

ERRORS OF JUDGMENT

Relevant for: Developmental Issues | Topic: Rights & Welfare of Children - Schemes & their Performance, Mechanisms, Laws Institutions and Bodies

Photo for representation.

The Allahabad High Court recently held that [oral sex with a minor \(aged about 10 in this case\) is not a case of 'aggravated penetrative sexual assault'](#) under [the Protection of Children from Sexual Offences \(POCSO\) Act](#). This is shocking as [Section 5\(m\) of the Act](#) clearly lays down that “whoever commits penetrative sexual assault on a child below twelve years” is said to commit “aggravated penetrative sexual assault”. Section 6 prescribes punishment with imprisonment for a term which shall not be less than 10 years but may extend to imprisonment for life.

Though para 16 of the judgment replicated Sections 3 to 10 of the Act, all verbatim, including Section 5(m), Justice Anil Kumar Ojha, in para 17, concluded that “putting penis into mouth does not fall in the category of aggravated (penetrative) sexual assault or sexual assault”. There seems to be a palpable error of law which must be set right quickly.

Editorial | [POCSO shocker: On Allahabad High Court verdict on child sexual assault](#)

The POCSO was enacted specially to protect children (of any sex) from offences of sexual assault, sexual harassment and pornography, realising the fact that a large number of such offences were neither specifically provided for nor adequately penalised. The Statement of Objects and Reasons of the Act reinforces the legislative intent, which was made clear by providing neutral definitions and enhanced punishments for various offences of sexual nature. Though Section 42 on ‘alternate punishment’ was specifically introduced in POCSO to award greater punishment, in case of difference when compared to any other law in force, the Indian Penal Code was also amended to remove anomalies in the quantum of punishment for same or similar offences.

Second, there is no ambiguity about the language used in Section 5 of the Act. Recently, the Supreme Court, while dismissing the requirement of skin-to-skin physical contact in cases of sexual assault, held that where the language of a statute was clear, the intention of the legislature was to be gathered from the language used. In the absence of any ambiguity of language used in Section 5 about the definition of ‘aggravated penetrative sexual assault’, there was no reason for the Court to deviate from the law and award lesser punishment. The ‘rule of lenity’, though not discussed in the judgment, had no application in the case.

Third, it was not a case where the Court had any discretion to award lesser punishment than the minimum 10 years as prescribed in Section 6 of POCSO. Earlier, the Courts had discretion under Section 376 (punishment for rape) of the IPC to award lesser punishment than the minimum prescribed by recording ‘adequate and specific reasons’. The Supreme Court, in *State of Rajasthan v. Vinod Kumar* (2012), set aside the High Court order which reduced sentences less than the minimum without recording ‘adequate and special reasons’. However, this discretion was taken away by amending Section 376 of the IPC in February 2013. Since the POCSO Act does not provide any discretion in awarding punishment of imprisonment, the High Court was mandated to adhere to the statutory provisions.

Expanding the scope of POCSO

Four, the High Court did not deliberate on the reasons for not considering the offence as being of aggravated nature. The age of the victim was recorded as about 10 years and did not fall even under the category of marginal difference from 12 years. The Supreme Court has held that recording of reasons by a judge is not a mere task of formality, but an exercise of judicial accountability and transparency. This makes the decision available for further scrutiny at the touchstone of reason and justice. Five, it was not even a case where the provision of minimum punishment of 10 years imprisonment for aggravated penetrative sexual assault was under challenge for being disproportionate (to the objective of protecting children aged less than 12 years) as compared to the gravity of the offence under Article 14 of the Constitution. When no such test of reasonableness was under scrutiny, the Court fell into error by not considering the offence under the applicable relevant sections.

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Despite quoting the relevant sections of 'aggravated penetrative sexual assault', the High Court overlooked Section 5(m) of POCSO and convicted the accused for 'penetrative sexual assault' with lesser punishment. Since monitoring of implementation of the Act is the responsibility of the National Commission for Protection of Child Rights, the State Commission for the Protection of Child Rights, and the State government, this decision, which appears to be per incuriam, must be challenged so that the accused is not allowed to escape from the clutches of the appropriate sections of the POCSO Act.

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