



“Romantic” Cases under the POCSO Act

**An Analysis of Judgments of Special Courts
in Assam, Maharashtra & West Bengal**

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Enfold Proactive Health Trust

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Table of Contents

Introduction	1
What is a “romantic” case for the purpose of this Report?	2
Methodology	3
Limitations	4
Outline of the Paper	4
1 Romantic Cases in the Criminal Justice System	5
1.1 What proportion of cases entering the Special Courts under the POCSO Act constituted “romantic” cases?	6
1.2 Who reports “romantic” cases and what prompts the reporting of such cases?	6
1.3 In what circumstances did the girls lodge an FIR against their partner?	8
1.4 What prompted the girls to leave home?	9
1.5 Who stated the relationship between the accused and the girl was “romantic”?	10
2 Profile of the Girls and Accused persons in “romantic” cases	11
2.1 What is the gender profile of girls and accused persons in “romantic” cases?	11
2.2 What was the occupational profile of the accused persons in “romantic” cases?	12
2.3 What was the proportion of girls who were married to the accused or married him subsequently?	12
2.4 Were there any problematic factors observable in “romantic” cases?	13
3 Girls’ testimony in “Romantic” cases	14
3.1 What did the girls state about the nature of their relationship during the legal proceedings?	14
3.2 How did the girls testify in court in “romantic” cases?	15
4 Age profile & Age-determination in “Romantic” cases	17
4.1 What was the age of girls in “romantic” cases?	17
4.2 What were the conclusions of the Special Court with respect to the age of the girls?	19
4.3 What was the age profile of accused persons in “romantic” cases?	20
4.4 Age profile of accused convicted in Maharashtra	22

5	Judicial Response to “Romantic” cases	23
5.1	What are the charges commonly applied in “romantic” cases?	25
5.2	What is the time taken for disposal of “romantic” cases by Special Courts?	27
5.3	What were the outcomes in “romantic” cases?	28
5.4	What was the nature of convictions in “romantic” cases?	30
5.5	Links between nature of testimony and outcomes	31
5.6	What was the link between the conclusions of the Special Court with respect to the age of the girls, nature of testimony, and the outcome under the POCSO Act?	34
5.7	What was the nature of testimony and outcomes in the cases in which the girls lodged the FIR?	35
5.8	What were the trends observable in cases of convictions in “romantic” cases?	36
5.9	What were trends observable in cases of acquittals in “romantic” cases?	39
5.10	What was the sentencing pattern in “romantic” cases?	42
5.11	What trends were observed in respect of bail in “romantic” cases?	44
5.12	How are the presumptions under the POCSO Act being used in “romantic” cases?	44
5.13	What was the proportion of “romantic” cases that were privately settled among the parties?	45
6	Approach of the Special Courts towards “consent” of the girl	46
6.1	Acknowledgment of “romantic” relationships by Special Court	47
6.2	Irrelevance of Consent	48
6.3	Consideration of girl’s assertion that the relationship was consensual	49
6.4	Consideration of “best interest”	50
6.5	Consideration of impact on marital life	51
6.6	Consideration of lack of “intention”	52
6.7	Consideration of “tender age” and sex based on false promise of marriage	52
6.8	Consideration of conduct of the girl	53
6.9	Varied consideration of exploitative elements	54
6.10	Consideration of misrepresentation by the accused	56
6.11	Approach of Special Courts in cases of sex based on promise to marry	56
7	Conclusion & Way Forward	59
	Annexure I - Reference Tables	
	Annexure II - Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief	

List of Abbreviations

CICL	Child in Conflict with the Law
Cr.P.C.	Code of Criminal Procedure, 1973
CWC	Child Welfare Committee
DLSA	District Legal Services Authority
FIR	First Information Report
IO	Investigating Officer
IPC	The Indian Penal Code, 1860
ITPA	Immoral Traffic (Prevention) Act, 1956
JJ Act	Juvenile Justice (Care and Protection of Children) Act, 2015
JJB	Juvenile Justice Board
NCRB	National Crime Records Bureau
NFHS	National Family Health Survey
NGO	Non-governmental Organisation
PCMA	The Prohibition of Child Marriage Act, 2006
POCSO	The Protection of Children from Sexual Offences Act, 2012
SC/ST Act	Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

Introduction

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) provides a comprehensive framework complete with substantive and procedural provisions to address sexual offences against children. It defines a “child” to mean a person below the age of 18 years, and criminalizes all forms of sexual acts with a child. The original draft of the Bill recognised the possibility of consensual sexual activity involving adolescents above 16 years, as well as the grounds on the basis of which such consent could be vitiated. However, following the recommendations of the Parliamentary Standing Committee to remove such an exception,¹ the Bill was modified and passed without any regard for adolescent sexuality.

