

## **CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN INDIA**

**Justice SHAMPA SARKAR**, Calcutta High Court  
(Shampasarkar761@gmail.com)

**Abstract:** The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation in family and protection matters. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in India.

**Key words:** child participation; family law; child protection; children's rights; justice system; India.

**By defining that such a situation concerns the child, does he/she become a party to the proceedings? Does he/she have the right to legal representation by a lawyer? Are there limits to the intervention of this lawyer in comparison with the other parties? The lawyer has an ethical duty to represent only the child's opinion, including cases where he/she does not consider the child's opinion in accordance with his or her best interests?**

The Protection of Children from Sexual Offences (POCSO) Act, 2012 was enacted by the Government of India to provide for a legal framework for the protection of children from sexual assault, sexual harassment and pornography, etc., while safeguarding the interest of the child at every stage of the judicial process, through the incorporation of child friendly mechanisms for reporting and recording of evidence, investigation, and speedy trial of offences by way of designated Special Courts, the National Commission for Protection of Child Rights (NCPCR) has been mandated to monitor the implementation of POCSO Act, 2012.

A child has the right to be a party in the proceedings before the POCSO Special Courts irrespective of their age, gender or level of maturity. As per Section 32 of the POCSO Act, 2012, the State is required to appoint a Special Public Prosecutor for every special court under the Act, for conducting cases

under the provisions of the Act. Such a Special Public Prosecutor is deemed to be a Public Prosecutor as defined in the Code of Criminal Procedure, 1973 (CrPC), the general law governing criminal procedure in India.

Section 301 of the CrPC provides that if any private person instructs a pleader to prosecute any offence in any court, the pleader so instructed shall act under the directions of the Public Prosecutor, who shall be in charge of the case. Section 40 of the POCSO recognizes the right of the child's family or guardian to take the assistance of a legal practitioner. Section 40 further dictates that if the child's family or guardian are unable to afford legal counsel then, the Legal Services Authority<sup>1</sup> shall provide a lawyer to them. The legal counsel so appointed, shall look after the proceedings on behalf of the child and shall also look after all the issues relating to the child like compensation matters, individual needs of the child etc. He will be concerned with the legal proceedings as well as other legal rights of the child like compensation matter, matters relating to individual care plan etc.

Courts have interpreted these provisions to account for special circumstances. For instance, the Delhi High Court, in in the case of *Smt Lavanya Anirudh Verma v State of NCT of Delhi*, CrI.M.C. 301/2017, directed that in an extreme case such as where the father of the child is the offender, the Special Court can appoint "**guardian ad litem**"<sup>2</sup> for protecting the interests of the child in the proceedings. In the case of *Arsheeran Bahmeech v State*, (2015) 224 DLT (CN 13) 13, some more guidelines for the appointment of the *guardian ad litem* were laid down. Most importantly, it was observed that such an appointment has to be in the best interests of the child. If qualified, the preference should be given to parents. A member of the bar or a practising advocate may also be appointed as *guardian ad litem*. The court must consider the background of the *guardian ad litem* and his familiarity with the judicial process.

It is also pertinent to note that Section 39 of POCSO Act provides that the State government is required to prepare guidelines for nongovernmental

---

<sup>1</sup> See The Legal Services Authorities Act, 1987, Preamble (“An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”).

<sup>2</sup>Defined in the UN Office on Drugs and Crime, *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary* (2009) <[https://www.unodc.org/documents/justice-and-prison-reform/Justice\\_in\\_matters...pdf](https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf)> last visited on 16 August 2021, as “a person appointed by the court to protect a child’s interests in proceedings affecting his or her interests”.

organisations, professionals and experts or other persons having special knowledge (in psychology, social work, physical health, mental health and child development) to govern and regulate their involvement at the pre-trial and trial stage for the purpose of assisting the child. The Ministry of Women and Child Development has prepared the Model Guidelines under Section 39 of the POCSO Act, titled “**Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012**” (Guidelines under Section 39) in this regard.<sup>3</sup>

The said guidelines provide that the role of the Legal Aid Services lawyer or the private lawyers appointed by the child and/or their family “*extends to representing the child, helping uncover the nature and extent of abuse, identifying responsible parties and securing damages to compensate the victim and facilitate the healing process.*”<sup>4</sup> The guidelines also suggest that while the lawyer has a duty to the Court to put forward the views of the child, the lawyer shall not require the child to express a view if he/she does not want to do so.<sup>5</sup> The lawyer is not required to put before the Court any views expressed to him in confidence.<sup>6</sup> The child should be represented independently, especially when parents, family or caregivers are the alleged offenders.<sup>7</sup>

In cases of a conflict between the child’s views and the best interests of the child, the lawyer ought to a) discuss the issues and disclose the lawyer’s obligations with the child; b) attempt to resolve the conflict with the child; and c) advise the Court of the lawyer’s position and, in the case where the lawyer is unable to resolve the conflict and as a matter of professional obligation, he should invite the Court to appoint another lawyer.<sup>8</sup> Thus, while the lawyer must act, as a general rule, in terms of the child’s instructions, the lawyer shall represent the child in accordance with the child’s welfare and best interests.

