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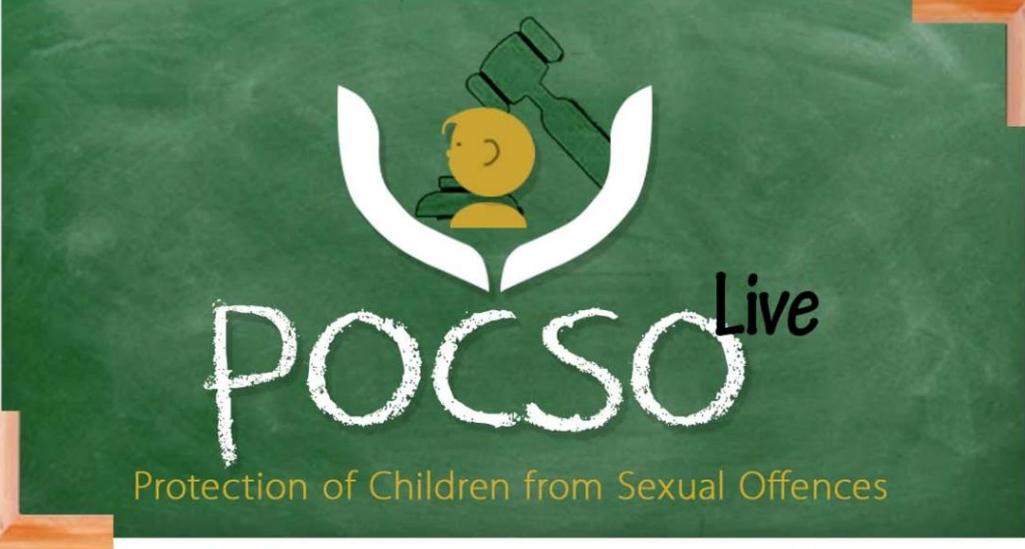
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# POCSO <sup>Live</sup>

Protection of Children from Sexual Offences

*A quarterly insight to the POCSO Law!*

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**POCSO LIVE** brings you updates and information relating to matters of protection of children from sexual abuse irrespective of gender. This is an effort to create awareness amongst all stakeholders having access to children about their duties and obligations towards protecting children from sexual abuse and keeping them safe.

## **“Child Sexually Abusive and Exploitative Material” on personal device amounts to crime!**

In the Landmark Judgement given by Supreme Court on 23rd September, 2024, The Apex Court held that even mere storage of child pornographic material is an offence under Protection of Children from Sexual Offences (POCSO) Act, 2012. POCSO is a comprehensive law in India aimed at protecting children from offenses of sexual assault, sexual harassment, and pornography. Section 15 of the POCSO Act specifically deals with the punishment for storage or possession of pornographic material involving a child. This provision, though often overshadowed by the Act's other sections, plays a crucial role in addressing the growing concern over child sexually abusive and exploitative material in the digital age. In this article we attempt to elaborate on the Section 15 of POCSO Law with the help of this said Judgement and thereby bring to you some important aspects of this Landmark Judgement. **CRIMINAL APPEAL NOS. 2161-2162 OF 2024 (ARISING OUT OF SPECIAL LEAVE PETITION (CRL) NOS. 3665-3666 OF 2024) JUST RIGHTS FOR CHILDREN ALLIANCE & ANR. VS. S. HARISH & ORS.**

### **Section 15 of POCSO Act, 2012**

(1) Any person, who **stores or possesses** pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an **intention to share or transmit child pornography**, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

(2) Any person, who **stores or possesses** pornographic material in any form involving a child **for transmitting or propagating or displaying or distributing in any manner** at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.

## GOOD TO KNOW!

### Basic Rights of a Child

Basic Rights of a Child are –

1. Right to Family Life
2. Right To Education
3. Play and Recreation
4. Right to Survival
5. Right to Safety
6. Right to be treated with Dignity

(3) Any person, who **stores or possesses** pornographic material in any form involving a child **for commercial purpose** shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."

As per Section 15 (1) there is no requirement whatsoever for an actual transmission of any child pornographic material in order to fall within the ambit of the said provision. What is sought to be penalized under Section 15 of the POCSO is the storage or possession of any child pornographic material when done with a particular intention or purpose as stipulated in sub-section(s) (1), (2) or (3), as the case may be. Thus, it can be said that it is the intention which being punished and not the commission of any criminal act. This is known as "Inchoate Crime" or "Inchoate Offence". Inchoate crimes are defined as criminal acts that are committed in preparation for a further offence. The term "inchoate" itself means "undeveloped" or "incomplete." As stated in the Judgement, "The Doctrine of Inchoate Crimes is a cornerstone of criminal jurisprudence. It is aimed at addressing the legal culpability of those who engage in a conduct that is preparatory to the commission of any substantive offence. Inchoate crimes, are often referred to and described as an incomplete or preliminary offence, that capture the essence of criminal intent and the preparatory actions that precede the commission of a criminal act. It underscores the principle that the law does not merely respond to offences already committed but also intervenes when a crime is in the process of being committed, thus thereby protecting public order and safety. Inchoate crimes represent a critical aspect of criminal law, embodying the legal system's proactive and deterrent approach to crime itself."