It has been nearly 10 years since the POCSO Act has come into force and ground-level reports, as well as data,² and experience show that a vast number of adolescents are sexually active and there are a significant number of ‘consensual’ sexual relations among adolescents and between older adolescents and adults. As per NFHS-5 (2019-21), for instance, 39% of women had sex for the first time before they attained 18 years.³ The legislation, however, does not consider the possibility of consent to non-exploitative sexual activities by adolescents. These cases attract statutory rape charges under the Indian Penal Code (IPC) and the POCSO Act, especially when adolescent girls elope with their partners or get pregnant. There is a possibility that the actual proportion of romantic and consensual cases under the POCSO Act is much higher as *Crime in India, 2020* reports that 46.7% of all cases filed under penetrative and aggravated penetrative sexual assault under the POCSO Act were ones in which the offender’s relation to the child victim was “Friends/Online-Friends or Live in Partners on Pretext of Marriage”.⁴

Studies based on 2788 cases under POCSO Act across five states in India by the Centre for Child and the Law at National Law School of India University (CCL-NLSIU),⁵ revealed that romantic cases i.e. cases in which the prosecutrix admitted to a relationship with the accused constituted 21.2% cases in Andhra Pradesh, 15.6% in Assam, 21.5% in Delhi, 21.8% in Karnataka (in 3 districts), and 20.5 % in Maharashtra.⁶ These studies indicated that the percentage of victims testifying against the accused in “romantic” cases was exceedingly low, and so was the rate of convictions, especially if the parties were married.⁷ A study by HAQ Centre for Child Rights and FACSE-Mumbai, revealed that 83 out of

¹ Department-related Parliamentary Standing Committee on Human Resource Development, 240th Report on The Protection of Children from Sexual Offences Bill, 2011, 21 December 2011, para 6.8.

² Swagata Yadavar, “India is Unprepared for Its Gathering Teen Sexual Revolution,” *Indiaspend* (12 January 2018), available at <https://www.indiaspend.com/india-is-unprepared-for-its-gathering-teen-sexual-revolution-23183/> 3; ‘Understanding the Lives of Adolescents and Young Adults (UDAYA)- Bihar Factsheet 2016’ (Population Council) <https://www.popcouncil.org/uploads/pdfs/2017PGY_UDAYA-BiharFactsheet.pdf> accessed 24 March 2022.

³ National Family and Health Survey-5 at p.210, http://rchiips.org/nfhs/NFHS-5Reports/NFHS-5_INDIA_REPORT.pdf

⁴ NCRB, *Crime in India 2020*, Table 4A.10.

⁵ Implementation of the POCSO Act, 2012 by the Special Courts: Challenges and Issues Centre for Child and the Law-NLSIU’s Studies on the Working of Special Courts in Five States (2018); <https://bit.ly/2vuJwT1>

⁶ All five studies are available at <https://ccl.nls.ac.in/publications/reports/>

⁷ CCL-NLSIU, Report of Study on the Working of Special Courts under the POCSO Act, 2012 in Delhi, (2016) pp.65, 67. CCL-NLSIU, Report of Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra, (2017) p.95.

231 POCSO cases from Mumbai and Delhi pertained to romantic relationships, wherein acquittal was the norm.⁸

While the above studies have shown that Special Courts appear to be taking a lenient approach while dealing with “romantic” cases⁹ in contrast to other cases under the POCSO Act, the criminalisation of consensual sex amongst or with adolescents has been flagged as a concern by several High Courts.¹⁰ In 2019, the Madras High Court observed that relationship amongst minors or minors with persons who are slightly above the teen years was not unnatural or alien but a result of natural biological attraction.¹¹ The judge concluded that it was unfortunate that the severe arm of the law through the POCSO Act criminalised such relationships and penalised them with severe sentences and recommended a revision of the age of consent and consideration of close-in-age exemptions.

There is therefore a need for evidence on the proportion of romantic cases under the POCSO Act, and the manner in which the law is being used to regulate or criminalise adolescents in non-exploitative consensual relationships that are voluntary and do not entail force, coercion, or compulsion.¹² It is with this objective that Enfold Proactive Health Trust, with support from UNICEF-India, undertook the analysis of 1715 judgments decided between 2016 and 2020 by Special Courts in Assam, Maharashtra, and West Bengal, that entailed an express reference to a romantic relationship between the victim and the accused. The research was initiated in May 2021 and completed by April 2022. Quantitative and qualitative analysis of the judgments was undertaken to gain an in-depth understanding of the manner in which “romantic” cases enter the criminal justice system, the profile of informants and “victims”, nature of charges applied in such cases, and the trends in testimony of the “victims” and its correlation with the outcomes. The analysis also focuses on the diverse approaches taken by the Special Courts in such cases, particularly their views on “consent” by minors.