**How does the child participate in Court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional? If it is another professional, can you identify it and specify its**

---

<sup>3</sup>Ministry of Women and Child Development, *Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012: Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012* (September 2013) <<https://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf>> last seen on 16 August 2021.

<sup>4</sup>ibid 70.

<sup>5</sup>ibid.

<sup>6</sup>ibid.

<sup>7</sup>ibid.

<sup>8</sup>ibid 70-71.

**responsibilities, please? If the participation is direct, is it voluntary? In this case, who consults the child if and how he/she wants to participate? Are there any institutional protocols on how to do that? Are there any informative materials specially prepared for children about its participation? Can you share it with our members?**

The child directly participates before the judge in court proceedings under the POCSO Act, which are conducted in-camera. However, as discussed above, Section 40 of POCSO Act also provides for the right of the child to participate in court proceedings with aid of legal counsel, presumably for more efficient and effective participation.

Section 33(2) provides that the Special Public Prosecutor or the counsel for the accused can conduct examination-in-chief, cross-examination or re-examination, as the case may be, of the child only through the Special Court, which shall put the questions to the child. Thus, the child has to testify before the court, although the court must ensure that is child is not repeatedly called in to testify.

As per Section 37, if the Special Court is of the opinion that the child needs to be examined at a place, other than the court, it shall issue a commission as per section 284 of the CrPC. During examination, the court should create a child friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust and confidence, to be present in court.<sup>9</sup>The child can call for assistance from an interpreter, special educator, or other professional while giving evidence; and may testify through video-link rather than in a courtroom.<sup>10</sup>

The Court can also give assistance of interpreter, special educator, psychological counsellor suo moto, if the Court considers that course of action to be necessary. Besides the legal practitioner and Special Public Prosecutor, the child is also entitled to take the benefit of the services of support persons who must provide support and assistance to the child through the pre-trial and trial process. The Guidelines under Section 39 state that the support person is in a way, a *guardian ad litem* for a child, who can be a useful intermediary between

---

<sup>9</sup>Protection of Children from Sexual Offences Act, 2012, s 33(4).

<sup>10</sup>Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012 (n 3) 5.

the authorities and the child.<sup>11</sup> Rule 4(8) of the Protection of Children from Sexual Offences Rules, 2020 (POCSO Rules) provides that the support person may be appointed by the Child Welfare Committee (CWC)<sup>12</sup> or the child and his/her family members. Such support person appointed by the CWC may be a person or organisation working in the field of child rights or child protection, or an official of a children's home or shelter home having custody of the child, or a person employed by the District Child Protection Unit (DCPU).<sup>13</sup>

Rule 4 (8) and (10) of the POCSO Rules, 2020 require the police and the Special Court to be informed about the appointment and termination of support persons. This indicates that the support person also has a role to play before the Special Court and should also be present each time the child is required to attend court proceedings.<sup>14</sup> The support person is required to keep the child and the child's guardians or other persons in whom the child has trust and confidence informed about the proceedings in the case.<sup>15</sup> Through the Support Person, the child also conveys to relevant authorities, their concerns about safety and the manner in which they wish to provide their testimony.<sup>16</sup> The Guidelines under Section 39 provide that "[t]he support person may be called upon by the Special Court to ascertain information about the child, such as whether the child is in a safe and protective environment, preferences of the child in a given situation."<sup>17</sup> The duties of the support persons are spelt out in Rule 4 of the POCSO Rules.

Since the child is required to testify before the Special Court, there is always the danger of traumatising or re-victimising and thus, support persons must have basic training in communicating with and assisting children of different ages and backgrounds to prevent the risks of revictimisation and secondary victimisation.<sup>18</sup> The Guidelines under Section 39 also provide that the support person must have an understanding of the legal and court procedures

---

<sup>11</sup>ibid 50.

<sup>12</sup>Juvenile Justice (Care and Protection of Children) Act, 2015, s 27(1) ("The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification").

<sup>13</sup>Protection of Children from Sexual Offences Rules, 2020, r 5(6).

<sup>14</sup>ibid.

<sup>15</sup>ibid, r 4(9).

<sup>16</sup>ibid.

<sup>17</sup>Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012 (n 3) 51.