The Apex Court States that, "the provision of Section 15 of the POCSO is in the nature and form of an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when stored with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc" For Section 15(2), the Judgement states, "The use of the words **"for transmitting or propagating or displaying or distributing in any manner at any time"** clearly suggests that again no actual act of transmission, propagation, display or distribution is required to take place."

Regarding Section 15 (3), The Honourable Court explained, "Again, the words "any commercial purpose" indicate that the storage or possession must be with an intention to generate or acquire any monetary gain or any other form of valuable consideration, irrespective and regardless of whether such monetary gain or valuable consideration is actually generated or acquired."

The Court laid sufficient emphasis on "possession" of such material by stating, "It observed that the control of a person over such material can be ascertained by seeing whether he could manipulate, alter, modify or destroy such material or not, if the answer to any of the above is in an affirmative, such material would be deemed to be in his conscious or constructive possession." Ample of examples were given to understand the doctrine of constructive possession discussing several possibilities where people are watching such abusive and exploitative material online without downloading but are in a position to delete or report such material are also to be considered in possession. People who may click on the link without knowing what would open after clicking may not be considered in possession of such material provided, they report and delete the material after knowing that it is abusive and exploitative.

## Section 30 of POCSO Act

### Presumption of culpable mental state –

- (1) 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 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.
- (2) 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.

Explanation. – In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

In the present case the Supreme Court put prominence on “presumption of culpable mental state” and stated, “, the statutory presumption under Section 30 of the POCSO operates or gets attracted not by virtue of the court before which the matter happens to be at, but by the offence itself, for which the legislature specifically provides such presumption in the first place. Since, the presumption in essence is in respect of mens rea required for any offence under the POCSO, this presumption is inextricably linked to the offence alone and not the power conferred upon a particular court. This is evinced by Section 30 sub-section (1), more particularly the expression **“In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused”**. Furthermore, the aforesaid expression is of wide import and the words **“prosecution for any offence under this Act”** occurring therein would subsume and include any proceeding in respect of an offence under the POCSO would.”

Referring to the time when the material was stored in the device, the court mentioned, “What is sought to be punished under Section 15 is not the time when such material was stored or came to be possessed but rather the storage or possession itself, which may be continuous, wherein the relevant point of time of such storage or possession for constituting any offence under the POCSO more particularly Section 15 would be reckoned from the date of registration of the FIR”

The Apex Court advised **to stop the usage of word “Child Pornography” and be replaced by “Child Sexual Exploitative and Abuse Material” as “CSEAM”** more accurately reflects the reality that these images and videos are not merely pornographic but are records of incidents, where a child has either been sexually exploited and abused or where any abuse of children has been portrayed through any self-generated visual depiction. It stated, “We further forbid the courts from using the term “child pornography” and instead the term “child sexual exploitative and abuse material” (CSEAM) should be used in judicial orders and judgements of all courts across the country”

Looking at the impact of what CSEAM would cause on the society, the Court rightly pointed out, “Those who consume such material may develop an increased desire to engage in further acts of child exploitation. The viewing of CSEAM can desensitize individuals to the horrors of child abuse, leading them to seek out more extreme forms of exploitation or even to commit acts of abuse themselves. Moreover, the demand for such material will always incubate a corresponding production and distribution of CSEAM. 11 Abusers may be motivated to create and distribute these materials to satisfy the demand, leading to the abuse of more children.12 This cycle of abuse and exploitation underscores the need for stringent measures to not only punish those who create and distribute CSEAM but also to deter potential consumers and reduce the demand for such material.”

### Few Guidelines given by the Court in this Judgement –

1. Courts should not show any leniency in such matters
2. Legal and social support services are also essential to help victims navigate the complexities of their situation and rebuild their lives
3. Sex Education in schools to reduce sexual violence and promote equality
4. Programs for Youth on Importance of Consent the legal implications of sexual activities, helping them understand the severe consequences of viewing and distributing child pornography.
5. Section 43 of the POCSO obligates the Central Government and the State Government to undertake measures and ensure that the provisions of the said Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the legislation

6. It further requires the appropriate government to also impart proper training at regular intervals to all government offices such as police on the implementation of the provisions of this Act.
7. Section 44 of the POCSO on the other hand obligates the National Commission for Protection of Child Rights and the State Commission for Protection of Child Rights constituted under the Act to regularly monitor and assist in the implementation of the provisions of this Act

Through this Judgement, the Court also gave certain suggestions/guidelines to the Union of India on constituting an **Expert Committee** tasked with devising a comprehensive program or mechanism for health and sex education, as well as raising awareness about the POCSO among children across the country from an early age, for ensuring a robust and well-informed approach to child protection, education, and sexual well-being.