What is a “romantic” case for the purpose of this Report?

For the purpose of this report, a “romantic” case means a case under the POCSO Act in which any of the following conditions exist:

- The “victim” expressly admits to being in or having been in love with the accused or having consented to sexual activity with the accused or willingly entered into a marriage with the accused;

⁸ HAQ & FACSE, Implementation of the POCSO Act - Goals, Gaps and Challenges (2017), p.100.

⁹ Shraddha Chaudhary, ““Love”, Consent and the POCSO”, 134 in Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues (2019)

¹⁰ *Vijaylakshmi v. The State Rep. the Inspector of Police* CrI.O.P.No.232 of 2021 [Madras High Court], decision dated 27 January 2021; *Vivek Kumar v. The State, Govt of NCT of Delhi*, I (2007) DLT (CRL.) (Delhi High Court); *Atul Mishra v. State of UP*, Criminal Misc. Bail Application No. 53947 of 2021 (Allahabad High Court); *Shembhalang Rynghang v. State of Meghalaya*, CrI. Petn. No. 64 of 2021 (High Court of Meghalaya); *Kuldeep v. State of Himachal Pradesh* 2019 SCC OnLine HP 2659 (Himachal Pradesh High Court).

¹¹ *Sabari v. Inspector of Police*, Criminal Appeal No.490 of 2018, decided on 26.04.2019 [High Court of Madras] para 29.

¹² Adapted from the definition of ‘Noncoercive and nonexploitative sexual conduct among adolescents’ in Briefing Paper on Criminalizing Adolescence, Centre for Reproductive Rights, pg.6

- “Victim’s” family members or other prosecution witness states that the victim was in a “romantic” relationship with the accused at the time of offence;
- The Special Court concludes that the “victim” was having a love affair with the accused or was in a consensual relationship at the time of offence.

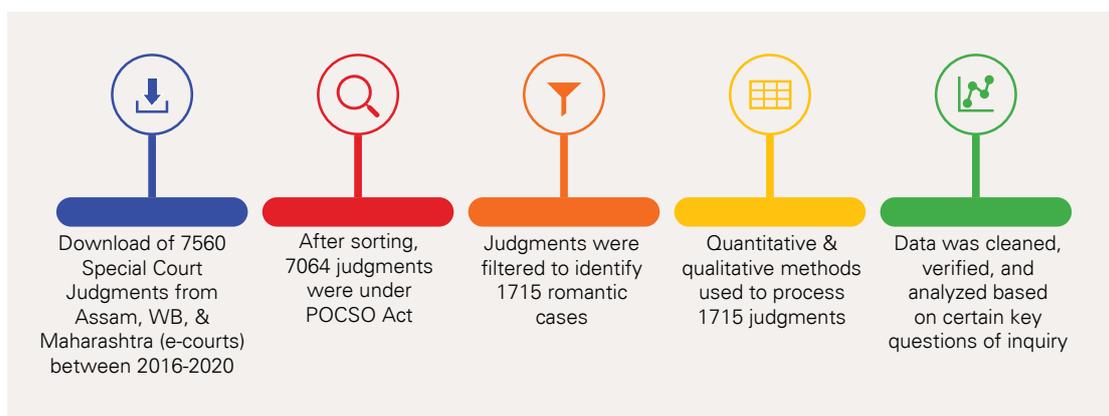
Although the facts of a significant number of cases hinted at a “romantic” relationship with elopement or marriage between the accused and the victim, they were excluded owing to the absence of an express reference to the relationship being romantic in nature in the text of the judgment. Additionally, the following types of cases were excluded:

- Cases where only the defence counsel or the accused claimed to be in a romantic relationship with the victim, but the victim, victim’s family, the prosecution, or the Special Court did not mention that it was consensual.
- Cases which were “romantic” in nature, but the primary accused was a child in conflict with the law whose case was before the Juvenile Justice Board, while the case of abetment by the adult accused persons was before the Special Court.

Our analysis revealed that all the “victims” were girls, and they are henceforth referred to as “girl” or “girls” in this report, except where text from the judgments referring to them as prosecutrix or victim is being quoted.

Methodology

A total of 7560 judgments disposed of by Special Courts in Assam, Maharashtra, and West Bengal between 2016-2020 were downloaded from e-courts in April-May 2021 using “Act-type” and “Case-type” method for search. After further sorting, 7064 judgments were found to be under the POCSO Act. Of these, 1715 cases fell within the category of “romantic” cases. An in-depth quantitative and qualitative analysis of these cases was undertaken to capture data on key inquiries such as informants in such cases, dates of lodging of the FIR and disposal of the case, age-profile of girls and accused persons, gender profile of the victims and accused persons, trends in admission to the “romantic” relationship, testimony of the girl, outcomes and the sentencing patterns, age-determination, the judicial approach to consent, and the application of legal presumption. The data was cross-checked and verified by multiple team members to ensure accuracy.