<sup>18</sup>ibid, 52.

involved in the conduct of a case under the POCSO Act, 2012.<sup>19</sup> Thus, the DCPU is required to arrange periodic training modules for those registered with the CWC.<sup>20</sup> The support persons also identify strategies to reduce the risks to the child over the pre-trial and trial period in a Child Protection Plan (CPP).<sup>21</sup>

**If the child does not want to participate directly, what alternatives are there in your country to ensure indirect participation? If there are doubts about what the child really wants or if his/her opinion is really expressed, what's the solution in your country?**

The child has to participate directly. However, the child need not compulsorily appear before the Judge in the courtroom in order to participate in proceedings. As per Section 37 of POCSO Act, if the Special Court is of the opinion that the child needs to be examined at a place, other than the court, it shall issue a commission as per section 284 of the CrPC. Section 284 provides that where the examination of a witness is necessary for the ends of justice, but the attendance of the witness cannot be procured, a commission may be issued for examining the witness.

The Delhi High Court has issued more elaborate guidelines in *Virender v State of NCT of Delhi*, CrI.A.No.121 of 2008 dated 18.9.2009 for special courts to follow so as to make it easier for the child to participate in court proceedings. These include the possibility of the testimony of a child being recorded through video-conferencing or close-circuit television to minimize trauma. The trial judge also may permit the presence of a social worker or other friendly, independent or neutral adult, in whom, the child has confidence to accompany the child who is testifying. Such persons may include an expert, supportive of the survivor child witness, in whom the witness is able to develop confidence, to be permitted to be present and accessible to the child at all times during his/her testimony. However, care should be taken that such person does not influence the child's testimony. Further, as discussed above, the manner in which the child wishes to testify can be communicated to the court through the child's support person.

The Guidelines under Section 39 also provide for cases where "a child is: i) by virtue of his/her age, maturity or disability, unable to express a view; or ii)

---

<sup>19</sup>ibid.

<sup>20</sup>Ibid.

<sup>21</sup>ibid, 53.

able to express a view but his/her age, maturity or disability are such that any view should be treated with caution; or iii) unable or unwilling to express a view or in any way guide representation". In such cases, the lawyer of the child is to be guided by the following, in representing the child:

i) The older the child, the more weightage should be given to the child's instructions. The younger the child, the more representation shall be in accordance with the child's welfare and best interests.

ii) The lawyer has a duty to see that all factors that impact on the child's welfare and best interests are put before the Court.

iii) In determining what best serves the child's welfare and best interests, the lawyer must take into account the principle that decisions affecting the child should be made and implemented within a timeframe that is appropriate to the child's sense of time.

iv) The lawyer must meet with the child he is appointed to represent, unless there are exceptional circumstances to prevent this. The timing and venue for such meeting and any further meetings should be at the discretion of the lawyer. However, the lawyer shall meet with the child at a time which ensures that the child's views are up to date at the time of the hearing so that they can be taken into account by the Court.

v) As a general rule, the lawyer shall act in terms of the child's instructions, conveying them to the Court by direct evidence if possible, call such witnesses as are required to carry out those instructions and examine and cross-examine and make submissions on behalf of the child.

vi) The Act provides under Section 33(8) that the Special Court may award compensation to the child. The lawyer should ensure that the child and his/ her family are aware of this, and should make the appropriate applications for interim and final compensation as provided under Rule [9] (of the POCSO Rules)."<sup>22</sup>

**In cases of direct participation, in what procedural phase does it take place? Is there a quantitative limit on consultation with the child? The child participates in this delimitation? How? When the opportunity to participate in the child is offered, what is the extent of options available to the child? I**

---

<sup>22</sup>ibid, 70-71.

**mean, should the child be limited to the aspects considered important by the adults or can the child bring other questions and possibilities?**

There are three stages in which the child is directly required to participate. The first is the interview or recording of the statement of the child by a police officer (Section 24) or a Magistrate (Section 25). This involves seeking information directly related to the alleged instance(s) of sexual abuse, and thus, is a forensic rather than a therapeutic process.<sup>23</sup> The second stage is that of medical examination (Section 26). Essentially, in the pre-trial phase, the child's involvement extends to two distinct aspects relating to the gathering of information from the child (or attending adults). These include information on medical history through medical examination and the interview, where information directly related to the alleged sexual abuse, such as, "details of the assault, including the time and place, frequency, description of clothing worn and so on" are sought from the child by investigative authorities.<sup>24</sup> The next and the third procedural phase requiring the direct participation of the child is during trial, for recording of evidence.

Section 33(5) provides that the Special Court must ensure that the child is not repeatedly called to the court to testify. Additionally, Section 35 mandates that the evidence of the child should be recorded within a period of 30 days of the Special Court taking cognizance of the offence. If there is delay, reasons are required to be recorded. Further, the Delhi High Court had provided that the Special Court shall ensure that the trial in POCSO cases are not unduly protracted and take all measures to conclude the the trial as expeditiously as possible, preferably within a year of the date of taking cognisance.<sup>25</sup>

The child has a right of effective participation in the proceedings. This is operationalised through the right of the child and his family/legal guardian to take the assistance of a legal practitioner, or be provided with a lawyer, if the family is unable to afford one. The guidelines provide that the lawyer has a duty to put before the Court the views of the child, but should not require the child to express a view if he does not want to do so.<sup>26</sup> However, the lawyer shall not be required

---

<sup>23</sup>ibid, 12.

