

**DISTRICT & SESSIONS COURT**  
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**Summary of Workshop papers of Judicial Officers on**  
**RECORDING STATEMENT OF WITNESS UNDER POCSO ACT**

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## **Recording statement of witness under POCSO Act**

### **Introduction**

1. As the preamble of the “Protection of Children from Sexual Offences Act, 2012” ( popularly known as the POCSO Act) suggests, the primary intention of the legislature behind this enactment is to protect children from offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Courts for trial of such offences. The Act has been enacted in consequence of the “Convention on the Rights of Child” adopted by the General Assembly of United Nations which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child. It is the primary aim that, the right to privacy and confidentiality of the child should be protected and respected by every person by all means and through all the stages of the Judicial processes involving the child as well as to see that, the law operates in a manner that, the best interest and well being of the child are regarded as being of paramount importance at every stage to insure the healthy, physical, emotional, intellectual and social development of the child. Thus, it should be the paramount consideration of all the concerned to see that, privacy and confidentiality of the child is protected throughout the Judicial process.

2. The fundamental principles to be followed in the determination of a case involving a sexual offence against a child have been laid down in the various international instruments and in the Preamble to the POCSO ACT, 2012 itself. The State Government, the Child Welfare Committee, the police, the Special Courts, all other government functionaries as well as N.G.O.'s and all professional and experts assisting the child at the trial and pre-trial stages are bound to abide by these following principles. These factors should be kept in mind while recording of statement of victim.

- Right to life and survival.
- The best interests of the child.
- Right to be treated with dignity and compassion.
- Right to be protected from discrimination.
- The right to special preventive measures.
- The right to be informed.
- The right to be heard and express views and concerns.
- The right to effective assistance.
- The right to privacy.
- The right to be protected from hardship during the justice process.
- The right to safety.
- The right to compensation.

### Constitutional Base

3. Article 15(3) of the Constitution of India empowers the State to make special provisions for children. Article 39 provides that the State shall in particular direct its policy towards securing that the tender age children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

### Why the need for special provisions for recording the statements and evidence of witnesses under the Act ?

4. It is not to forget that the victims in the cases under the POCSO Act are children who are special and different than adults. Their thoughts, emotions, thinking ability, feelings, immaturity, helplessness are some of the factors which needs consideration. Their interests are to be protected. These witnesses cannot face the rigors of the legal procedure and the trauma which they require to face in tender ages. They are many a times beyond the capacity of understanding what has happened with them. The incident to which they are forced, has the vigor to change their perspective towards many things, which are valuable for their normal upbringing. Hence, the legislation felt the need to make special provisions for dealing with these witnesses while making them recollect and narrate the incidents.

5. The tenor of the POCSO Act shows that, with a view to meet the above requirements, and to meet the standards laid down in the convention on the rights of the child various provisions have been made. In most of the cases of child abuse, as like in other criminal cases the law is set into motion on the basis of the statement of the concerned child or victim of the offence. However, considering that, the maker of the statement is child and is victim of sexual or other abuses, certain precautions are required to be taken. Therefore, some special provisions have been made in this behalf.

### **Provisions and procedure**

6. Chapter VI of the Act incorporates these provisions. Section 24 provides for the safeguards and special precautions which are required to be taken while recording statement of concerned child. It lays down that :

1. The statement of 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 child shall not be in uniform.

3. The Police officer making the investigation shall while examining the child insure 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 insure 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.

7. The above special provisions are made so as to protect the interests of the child while his statement is being recorded by police. Section 25 of the Act is in respect of the recording of statement of child by Magistrate. The Sub-section 1 of the said section lays down that, if the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, the Magistrate recording such statement shall notwithstanding anything contained therein, record the statement as spoken by the child. The proviso lays down 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. The Sub-section (2) states that, the Magistrate shall provide to the

child and his parents or his representative, a copy of the documents specified under Section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

8. Section 26 is also an important provision, since it provides for certain special safeguards and precautions to be taken while recording such statement. It prescribes that:-

- (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 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;
- (3) if the child is having any mental or physical disability the assistance of 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 may be taken.

9. With a view to ascertain that, all the necessary precautions are taken and the child is not subjected to any

undue pressure, coercion etc. a provision is made in sub-section (4) and it is laid down that, wherever possible the Magistrate or police officer as the case may be shall ensure that, the statement of the child is also recorded by audio- video electronic means.

10. **Necessary precautions to be taken by the police officer or Magistrate while recording statement of child :-**

- The statement of child shall be recorded as spoken by the child.
- It should be recorded in the presence of parents of the child or any other person in whom the child has trust or confidence.
- Police officer recording statement of child shall record statement at a residence of the child or at a place where the child usually resides or at the place of choice of child and as far as practicable by a woman police officer not below the rank of Sub Inspector.
- The police officer while recording the statement of child shall not be in a uniform and at any point of time he will not bring the child in contact in any way with the accused while recording statement.
- Whenever it is necessary, the Magistrate or the police officer may take the assistance of a translator or an interpreter having such qualifications, experience while recording the statement of the child.