Limitations

The researchers could not obtain data pertaining to romantic cases involving children in conflict with the law as orders of the Juvenile Justice Board are not available in the public domain. A small number of judgments from the selected states were in Bengali, Marathi and Assamese were excluded from the analysis pool due to lack of time and funds to arrange for their translation. The analysis based on judgments of Special Courts is confined to the facts and details enumerated by the judge in the judgment. We recognise that the judgments do not reflect the nuances and the circumstances in which testimony was given by the victims or capture what transpired behind the scenes.

Outline of the Paper

Section I of the paper discusses the manner in which “romantic” cases enter the criminal justice system and provides data on the profile of informants in such cases as well as the factors that triggered the filing of the case. It also identifies who states the relationship between the victim and the accused is “romantic”. Section II covers the profile of the girls and the accused persons in “romantic” cases including their gender profile, occupational profile of the accused, and marital status of the girls. Section III indicates what the girl said about the relationship and the manner in which they testified in court. It also elaborates on the testimony of the victims in cases in which they were informants. Section IV unpacks the age profile of the victims and the accused, and the determination of the victim’s age by the Special Courts. Section V details the charges applied in “romantic” cases, the outcomes in “romantic” cases, the link between testimony and the outcome, the link between age determination and outcomes, the conviction and sentencing patterns, and the basis of convictions and acquittals. It also examines the duration taken to dispose of a “romantic” case. Section VI summarises the approach taken by the Special Courts with respect to consent by minors. Section VII offers conclusions and recommendations for law and policy reform.

1

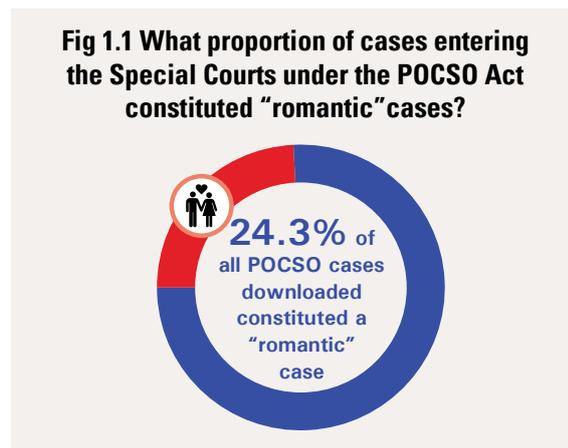
Romantic Cases in the Criminal Justice System

Key Findings

- Of the total 7064 POCSO judgments registered between 2016 and 2020 and available on e-courts from the states of Assam, Maharashtra, and West Bengal, 1715 cases (24.3%) constituted “romantic” cases.
- Informants in “romantic” cases were predominantly the parents (70.8%) and relatives (9.4%) of the girls who combinedly constituted 80.2% of informants. Girls were informants in 18.3% cases.
- In 314 cases (18.3%), girls lodged the complaint in a “romantic case”, for reasons such as the accused’s refusal or breach of promise to marry the girl (155 cases), and forced sex or kidnapping in 154 cases. Other factors included pressure from family or community to lodge a case (52 cases); sexual harassment, which included stalking by the accused (24 cases), and other forms of violence (14 cases).
- 1113 girls (64.9%) “left home” with their partner or to be with their partner. Reasons that prompted the girls to leave included parental disapproval of the relationship (280 cases), arrangement of a marriage against their will (113 cases) and violence or threat of violence at home (65 cases).
- **Who stated the relationship between the accused and girl was “romantic”?**
 - ◆ In 1508 cases (87.9%), the girl admitted to being in a romantic relationship with the accused, either during the investigation stage or evidence stage, or both.
 - ◆ In 578 cases (33.7%), the girl’s family and in 170 cases (9.9%), the prosecution presented to the court that the girl and the accused were having a “love affair”.
 - ◆ In a majority of cases, i.e., in 1058 cases (61.7%) the Special Court expressly concluded that the relationship between the accused and the girl was consensual in nature or that they were having a “love affair”. This included 131 cases (7.6%) where although the Special Court concluded that the relationship was romantic, this was denied by the girl or she was silent about it.