<sup>24</sup>ibid, 12.

<sup>25</sup>Nipun Saxena v Union of India, 2018 SCC OnLine SC 2439.

<sup>26</sup>ibid, 70.



to put before the Court any views expressed to him in confidence.<sup>27</sup> The guidelines also explicitly state that the child's right to be heard is to be respected in all judicial and administrative proceedings.<sup>28</sup> The child ought to be given a reasonable opportunity to express their views, which must be taken into account. The child is also to be allowed to provide further information, views or evidence during the proceedings.<sup>29</sup>

The child's right to be represented is independent of the parents, especially so, in proceedings where parents, family members or care-givers are the accused.<sup>30</sup> The guidelines also delineate the course of conduct the lawyer should adopt when the child's views are in conflict with the best interests of the child. When no reconciliation of the two are possible, and the lawyer who is required to advocate the child's views, is unable to continue, the lawyer may invite the court to appoint another lawyer.<sup>31</sup>

In addition, the child is entitled to have the assistance of a support person as discussed above. The Special Court may seek information about the child, such as whether the child is in a safe and protective environment, preferences of the child in a given situation etc., through/from the support person.<sup>32</sup> Furthermore, Section 38(2) states, "if a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child". A similar provision is made for the stage of recording of statement (Section 26(3)). Thus, a child also has the right to have child development experts present at the stage of taking evidence from the child and recording his/her statement for the purpose of investigation and trial under the Act, and also for the purpose of facilitating communication between the child and the authorities.<sup>33</sup>

---

<sup>27</sup>ibid.

<sup>28</sup>ibid, 68 ("They must be given a reasonable opportunity to express their views all matters affecting him and these must be taken into account. He should also be allowed to provide initial and further information, views or evidence during the proceedings.")

<sup>29</sup>ibid.

<sup>30</sup>ibid, 70.

<sup>31</sup>ibid.

<sup>32</sup>ibid, 51.

<sup>33</sup>ibid, 61.

The child's participation is governed by two principles, namely, the right to be informed<sup>34</sup> and the right to be heard and express views and concerns. The guidelines delineate these principles as follows:

*"The right to be informed* - There are two aspects of child victims' and witnesses' right to be informed. The first aspect is the more general one and consists of informing child victims and witnesses about the assistance they are entitled to, the way legal proceedings are organized and the role they can play in those proceedings if they decide to do so. The second aspect is more specific and relates to information on the particular case in which the child is involved: it implies being informed about the progress of the case, about the scheduling of the proceedings, about what is expected of the child, about the decisions rendered, about the status of the offender, and so forth.

*The right to be heard and to express views and concerns*—Every child has the right to be heard in respect of matters affecting him/her. The child has a right to participate at all levels: being informed, expressing an informed view, having that view taken into account, and being the main or joint decision maker. When, for any good reason, the requirements and expectations of the child cannot be met, it needs to be explained to the child, in a child-friendly way, why certain decisions are made, why certain elements or facts are or are not discussed or questioned in Court and why certain views are not taken into consideration. It is important to show respect for elements that a child finds important in his/her story, but which are not necessarily relevant as evidence."<sup>35</sup>

As such, recently, the Allahabad High Court, upheld the child survivor's and /or their parent/guardian's right to participate in bail proceedings as well, and observed that:

"[T]he reading of Section 40 of POCSO Act as well as Rule 4(13) and 4(15) of the Rules of 2020, it is clear that this Court is required to ensure that the SJUP [Special Juvenile Police Unit] or the local police informs the family or guardian of the child and also provide them legal assistance as required with regard to all proceedings, including the bail applications filed by the accused. Thus, it is necessary to implead the complainant, and in case the complainant is not a family

---

<sup>34</sup>See elaborate discussion in *Arjun Kishanrao Magle v State of Maharashtra*, Criminal PIL No. 52021 (Bombay High Court).

<sup>35</sup>Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012 (n 3) 9-10.

member or guardian of the child, then the family member or guardian of the child as opposite party along with the complainant in the bail applications filed before this Court.