In the light of this Judgement, the intent of POCSO Law has been highlighted that the wellbeing of a child is a collective responsibility of various stakeholders in the society. Under S. 19 of POCSO, any person who has "knowledge" of the commission or likely commission of a sexual offence against a child must report that offence to the police. Let us be aware of our responsibility on mandatory reporting as envisaged in the law as "Ignorance of Law cannot be an excuse!"

## *Features of Juvenile Justice (Care and Protection of Children) Act, 2015*

The Juvenile Justice (Care and Protection of Children) Act, 2015 is a key legal framework in India for the care, protection, and rehabilitation of children in conflict with the law and those in need of care and protection. Below are the salient features of the Act:

### Definition of a Child

- The Act defines a child as any person below the age of 18 years Section 2 (12)
- It categorizes children into two groups:
  - Children in Conflict with the Law: Juveniles accused or convicted of committing a crime. (section 2(12))
  - Children in Need of Care and Protection: Vulnerable children, such as those who are abandoned, abused, or victims of exploitation. Section 2 (14) of the Act
  - Juvenile – Means a child below 18 years age –Section 2(35)

### Legal Framework

The definitions help differentiate between young offenders and adults in the legal system, ensuring that youths receive appropriate care and rehabilitation rather than punitive measures. There are 16 general principles of care and protection of children embodied in the Act and the 'best interest of the child' is of paramount importance.

### Offences and Punishments

The Act also defines 'Serious offences', 'serious offences' and 'petty offences' as offences for which the maximum punishment under law is imprisonment for seven years or more or, is between 3 years to seven years or, is less than 3 years, respectively.

### Serious or Petty Offence

As per Section 18 of the Act, irrespective of the age of the child, if the child has committed a petty offence or a serious offence, or a child below 16 years of age has committed a heinous offence, based on the nature of the offence and specific need for supervision or intervention, the Juvenile Justice Board shall pass orders ranging from release on probation with a requirement to participate in counselling or other restorative practices or be sent for not more than 3 years, to a special home for providing reformatory services. In some cases, depending on the nature of the crime and the juvenile specific needs, the Board may order the guardian to pay a fine. If found guilty of a serious offense, the minor may be removed from the observation home and placed in jail after turning eighteen.

### Heinous offence

In the case of a heinous crime committed by a juvenile aged 16 to 18, the Juvenile Justice Board will first conduct a preliminary investigation. If the Board is satisfied, the case can be transferred to a special Children Court, where the juvenile may be tried as an adult. In that case, the juvenile may face the same punishment as any adult who has been convicted of such a crime. However, care must be taken to ensure that the trial is conducted in a child-friendly environment, and that a juvenile cannot be punished with life imprisonment or death sentence.

## **Person who ceases to be a child in the process of Inquiry or has committed the offence when he was a child**

As per Section 5 of the Act, when a child in conflict of law, during the course of inquiry completes the age of eighteen, the inquiry is continued by the Board and orders may be passed as if such person had continued to be a child

As per Section 6 of the Act, When a person is apprehended for an offence allegedly committed when he was under the age of eighteen years, then the person is required to be treated as a child during the process of inquiry

### **NEWS CORNER –**

## **Urgent Need for Fast – Track Courts – In the light of pending cases under POCSO in Pune**

As per the news report in Pune Mirror dated 23<sup>rd</sup> September, 2024; Pune district has a total of 5,346 cases pending, of which city's share is 3,696. With over 5000 cases of child abuse awaiting justice in the district, there is dire need for special fast track court to dispose of them immediately.

Following a PIL in 2017, the Supreme Court ordered the establishment of special fast-track courts in places where more than a hundred cases under the POCSO Act were pending. Accordingly, special fast-track courts were established at thirty places in Maharashtra, including Pune. Pune Special Judge KK Jagirdar conducted the cases in this court. However, after Judge Jagirdar retired last year, no new judge has been appointed for the fast-track court and thus its functioning has stopped.

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Advocate Vaishali Bhagwat, is amongst the first technology lawyers in the country with prior qualification and working experience in the field of Computer Science, Cyber Defense and Information Assurance.

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Vaishali is on the advisory board of several educational and academic institutions for POCSO related services of drafting and implementation of the Child Protection Policy and training of the members of the child protection committee.

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*Thank you for reading!*

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