extremely frightening. The NCRB data released every year is also telling a similar horrifying picture. Whereas many cases occurring in homes remain unreported and unfortunately many children are forced to bear all pain of sexual abuse silently. Child sexual abuse is a very serious issue and should therefore be taken with utmost seriousness and sensitivity. considering the severity of problem in 2012, the POCSO Act was passed by parliament with the main objective of protection of children from various kind of sexual abuses and offence .In 2018 after a horrifying incident of khatua, in Jammu and Kashmir, some amendments were made in POCSO Act and IPC under which in some aggravated forms of sexual crime against children it has been added stringent provisions ranging from life imprisonment to death sentence. But all these legal remedies will prove to be completely useless. If our judicial system adopts the same criteria on such crimes as it does in others cases of sexual offences as seen in many judicial decisions. Majour Singh case, Mathura Rape case and Rahim Beg case are the few great example of injustice precedent.

Keywords: *child sexual abuse, sexual violence, molestation, criminal justice system, judiciary, protection of children, POCSO Act and IPC.*

Introduction

“Safety and securities don’t just happen; they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society a life free of violence and fear.” – Nelson Mandela.

“Child sexual abuse” is a dark reality of every society which has always been tried to hide. It is a serious and widespread problem in India as well as many parts of the world. The scope of the problem is so deep and vast proportions seem that virtually all children are at risk of abuse. Children are abused by loved ones, friends, family friends, those in whom they place their trust, and those

they do not known. Even, Children of all ages are at risk and vulnerable to sexual abuse, whether in their homes, their community, or even over the internet. Certainly, it is very serious and sensitive issue and because of its peculiar nature, it required more attentive, sensible and sympathetic approach of handling. Unfortunately, there have been some judgments given by the courts that have made us think that, our judicial system is how cautious about such heinous crimes against children? In the present Research paper, an attempt has been made to understand the severity of child sexual abuse with available legal remedies and critical study of some judicial decision also has been made.

Prevalence

The United Nation Population Report titled, 'The power of 1.8 billion' India is the world's largest youth population and 28 per cent of India's population is 10 to 24- year-old¹. In such a situation the considering question is that; are our innocent children really safe? If we pay attention on government commissioned report seriously, we get very shocking and depressing revelation. As per the government commissioned survey more than 53 per cent of Indian Children are subjected to sexual abuse and sexual assault.

Majority of these cases were perpetrated by someone known to the child or in a position of trust and responsibility and surprisingly in many cases most children did not report the abuse to anyone. Observing a data of National Crime Report Data (NCRB) of last few years we can receive an idea about the seriousness of the problem very easily. According to NCRB Data, 32,608 cases were reported in 2017 while 39,827 cases were reported in 2018 under the POCSO Act. NCRB data indicates that, a total 109 children were sexually abused every day in India in 2018, which showed a 22 per cent jump in cases from the previous year². In percentage wise 34.7 per cent cases were registered under POCSO Act in 2018.

The NCRB Report "Crime in India, 2019"³ which was released on September 29, 2020 has revealed that crimes against children increased by 4.5% in 2019 as compared to 2018. The report added that there was also an 18.9% increase registration of cases under the POCSO Act. Report also stated that as many as 1, 48,185 crimes against children were reported in 2019 in the country and in this, 31.2% cases of crimes against children were registered under the POCSO Act.

Further report also stated that of the 26,192 cases registered under the POCSO Act involving rape charges, 24,672 accused were known to the survivors. Furthermore, in 2,153 cases, the accused was one of the family

members; meanwhile, of the 26,192 cases filed under POCSO Act that has rape charges, while 25,934 were girls, 258 were boys.

Uttar Pradesh reported the highest number of crime against girl children under the POCSO Act with 7,444 cases. This was followed by Maharashtra with 6,402 cases and Madhya Pradesh with 6,053 cases. Furthermore, registration of cases under the POCSO Act has increased by 18.9%.⁴

Child sexual abuse: Meaning and Definition

In a general sense, the term "child sexual abuse" means abuse or exploitation and molestation of children for sexual purposes. It contains various types of sexually abuse acts towards children, including sexual assault, rape, incest, and the commercial sexual exploitation of children for e.g. Pornography, forced prostitution etc. There are many definitions of child sexual abuse and each of which perceives it in different angles. According to US Centers for Diseases Control and Prevention (CDC), child sexual abuse is "any completed or attempted sexual act, sexual contact with, or exploitation (it also include noncontact sexual interaction) of a child by a caregiver⁵." This definition of child sexual abuse is very specific and it defines each of the boldface terms and distinguishing sexual acts as those involving penetration, abusive sexual contact as intentional touching with no penetration, and noncontact sexual abuse such as exposing a child to sexual activity, taking sexual photographs or videos of a child, sexual harassment, prostitution, or trafficking.

The World Health Organization (WHO), defines child sexual abuse as "the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violate the laws or social taboos of society. Child sexual abuse is evidenced by this activity between a child and an adult or another child who by age or development is in a

relationship of responsibility, trust or power, the activity being intended to gratify or satisfy the needs of the other person. This may include but is not limited to: the inducement or coercion of a child to engage in any unlawful sexual activity; the exploitative use of child in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and material⁶.”