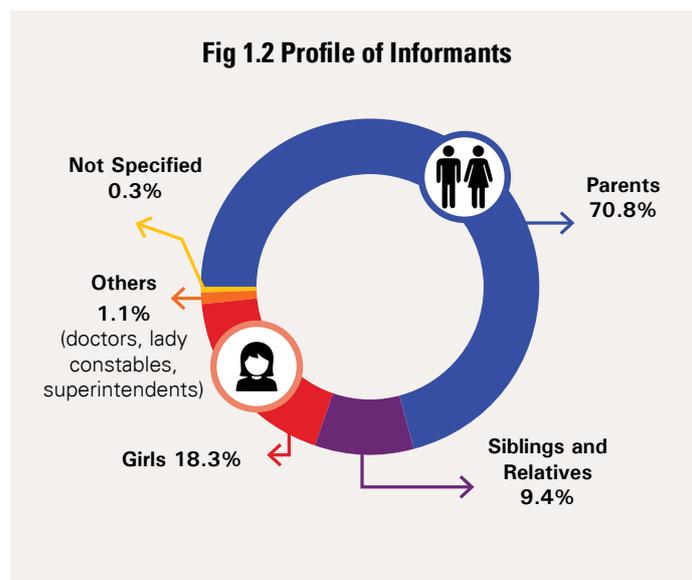
1.1 What proportion of cases entering the Special Courts under the POCSO Act constituted “romantic” cases?

Of the total 7064 POCSO judgments registered between 2016 and 2020 in the states of Assam, Maharashtra, and West Bengal, 1715 cases (24.3%) constituted “romantic” cases. The proportion was much higher in Assam at 30.1%. Given the narrow definition of “romantic” cases taken for the purpose of this Analysis, the actual number and proportion of such cases may be higher. Refer Table 1.1: Proportion of “Romantic” Cases and Table 1.2: Year-wise disposal of “Romantic” Cases.



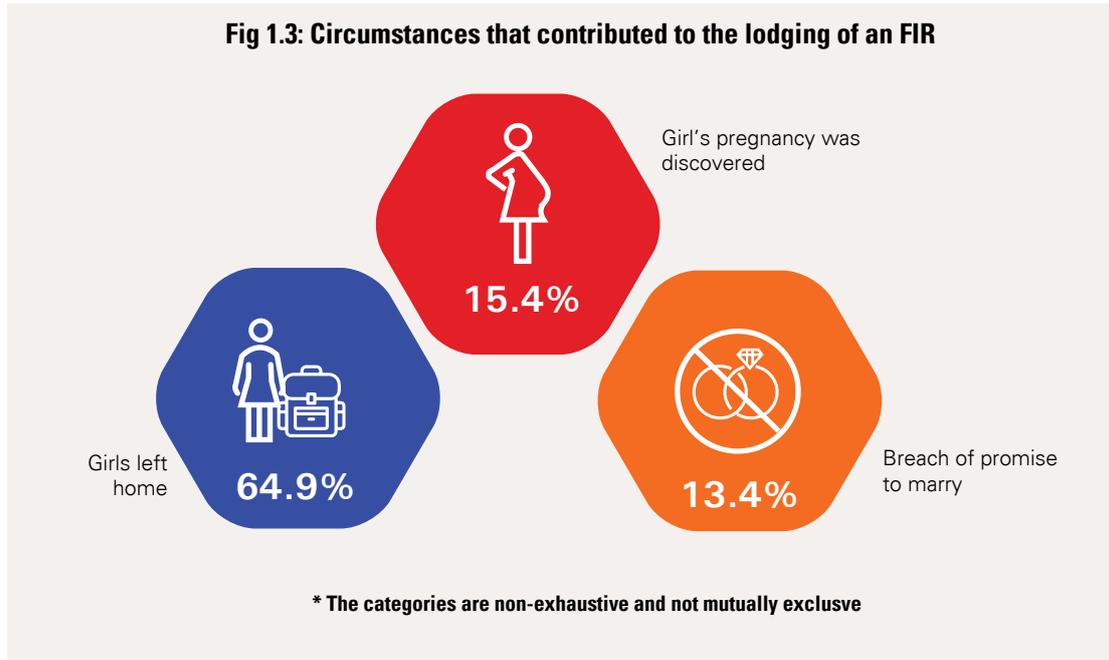
1.2 Who reports “romantic” cases and what prompts the reporting of such cases?

Parents of the girls were the informants in 1215 cases (70.8%) and family members such as siblings and relatives were informants in 162 cases. **Together parents and relatives constituted 80.2% of informants.** The girls were the informant in only 314 cases (18.3%). Other informants included doctors or the hospital where the girl sought treatment (six cases), Superintendent/ staff of a child care institution (three cases), lady police constable (two cases), and village headman (one case). Refer Table 1.3: State-wise profile of informants.