There is yet another reason to serve notice of the bail application in every POCSO offence case upon the parent/guardian of the child. A perusal of provisions of POCSO Act and Rules of 2020 casts a duty upon every person involved with the matter including the courts to provide circumstance and atmosphere wherein the victim child and his family feels safe and secure. Providing complete knowledge of [the] judicial proceeding and opportunity to participate in the same would be a step in right direction in making the victim child and his family to maintain [sic] its faith in the justice delivery system of the society and thus feel safe and secure".<sup>36</sup>

Further guidelines to ensure effective participation of the child witness and his/her family/parent/guardian in all proceedings (including bail) were issued by the Bombay High Court in *Arjun Kishanrao Magle v State of Maharashtra*, Criminal PILNo.52021:

"We are thus of the clear opinion that the POCSO Act read with Rules 4(13) and 4(15) of the POCSO Rules recognize a statutory entitlement to the assistance of and representation by legal counsel for the family or the guardian of the child and entitlement to be present and to participate in proceedings in accordance with the said provision. As a necessary corollary, there is also an entitlement of such persons to be made aware of the filing of applications and the hearings scheduled on such applications at the various stages of the proceedings. We are accordingly inclined to dispose of the petition with the following directions:-

(i) Notwithstanding the duty of the SJPU to intimate the child's family or guardian or the legal counsel under Rule 4 of the POCSO Rules:- a. where an application is made before the Court on behalf of the prosecution, it shall be the duty of the office of the public prosecutor to issue notice of hearing of such application to the child's family or as the case may be, the guardian, and where a legal counsel on behalf of the child is already on record, to such legal counsel, along with all relevant documents and the record necessary for effective

---

<sup>36</sup> Rohit v. State Of U.P. Thru. Secy. Home Lko., BAIL No. 8227 of 2021 (Allahabad High Court).

participation in the proceedings; b. when an application is made before the Court on behalf of the accused, it shall be the duty of the accused to issue notice of hearing of such application to the child's family or as the case may be, the guardian, and where a legal counsel on behalf of the child is already on record, to such legal counsel, along with all relevant documents and the record necessary for effective participation in the proceedings.

(ii) When an application is made on behalf of the prosecution, it shall be the duty of the Police Officer to confirm to the relevant Court that service of such application alongwith all relevant documents and the record necessary for effective participation in the proceedings, and the notice of hearing has been undertaken and completed along with proof of service.

(iii) In the event, it has not been possible to serve the child's family, guardian or legal counsel, it shall be the duty of the SJPU to inform the reasons in writing to the relevant court.

(iv) The appropriate Court, before proceeding to hear the application, shall ascertain the status of service of notice, and if it is found that notice has not been issued, the Court may make such reasoned order as it deems fit to secure the ends of justice, taking into account any emergent circumstances that warrant dealing with the application in the absence of the child's family or guardian or legal counsel.

(v) In the event despite issuance of notice, the child's family, guardian or legal counsel, does not attend the hearing, the Court may proceed further without the presence of such noticee, or issue a fresh notice, as the Court may deem fit and proper, considering the interest of justice.

(vi) When the proceedings under the Act would also relate to an offence against Sections 376(3), 376-AB, 376-DA or 376-DB of the Indian Penal Code, the notice to the victim shall be issued under Section 439(1-A) read with Rule 4(13) and 4(15).

(vii) This order shall be brought to the notice of all the Sessions Judges and Special Court Judges in the State of Maharashtra.”

**How is the courtroom where participation takes place? And the formalities of the child's participation in front of the judge? Is the participation taking place in the regular courtroom or in the office? Who is**

**present in the courtroom/cabinet? How are the people dressed? Can you present a photo of such an atmosphere?**

Child-friendly courtrooms are not regular court rooms and are also separated from regular court premises. Child friendly courtrooms are to be typically equipped with screens for the witness stands. There is no protocol on whether the judge should be in uniform or not.

The Delhi High Court has issued guidelines stating that the child witness should also be permitted to testify from a place in the courtroom which is different than those that are normally reserved for other witnesses.<sup>37</sup> Section 37 of the POCSO provides that the proceedings must be conducted in camera and in the presence of the parents or any other person in which the child reposes trust and confidence. Examination may also be conducted in any other place than a courtroom, through commissions issued under Section 284 of the CrPC.

Additionally, the child-friendly courtrooms are now equipped with video-conferencing facilities having close circuit television system, which allow the child to testify in a separate room from the accused without coming under glare of the offender, while the accused is able to hear the statement of the child. Other means of doing this include single visibility mirrors or curtains and screens.<sup>38</sup> Thus, the POSCO Act requires the court to ensure that the child is not exposed to the accused during the proceedings (section 36). Special waiting rooms are provided within the court premises to allow the families to wait in privacy throughout the court proceedings. However, either of the parents or a person of trust is entitled to remain present in the Court room during testimony of the child.

In view of the direction of the Hon'ble Supreme Court of India in the case of *Sampurna Bahura & Another v Union of India & Others*, (2018) 4 SCC 433, child friendly court rooms have been augmented in India. The child never comes in contact with the offender in these child friendly Court rooms.

Children are entitled to have their parents, or other persons in whom they repose their trust and confidence in the courtroom. Other persons that are allowed to be present are the child's lawyer and support person. This right under

---

<sup>37</sup>State v Rahul, CRL.L.P. 250/2012: 2013 IV AD (Delhi) 745 (Delhi High Court); Virender v State NCT of Delhi, 2009 SCC Online Del 3083 (Delhi High Court).