●In case of a child having a mental or physical disability, the Magistrate or the police officer shall 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 to record the statement of the child.

●Wherever possible the Magistrate or the police officer shall ensure that the statement of the child is also recorded by audio-video electronic means.

### **Examination of the victim in special court.**

11. Sections 33 to 38 provide for the procedure and powers of special courts and recording of evidence. Said procedure can be summarized as follows :

1)**Questions by the Judge** - In the course of recording the examination-in-chief, cross-examination or re-examination, all questions to the child by the Special Public Prosecutor or the counsel for the accused must be communicated to the Special Court which must then put the questions to the child. S. 33(2)

2)**Aggressive Questioning** - The Special Court shall ensure that the dignity of the child is maintained at all times. No aggressive questioning or character assassination shall be permitted. S.33(6)

3)**Assistance of Translator or Interpreter** - If the child does not speak the language of the court, the Special Court may take the assistance or an interpreter or translator who shall be paid for the service S.38(1). The Special Court shall verify that the interpreter or translator has no conflict of interest with the case. Rule 3(9)

4)**Assistance of Special educator/expert** - If the child is mentally or physically (temporary or permanent ) disabled a special educator or a person familiar with the manner of communication or an expert may be called the shall be paid for service S.38(2). The Special Court shall verify that the special educator or expert has no conflict of interest in the case Rule 3(9).

5)**No exposure to the Accused** - The child should not be able to see the accused while testifying. The statement may be recorded through video conferencing or by using single visibility mirrors, curtains or any other device to shield the child victim from the direct gaze of the accused. S. 36(1) and (2)

6)**Frequent Breaks** - The court may permit frequent breaks for the child during examination if necessary. S.33(3)

7)**Presence of Persons who the child trusts** - In order to make the child comfortable, the child shall be examined in the presence of a person who s/he trusts. S. 33(4)

8)**Child Victim should not be called repeatedly** - The child shall not be called repeatedly to the court to give evidence.

S. 33(5)

9)**Confidentiality** - Identity of the child shall not be revealed. Identity of the child includes the family's identity, school, relatives, neighbourhood and other information. S.33(7)

10)**Examination at another location** - The Special Court may order that the examination of the child may be conducted at an alternate location. S.37

11)**Trial in camera** - All trials before the Special Court must be conducted *in camera* and in the presence of the parents of the child or any other person the child trusts. No member of public or an advocate, who is not connected with the case shall be present in the court.

### **Model guidelines**

12. **The Ministry of Women and Child Development** has issued **model guidelines under Section 39** of the Protection of Children from Sexual Offences Act, 2012 in September 2013. There is a specific guidance on examining child victims and witnesses before trial and after trial. These guidelines are as follows :

**Before trial**

- i) **List cases for trial as soon as possible and avoid adjournments :** It is in the interest of the child that the trial is concluded as quickly as possible. Prolonging the judicial process will only cause more trauma to the child.
- ii) **Ensure that communication with the child is in an understandable language and manner :** The majority of young witnesses experience communication difficulties while giving evidence, often because questioning is developmentally or otherwise inappropriate. Before a child gives evidence, try having a conversation with him outside the Court so that you have an idea about his/her communication abilities and concentration span.
- iii) **Consider what special measures may be taken in light of the child's wishes and needs:** Make whatever applications are necessary to ensure that the child receives the benefit of existing child- friendly measures. Ensure applications are made within time limits so that the child can be informed of decisions before trial.
- iv) **Ensure that the child is able to exercise his/her right to be accompanied by an adult**

**in whom he has trust and confidence:** This could be the child's parent, guardian, or other person, or the support person appointed by the CWC.

- v) **Chart all stages of children's evidence to minimize time at court and give them a fresh start in the morning:** The start of children's testimony should not be delayed by other matters on the court list. It is best to make an estimate of the amount of time the child will have to be present in Court, and in doing this; to bear in mind his/her concentration span, the length of any recording, the best time to view it and the need for breaks. Request the Special Court to accommodate these requirements.
- vi) **Request that the child is given an opportunity to visit the court to familiarize himself with it before the trial:** This will enable the child to experience the atmosphere in Court so that he is not intimidated at the trial and avoid the need for him to attend early on the day of trial to see facilities. It will also allow him to express an informed view about special measures, so that a revised application can be made if necessary in advance of trial.
- vii) **Request that the child sees or can be briefed**

**on his /her statement for the purpose of memory-refreshing before trial**

**viii) Consider the witness's access to the building and suitability of waiting areas:** Where it is difficult to segregate young witnesses from defendants within and around the building, consider standby arrangements or the use of remote live links.