It was observed that the parents or relatives of the girl lodged the FIR when the girl was found to be missing from home or was suspected to have left home with her partner; or pursuant to discovering the pregnancy of the girl; or in cases where there was a breach of promise to marry alleged on part of the accused. In 1113 cases (64.9%) the girls left home, in 266 cases (15.4%) the girl was found to be pregnant, and in 231 cases (13.4%) a breach of promise to marry on the part of the accused was alleged. Refer Table 1.4: Circumstances that contributed to the lodging of an FIR.

Fig 1.3: Circumstances that contributed to the lodging of an FIR



Additionally, refusal of the accused to marry the girl (in the absence of a promise to marry), accused marrying someone else, failure to arrive at a compromise, misunderstanding between the families, and pressure by the community and family members to file a complaint against the accused were also mentioned as reasons for lodging the FIR. In a few cases, the matter was reported upon the insistence of medical practitioners. For instance, in *State of Maharashtra v. Mohsin Basuddin Pakhali and Ors.*,¹³ a married young girl sought treatment for her pregnancy at a private clinic along with her husband and other family members. As she stated herself to be above 18 years, the doctors provided medical treatment throughout the pregnancy until her delivery. Shortly after the delivery, the clinic had undergone an inspection visit by an Officer of the Central Adoption Resource Authority along with the members of the Child Welfare Committee who verified the register of the hospital in respect of delivery of women between 18 and 19 years. As they suspected the girl of being a minor, the doctor sent hospital staff to the house of the girl's father to bring her age proof. The Aadhar card of the girl revealed her to be a minor. Consequently, as per the direction of the Inspection Committee, the doctor filed an FIR against the accused. The girl refused to testify against her husband and stated that she was an adult and her age was recorded erroneously in the Aadhar card, which she had failed to rectify. As her minority could not be established, the Special Court acquitted the accused.

In their testimony, some girls also mentioned that cases were lodged by their families against the accused because he belonged to a different caste or religion. In a miniscule number of cases, violence by the accused and/or family members of the accused (36 cases) or deception by the accused (13 cases) led to the lodging of the FIR. [Refer Section 1.3 In what circumstances did the girls lodge an FIR against their partner?](#) and [Section 2.4 Were there any problematic factors observable in "romantic" cases?](#)

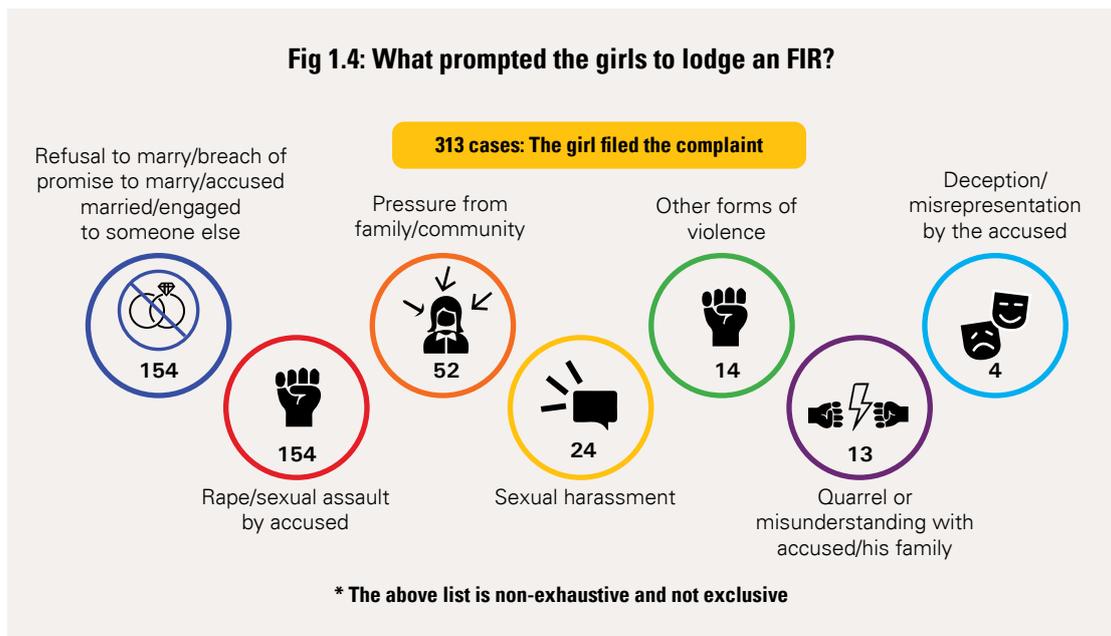
¹³ Special Case Pocs0 No. 24/2019, decided on 20/07/2019 by the Special Court in Kolhapur (Maharashtra).