<sup>38</sup>Sakshi v Union of India, AIR 2004 SC 3566.

the Act and Rules is in light of the Supreme Court's directions to allow a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying.<sup>39</sup> Additionally, interpreters, special educators, or other professionals, whose assistance the Special Court might require, may be present. The Delhi High Court has also directed that persons who are not necessary for proceedings including extra court staff should be excluded from the courtroom during the hearing.<sup>40</sup>

Herein below are some pictures of a Child Friendly Court room:



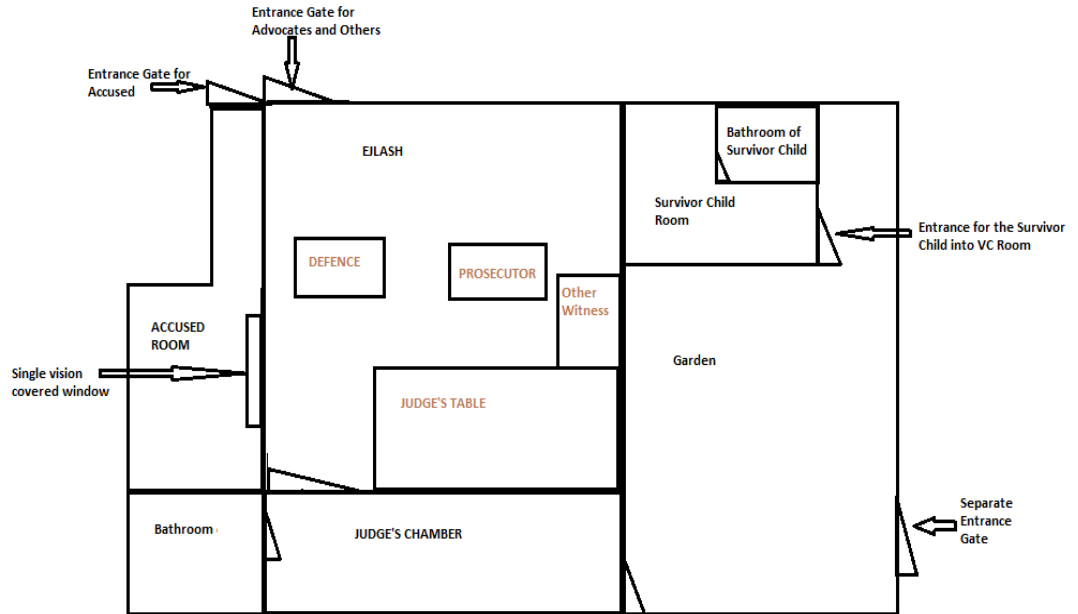
---

<sup>39</sup>Sudesh Jakhu v K.C.J. & Ors, 1998 CrI.L.J. 2428.

<sup>40</sup>Virender v State NCT of Delhi, 2009 SCC Online Del 3083 (Delhi High Court).



Herein below is the layout of a Child Friendly Court room:



**Is there a protocol on how to address questions to the child in family and child protection issues? Who developed it? Can you share it with our members? If there is not, how do you do it?**

The Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012, prepared by the Ministry of Women and Child Development, provides guidance about interviews, recording of statements of the child, medical examination etc. The same may be found at this [link](#).

Furthermore, the Supreme Court and other High Courts have issued guidelines for addressing questions to child witnesses during trial and investigation. These have been summarised by the Delhi High Court, and are reproduced below:

“83. It therefore needs no further elaboration that the care which is required, whether the child is victim of the offence or is one who has witnessed the occurrence would remain the same. It is also evident that on different aspects of investigation, medical examination and trial relating to commission of offences including sexual offences wherein either the victim is a child or a child is required to appear as a witness in support of the prosecution, directions have been made and guidelines have been laid down in different judgments which have not received the attention they deserve. It would be in the interests of justice to



therefore compile the same to facilitate their implementation. Upon hearing learned counsel for the parties in the present case and on a consideration of the several judgments placed by Mr. Manoj Ohri, learned APP for the state, certain additional requirements have been also noticed and set out in the preceding paragraphs. For the sake of convenience, the directions and guidelines laid down by the Apex Court and this court so far as case involving a child victim or child witness which are required to be mandatorily and urgently implemented are culled out as follows:-

#### I. POLICE

(i) On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(ii) Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors. , 2004 SCC OnLine Del 970)

(iii) The investigation of the case shall be referred to an officer not below the rank of Sub- Inspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.(Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(iv) The statement of the victim shall be recorded verbatim. (Ref: Court On Its Own Motion vs. State & Anr.)