Notably, these definition of child sexual abuse are exploring every variants of sexual abuse and include physical touching or physical force, completed sex acts, attempted sex acts and noncontact assaults such as harassment, threats, forced exposure to pornography, and taking unwanted sexual images.

According to UNICEF, Child sexual abuse means contacts or interactions between a child and an older or more knowledgeable child or adult (stranger, sibling, parent, or care-taker), when the child is being used as an object of gratification for the older child's or adult's needs. Such contacts or interactions are carried out against the child using force, trickery, bribes, threats or pressure⁷.

Protection of children from Sexual Offences Act, 2012

In concern to Indian legal system, to deal with the cases of child sexual abuse effectively, before 2012, there was not a single law to deal with the sexual crimes against children in particular. In absence of any particular law cases of child sexual abuse were protected by section 354, section 375, section 377, and section 509 of Indian penal code, 1860. And the cases of pornography were dealt by Young Persons (Harmful Publication) Act, 1956. In 2012, the government has brought in a special law, namely, the protection of children from Sexual Offences (POCSO) Act, 2012. The Act has come into force with effect from 14 November 2012. The Act through its 46 provisions increased the scope of reporting offences against children, which were not earlier covered under the Indian penal code. It is a very comprehensive law to provide for the protection of children from the

offences of sexual assault, sexual harassment and pornography. This Act is formulated to safeguard the interest of child at every stage of judicial Process by incorporating child- friendly mechanisms for reporting, recording of evidences, investigation and speedy trial of offences through designated Special Courts. The Act clearly defines a child as any person below 18 years of age.

The Act covers a wide range of sexual offences. Penetrative and aggravated penetrative sexual assault, sexual and aggravated sexual assault, sexual harassment, and using a child for pornographic purposes are the five offences against children that are covered by this Act. In this way the Act, recognizes almost every form of sexual abuse against children as punishable offences, and makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child. Further, by facilitating child- friendly judicial process definitely the said Act encourages children who have been victims of sexual abuse to report the offence and seek redress for their suffering as well as to obtain assistance in overcoming their trauma.

Judicial Response towards child sexual abuse

What is justice and how should it be done? In words of Lord Hewart, “Justice is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done⁸.” Indeed “feel of Justice” is very important. In every Criminal Justice System, the role of judge is very far reaching and influential; in fact in a eye of common man, it is the ultimate duty of judge to do justice as per the existing law to the aggrieved person. However, on perusal of several judicial decisions, it appears that in cases of child sexual abuse and POCSO Act, the judges language is not as decent, sensible and accountable as it should be. Even from a legal point of view, it seems quite hollow at times. A short while ago, the Nagpur Bench of the Bombay High Court in the case of Satish Bandhu Ragde v. The State of Maharashtra ⁹ expressing a unique

view in concern to sexual assault against children and held that, “skin to skin” contact is essential to constitute the offence of sexual assault defined under section 7 of The Protection of Children from Sexual Offences Act, 2012 (POCSO Act). In this case, a single bench of Justice Pushpa Ganediwala made the observation while modifying the order of session court that held a 39- year old man guilty of sexual assault for groping a 12- year old girl and removing her salwar and found liable for the punishment of three years imprisonment as stated in POCSO Act, 2012¹⁰. On the contrary The Honorable Court held that the act of pressing the breast of any child in the absence of any specific details as to whether the top was removed or whether he inserted his hand inside it would not fall in the definition of “Sexual assault” as expressed under section 7 of the Act.

Further the honorable court also held that to fall within the definition of sexual assault, the convicted act must be of the same nature as the act expressed under section 7 of the POCSO, which defines sexual assault as “ whoever, with sexual intent touches the vagina, penis, anus or breast of the child 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 is said to commit sexual assault.” Therefore the court has concluded that the touching of the breast without removing cloth or without skin to- skin contact is not similar to the above mentioned act and hence, does not attract this definition. However, it would certainly fall within the definition of the offence under section 354 of IPC¹¹, a less serious offence and therefore, convicted the man under section 354 IPC “outraging a women’s modesty” and punished him with one year rigorous imprisonment.

Certainly, it is a most bizarre interpretation of this highly sensitive law and also contrary to the object of POCSO Act. In fact it is not the language of Justice. In this case, judge firstly, did not interpret the offence to constitute an attempt to commit sexual assault under the POCSO Act and

alternatively chose to apply s/354 IPC. Secondly, the terminology ‘skin to skin contact’ used by the judge, has not used anywhere in this Act. In respect to this new formulated terminology the Act is very clear and sharp. As per the language of the Act, to constitute the offence of sexual assault the only requirement is ‘sexually intended touch’.

Definitely, this absurd and irrational decision of Bombay High Court reminds us very regressive verdict of Punjab and Haryana Court, in Major Singh Lachhman Singh v. The State ¹² in this case the court held that, tampering with private parts of the female child of seven and half months is not crime, hence accused could not be held guilty under section 354 IPC because a female child of seven and half month is physically incapable of having any sense of modesty. The majority of the learned judges in the High Court held that the word “outrage her modesty” means there must be subjective element so far as the woman against whom criminal force was used in concerned and the offence could be said to have been committed only when the woman felt that her modesty had been outraged. Therefore, the test of “outrage of modesty” is the actually reaction of woman not for any female child of just seven month old.