1.3 In what circumstances did the girls lodge an FIR against their partner?

In 314 cases (18.3%), girls lodged the complaint in a “romantic” case, deviating from the usual trend of parents triggering the criminal justice system. These cases have been included under “romantic” cases, as the victim admitted her relationship with the accused in 271 cases out of 314 cases (86.3%) and in the remaining cases either her family, the prosecution, or the court concluded that the relationship was consensual.

The predominant reason for girls filing the complaint was the breach of promise to marry on the part of the accused, or refusal to marry, or the accused marrying or planning to marry another person in 155 cases. This also included cases where the girls filed a case after the accused married or got engaged to another girl. In 154 cases, the girls filed a case alleging forced sex or kidnapping. Other factors included pressure from family or community to lodge a case (52 cases); sexual harassment, which included stalking by the accused (24 cases), other forms of violence (14 cases). In a few cases, complaints were lodged because of a misunderstanding between the girl and the accused (13 cases). Deception or misrepresentation by the accused was expressly mentioned in only four cases and entailed misrepresentation as to the religion, name, economic status, age, or marital status of the accused. Refer Table 1.5: What prompted the girls to lodge an FIR.

In one case, the FIR was lodged against the accused under the POCSO Act based on the response of the girl to a doctor conducting her medical examination after she was admitted to a Child Care Institution. In *State of Maharashtra v. Bhatiya @ Rahul Arjun Gore*¹⁴, the girl quarrelled with her sister over the latter’s disapproval of her love affair with the accused, and left home. Her sister filed a missing complaint after which the girl herself came before the police and mentioned in her statement that she was having a relationship

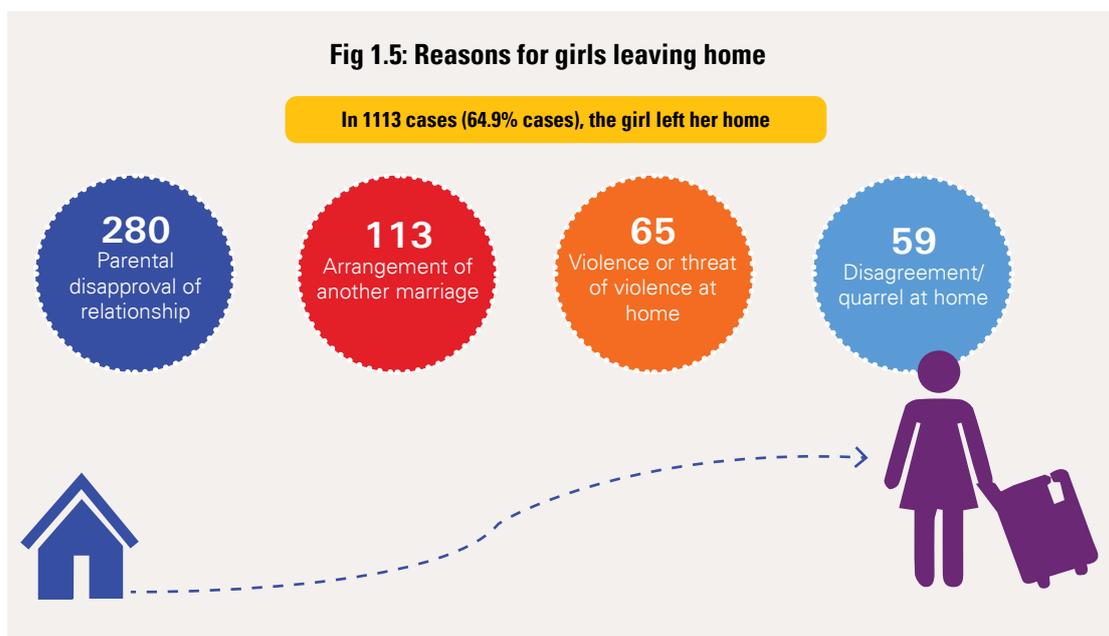


¹⁴ Sessions Case No. 85/2016 decided by the Special Court in Pune on 14-03-2016 (Maharashtra).

with the accused and intended to marry him. She did not, however, make any reference to sex with the accused and also refused to undergo medical examination. After she returned home, the sisters quarrelled again. The girl was brought to the police station and upon her refusal to live with her family, she was sent to a *Mahila Sudhar Gruh* based on an order by the Child Welfare Committee. When she was medically examined, on being asked by the doctor, she mentioned sexual intercourse with the accused. Following this the girl was again taken to the police station where she gave her statement revealing her affair with the accused and admitted to having had sexual intercourse with him based on a promise to marry. Based on her statement, she was treated as an informant and an FIR was lodged and charges under Sections 4 and 6, POCSO Act and Section 376(2)(i) and Section 376(2)(n) of the IPC were included. [Refer Section 5.7 What was the nature of testimony and outcomes in the cases in which the girls lodged the FIR?](#)

1.4 What prompted the girls to leave home?

1113 girls (64.9%) “left home” with their partner or to be with their partner. [Refer Table 1.6: Number of girls leaving home.](#) The reasons for leaving home were not available in all cases, but where reasons were mentioned, it emerged that parental disapproval of the relationship was the primary reason (mentioned in 280 cases). Another significant factor was the arrangement of a marriage against their will, which was mentioned by girls in 113 cases.