(v) The officer recording the statement of the child victim should not be in police uniform.(Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(vii) The statement should be recorded promptly without any loss of time. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(viii) The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.( Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(ix) The Investigating Officer to ensure that at no point should the child victim come in contact with the accused. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xi) The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.( Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xii) In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.( Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xiii) The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A Cr.P.C) at the nearest government hospital or hospital recognized by the government.( Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xiv) The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.( Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xv) The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xvi) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.( Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xvii) The Investigating Officer shall ensure that the identity of the child victim is protected from publicity. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(xviii) To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O., for investigations on any particular aspect of the matter, the same shall be adverted to by the I.O. Proper entries shall be made by I.O. in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors. , 2004 SCC OnLine Del 970)

(xix) Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors., 2004 SCC OnLine Del 970)

(xx) The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors. , 2004 SCC OnLine Del 970)

(xxi) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors. , 2004 SCC OnLine Del 970)

(xxii) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

## II RECORDING OF STATEMENT BEFORE MAGISTRATE

(i) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(ii) In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(iii) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(v) The IO shall ensure that the statement of the child victim is also video recorded. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(vi) No Court shall detain a child in an institution meant for adults. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

### III MEDICAL EXAMINATION

(i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts. (Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors. , 2004 SCC OnLine Del 970)

(ii) While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

(iii) In case of a girl child victim the medical examination shall be conducted preferably by a female doctor. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(iv) In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(v) The report should be prepared expeditiously and signed by the doctor, (obviously a lady doctor), conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(vi) In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(vii) The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(viii) Emergency medical treatment wherever necessary should be provided to the child victim. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(ix) The child victim shall be afforded prophylactic medical treatment against STDs.(Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(x)In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

#### IV COURT

(i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.

(iii) The trials into allegations of commission of rape must invariably be "in camera". No request in this behalf is necessary. (Ref : State of Punjab vs. Gurmit Singh , (1996) 2 SCC 384 , AIR 1996 SC1393)

(iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: Court On Its Own Motion vs. State & Anr., (2007) 4 JCC 2680).

(v) The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.

(vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims

or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref : Sakshi vs UOI, (2004) 5 SCC 518, AIR 2004 SC 3566).

(vii) Competency of the child as a witness should be evaluated and order be recorded thereon.

(viii) The trial court is required to be also satisfied and ought to record its satisfaction that the child witness understands the questions put to him/her and can give rational answers. There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

(ix) The Court is mandated to avoid disclosing the name of the prosecutrix in the court orders and judgments to save further embarrassment to the victim of the crime; anonymity of the victim of the crime, her other details like name of school, parents, place of residence etc. must be maintained.<sup>41</sup>

(x) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi , 2009 SCC OnLine Del 1958 , ILR (2009) 6 Del 663.<sup>42</sup>

(xi) The court should be satisfied that the victim is not scared and is mandated to provide a child friendly atmosphere for making it convenient for the child to tell the truth.

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim. - This para should be deleted.

---

<sup>41</sup> See also Nipun Saxena v Union of India, 2018 SCC OnLine SC 2439.

<sup>42</sup> Section 164(5A) was inserted by the Criminal Law Amendment Act (2013) to provide that in case of an offence of rape [inter alia] having been committed the Judicial Magistrate shall record the statement of the person against whom such offence has been committed as soon as the commission of the offence is brought to the notice of the police.

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure; This para should be deleted as this course is now made obsolete by present day child mental health experts.

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu vs. K.C.J. & Ors, 1996 SCC OnLine Del 397, 1998 Cri LJ 2428). This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony. This para is repetition. So it may be deleted.

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing. This para may be deleted please as it is included in the topic of incamera trial, as discussed earlier.

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented. This is also said earlier. So it may be deleted please.

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref : Sakshi vs UOI, (2004) 5 SCC 518 , AIR 2004 SC 3566). Specific provision of POCSO Act may also be referred.

(xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref : Sakshi vs UOI, (2004) 5 SCC 518, AIR 2004 SC 3566).

(xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.

(xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something,

which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref : Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158 ).

(xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref: State of Rajasthan vs. Anil alias Hanif & Ors. AIR 1997 SC 1023).

(xxii) The court should ensure that the embarrassment and reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance "gandi harkatein" or "batamezein" have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of



the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

(xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref : Sakshi vs UOI, (2004) 5 SCC 518 , AIR 2004 SC 3566).

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab vs. Gurmit Singh) To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced, humane and ensure protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child. Please refer provisions of POCSO ACT and decision of the SC relating to time bound trial of these cases.

#### V GENERAL

(i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.

(ii) The juvenile police unit and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

(iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness. This would create and inspire a feeling of confidence and trust in the child.

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi , 2009 SCC OnLine Del 1958 , ILR (2009) 6 Del 663)

(v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out.

(vi) No court shall detain a child in an institution meant for adults.( Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi , 2009 SCC OnLine Del 1958 , ILR (2009) 6 Del 663). This would apply to investigating agencies as well.

(vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted.”<sup>43</sup>

**Note:** These guidelines were issued in, i.e., before the enactment of the POCSO. While these guidelines have informed the procedure envisaged under the new Act and Rules, the Act envisages a new and special procedure for prosecution of crimes involving sexual offences against children. As such, some of the terminology in the guidelines summarised may not correspond to those employed in the current legal framework.

A number of the Guidelines laid down by courts have been made mandatory under the POCSO Act:

**“Section 19 - Reporting of offences**

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,--

(a) the Special Juvenile Police Unit; or (b) the local police.

(2) Every report given under sub-section (1) shall be-- (a) ascribed an entry number and recorded in writing; (b) be read over to the informant; (c) shall be entered in a book to be kept by the Police Unit

(3) Where the report under sub-section (1) is given by a child the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents, are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child

---

<sup>43</sup>ibid.

into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

#### **Section 24 - Recording of statement of a child**

(1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.

(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

#### **Section 25 - Recording of statement of a child by Magistrate**

(1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973(2 of 1974) (herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child: Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

**Section 26 - Additional provisions regarding statement to be recorded**

(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

**Section 27 - Medical examination of a child**

(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973(2 of 1974).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

**Section 33 - Procedure and powers of Special Court**

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or reexamination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) 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.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial: Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child. Explanation.--For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973(2 of 1974) for trial before a Court of Session.”

Additionally, courts have also adopted the Guidelines for Recording of Evidence of Vulnerable Witnesses framed by the Delhi High Court.<sup>44</sup>

**Who is allowed to ask questions the child? Are the questions asked directly by the party or are they intermediated by the judge? What are the concerns adopted by the judge to avoid questions that may embarrass or violate the rights of the child? How does the debate unfold around the regularity of questions if the child is present in the atmosphere?**

As discussed above, as per Section 33(2), the Special Court (the judge) puts the questions to the child. Further guidelines to avoid embarrassing questions or those that violate the rights of the child have been discussed in the previous question.

**Is the decision taken in front of the child? If the child wants to, can he/she stay in the room?**

Presence of the child at the time of decision making is not mandatory. Rather section 33 (5) of the POCSO Act, 2012, mandates that the child should not be called on repeated occasions. However, there is no bar on the child or his/her parents or his/her person of trust or his/her Counsel to remain present at the time of delivery of judgment subject to the mandate of law that the child should not be visually exposed to the offender at any time.

**Are there any special rules about the consideration of the child's opinion in the context of the reasons for the decision? What's the weight given to the child's opinion? Is it the age a criteria? Which one? If the child's degree of maturity is taken into account, how is this maturity assessed? By whom? What are the criteria considered?**

There are no specific legal mandates on considering the child's opinion on the decision, based on the child's age or maturity. However, one may refer to the child's *right to be heard and to express views and concerns*, which has been delineated as follows: "Every child has the right to be heard in respect of matters affecting him/her. The child has a right to participate at all levels: being informed, expressing an informed view, having that view taken into account, and being the main or joint decision maker. When, for any good reason, the requirements and

---

<sup>44</sup>*Guidelines for Recording of Evidence of Vulnerable Witnesses*<[http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile\\_lcwcd2x4.pdf](http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf)>last visited on 10 September 2021.

expectations of the child cannot be met, it needs to be explained to the child, in a child-friendly way, why certain decisions are made, why certain elements or facts are or are not discussed or questioned in Court and why certain views are not taken into consideration. It is important to show respect for elements that a child finds important in his/her story, but which are not necessarily relevant as evidence.”<sup>45</sup>

**How is the decision communicated to the child? Are there any protocols for this communication? If the child has doubts or questions, is he/she allowed to speak with the judge? How do you do that?**

The practice provide that the child’s lawyer or the special public prosecutor and explain the given decision or judgment to the child in a language adapted to the child’s level of understanding.<sup>46</sup> He/she/they should give the necessary information on possible measures that could be taken, such as appeal or other mechanisms for complaints as well as compensation.<sup>47</sup> When a decision has not been enforced, the child should be informed through his/her lawyer or the special public prosecutor of available remedies either through non-judicial mechanisms or access to justice.<sup>48</sup>

**Does the child have the right to appeal the decision?**

The proviso to Section 372 of the CrPC gives the right to the child to prefer an appeal against an order of acquitting the offender or convicting the offender for a lesser offence or imposing inadequate compensation. The Delhi High has also provided that the child need not disclose his/her/their identity when filing an appeal.<sup>49</sup>

---

<sup>45</sup>Guidelines for the Use of Professionals and Experts under the POCSO Act, 2012 (n 3) 10.

<sup>46</sup>ibid, 72.

<sup>47</sup>ibid.

<sup>48</sup>ibid.

<sup>49</sup> Nipun Saxena v Union of India, 2018 SCC OnLine SC 2439.