As a matter of fact, such kind of absurd and irrational language of justice has been followed in several cases of sexual crimes. It’s not a new phenomenon. In Rahim Beg And Anr. V. State of UP ¹³, the two accused, named, Rahim Beg and Mahadeo had committed rape and murder of 12 year old minor girl but the court acquitted him on the ground that mere presence of stains of semen on the langot of Rahim Beg without any injuries marks on genitals could not necessary connect with the offence of rape.

In this series of insensitive language of justice, the verdict of Mathura rape case has set up another precedent of injustice. The Mathura rape case ¹⁴was occurred in 1972. The judgment was delivered by justice Jaswant Singh, Kailasam and Koshal, which was very conservative, hence highly condemned and criticized for its irrational

legal mind, insensitiveness and sexist tone . in this case, Mathura was a 16 year old poor tribal girl and was gang raped by two police constable, named Ganpat and Tuka Ram in the police station premises. Firstly, The Session Judge acquitted the accused, as he believed that this was not a case of rape but an act of “consensual sexual intercourse” and Mathura was not a girl of good character so that being ‘habitual to sex’ might have invited Ganpat to satisfy her sexual needs and thus her consent was not reliable.

The Nagpur Bench of the Bombay High Court reversed the order of acquittal and considering the same facts convicted Ganpat under section 376 IPC for Rape and awarded rigorous punishment of five years, and Tuka Ram was held liable under section 354 IPC and awarded rigorous Imprisonment for one year. Further the High Court held that the Session Court cannot ignore the difference between ‘consent’ and ‘passive submission’ and lack of injuries did not mean consent to sexual intercourse. The High Court remarked that ‘mere passive or helpless’ surrender of the body and its resignation to the other’s lust induced by threat of fear cannot be equated with the desire or will.

Thereafter, in appeal the Supreme Court reversed the High Court judgment and acquitted both the policeman. The Court held that Mathura did not raise any alarm and “meekly followed Ganpat”, so her consent could not be equated with the passive submission. Thus, it was not rape. It was just a consensual sexual intercourse. However, the learned judges of the Supreme Court failed to tell that whether a police station was a right place to have sex?

Till from the Mathura case to now, still the perception of the judges in concern to sexual abuse of children are not seem sensitive and appropriate at all. in most of the cases, they are habitual to understand rape in a stereotypes frames as like as they has been persistently followed in rape cases against women.

Jumman Khan v. State of UP¹⁵ was the only case in which the accused was sentenced to death. After that, it was not followed by court as a precedent in any case. However, in several cases the court has accepted that ‘rape against children’ are the most heinous and brutal form of crime.

Conclusion

On the one hand there is a distressed fact that the abhorrent and aggravated crimes like child rape are on the rise and on the other hand, in most of the cases, the rapists are escaping by taking advantages of loopholes of the law in such a situation, the Indian Judicial system which is already quite slow and complicated in terms of procedure and ambiguous and contradictory in terms of language of law, other discomfiture added by our learned judges through their astonishing interpretation.

Obviously, such kind of insensitive interpretation of the law in concern to child sexual abuse certainly going to weaker and narrow the entire POCSO Act. Sexual violence against children is extremely deadly. In 2018, after the kathua rape case ¹⁶ In which a 8 year old Muslim tribal girl was gang raped and murdered by group of six local person including temple pujari. This was extremely brutal and inhuman incident. Thereafter, considering huge outcry of public some amendments were made in POCSO Act and IPC and under which in some aggravated forms of sexual crime against children it has been added stringent provisions ranging from life imprisonment to death sentence. Definitely, it is a moral and professional responsibility of every judge to take all caution and legal understanding while pronouncing decision on issues of child sexual abuse. Remember! Justice has to be done with the victims not with the rapists. Children are the most precious asset. Safe and holistic development of children is the primary concern of every Nation. Last but not least, we the people of India, still hoping for Justice!!.

References

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⁷ Dr. Mamta Rao, Law Relating to Women and Children (Eastern Book Company, Lucknow 4th edn;2018) p-598.

⁸ R v. Sussex Justice, ex P. Mc Carthy, (1924) 1 kb 256,259.

⁹ Cr.appeal No. 161/2020, High Court of Bombay,

¹⁰ POCSO Act,2012, S.8: whoever commits sexual assault, shall be punished with imprisonment of either punishment for 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.

¹¹ Indian Penal Code 1860 ,S. 354: Assault or Criminal force to woman with intent to outrage her modesty- whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

¹² AIR 1963 PH 443.

¹³ AIR 1973 SC 343.

¹⁴ Tuka Ram And Anr v. State of Maharashtra; AIR 1976 SC 185.

¹⁵ AIR 1991 SC 345.

¹⁶ Mohd. Akhtar v. The State of Jammu And Kashmir, WP (crl.) 85/2018.