**At trial**

- i) Children have the right to be heard in any judicial and administrative proceedings affecting them.** 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.
- ii) Children have the right to information about the case in which they are involved,** including information on the progress and outcome of that case, unless the lawyer considers that it would be contrary to the welfare and best interests of the child. It would be best if the lawyer coordinates with other persons or agencies concerned with the child's welfare, such as the support person, so that this information is conveyed in the most effective

manner. Victims should receive the most appropriate information on the proceedings from all their representatives, and the assistance of a support person appointed under Rule 4(7) most often constitutes the best practice in ensuring that full information is conveyed to the victim.

**Such information would include:**

- (a) Charges brought against the accused or, if none, the stay of the proceedings against him;
- (b) The progress and results of the investigation;
- (c) The progress of the case;
- (d) The status of the accused, including his/her bail, temporary release, parole or pardon, escape, absconding from justice or death;
- (e) The available evidence;
- (f) The child's role in the proceedings;
- (g) The child's right to express their views and concerns in relation to the proceedings;
- (h) The scheduling of the case;
- (i) All decisions, or, at least, those decisions affecting their interests;
- (j) Their right to challenge or appeal decisions and the modalities of such appeal;
- (k) The status of convicted offenders and the

enforcement their sentences, including their possible release, transfer, escape or death.

- iii) **Ensure ahead of time that equipment is working, recordings can be played and that camera angles will not permit the witness to see the defendant:** Do not wait until the young witness is in the live link room to run checks: delays and malfunctions can be disruptive to the child. Where a live link is being used during the child's testimony, ensure that they are able to see all of the questioner's face.
- iv) **Explain that the judge or magistrates can always see the witness over the live video link:** Explain that this is the case even when the witness cannot see the judge or magistrates.
- v) **Request the Public Prosecutor to himself to the child before the trial and to answer his/her questions:** Judges and magistrates may also ask if the child would like to meet them before the trial starts, to help to establish rapport and put the child at ease. Under the POCSO Act, 2012 questions to the child will be routed through the Judge, and it would be useful for the child to be familiar with their manner of conversation, and vice versa.
- vi) **Encourage the child to let the court know if**



**they have a problem:** They may not understand a question or questions that are too fast, or they may need a break. However, many children will not say they do not understand, even when told to do so. Professional vigilance is therefore always necessary to identify potential miscommunication, and it is the child's counsel who will have to be mindful of any instance where the child is losing concentration, feeling ill, etc.

- vii) **Do not ask the child at trial to demonstrate intimate touching on his/her own body:** This may be construed as abusive. The child can instead be asked to point to a body outline diagram.

#### Case Law

13. Many a times, victim is a girl. Therefore, useful reference can be made to the directions issued by the Hon'ble Apex Court in *State Of Karnataka vs Shivanna @ Tarkari Shivanna, MANU/SC/0400/2014* to all the police stations regarding 'recording statement of Rape Victim'. The Directions are as follows;

- (i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably lady Judicial Magistrate for the

purpose of recording her statement under Section 164 Cr.P.C. A copy of the statement under Section 164 Cr.P.C. should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement under Section 164 Cr.P.C. should not be disclosed to any person till charge sheet/report under Section 173 Cr.P.C. is filed.

(ii) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

(iii) The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

(iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

(v) Medical Examination of the victim: Section 164 A Cr.P.C. inserted by Act 25 of 2005 in Cr.P.C. imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy

of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim under Section 164 Cr.P.C.

14. In case of *Shraddha Ghanshyam Velhal V. State of Maharashtra, 2013 LawSuit(Bom) 2473* the Hon'ble Bombay High Court has held that,

“These provisions lay down the requirements of such recording. A copy of such statement is all that is required to be provided by the Magistrate to the child and his/her parents when the final report is filed under Section 173 of the Cr.P.C. Though Section 25(2) of the Children Act specifies that the Magistrate shall provide such copy, it does not thereby signify that the final report therefore must be filed before the Court of such Magistrate. The concerned Magistrate would sufficiently comply with the provision of law under Section 25(2) of the Children Act by having the copy of the report sent to the Children Court for being served on the child and the parents through the concerned Investigating Officer who is required to file the final report before the Special Court under the Act. That would be the Court taking cognizance of the offence, which is the Children Court. The requirement of supplying such copy would not confer jurisdiction, otherwise conferred upon the Special Court, to the

Court of any Magistrate. Other than performing that duty as statutorily enjoined, the Magistrate has no jurisdiction to do any other thing under the Children Act.”

### Conclusion

15. The Act is a welcome piece of legislation, in that it recognises almost every known form of sexual abuse against children as punishable offences, leaving little room for ambiguity in its interpretation. Further, by providing for a child-friendly judicial process, the Act encourages children who have been victims of sexual abuse to bring their offender to book and seek redress for their suffering, as well as to obtain assistance in overcoming their trauma. It makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child; working together, they can ensure that the child is given an opportunity to obtain justice for the harm suffered, and begin the process of rebuilding the child's life and future.

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