Other reasons included violence at home, disagreements and quarrels at home, being unable to contact or meet their partner, being scolded by parents for not studying, or their desire to be with their partner without any restrictions. In some cases, the girls also mentioned during their testimony that they had only gone for an outing or overnight trip with their partner and not eloped and the case had been hurriedly filed by their parents. [Refer Table 1.7: Reasons cited by girls for leaving home for state wise breakup.](#)

1.5 Who stated the relationship between the accused and the girl was “romantic”?

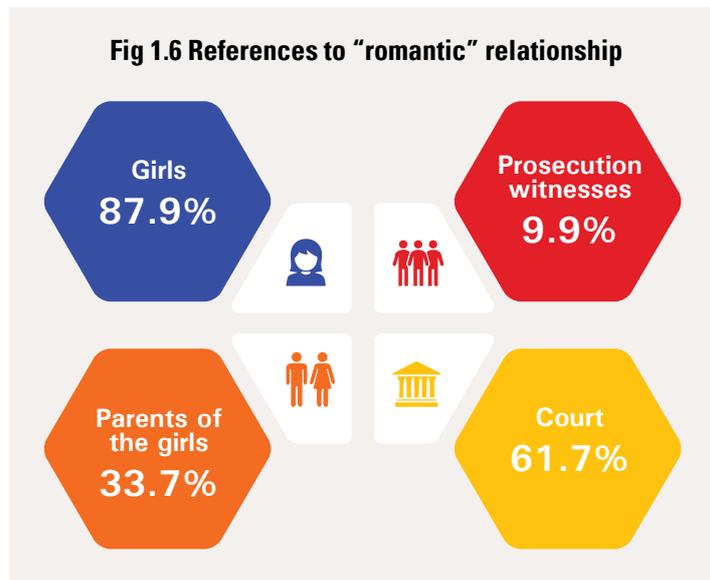
- **Girl:** In 1508 cases (87.9%), the girl admitted to being in a “romantic” relationship with the accused, either during the investigation stage or evidence stage, or both.

- **Girl’s family:** In 578 cases (33.7%), the girl’s family stated that the girl and the accused were having a “love affair”.

- **Prosecution witnesses:** In 170 cases (9.9%), prosecution witnesses

other than parents of the girl stated that the girl was having a love affair with the accused in their testimony.

- **Special Court:** In a majority of cases, i.e., in 1058 cases (61.7%) the Special Court expressly concluded that the relationship between the accused and the girl was consensual in nature or that they were having a “love affair”. This included 131 cases (7.6%) where the Special Court concluded that the relationship was “romantic”, even though this was denied by the girl or she was silent about it. Refer to Section 6.1 for more details.



Refer Table 1.8: Who stated the relationship between the accused and accused was “romantic”? for a state wise break-up.

2

Profile of the Girls and Accused persons in “romantic” cases

Key Findings

- All “victims” in “romantic” cases were girls (1715 cases) and in all but one case from Maharashtra, the primary accused was male.
- In 798 cases out of 1715 (46.5%), the girl was married to the accused of which in 180 cases (10.5%), the girl and accused were married to each other at the time of filing of the FIR, while in 618 cases (36.0%) they married subsequently.
- Convictions were an exception in cases in which the girl was married to the accused, and was recorded in only 15 cases (1.9%) of the total 798 cases in which they were married.
- A specific reference to occupation of the accused was available in 996 cases from Maharashtra. Nearly a third of all accused persons i.e., 373 (31.7%) constituted labourers, followed by the service sector in 98 cases (8.3%), drivers of vehicles in 94 cases (8.0%), and students in 74 cases (6.3%).
- One or more problematic factors such as violence, abuse, misrepresentation, etc. were observable in 248 cases out of 1715 cases (14.5%). Out of these, convictions were recorded in 54 of these cases (21.8%). In 188 cases (11%), the girl testified that the accused forcibly had sex with or kidnapped her. The accused was violent or threatened violence in 36 cases (2.1%). The accused misrepresented his name or age, suppressed that he was married or stated that he belonged to a different faith in 21 cases out of 1715 cases (1.2%). In 15 cases (0.9%), the accused was in a position of trust or authority by virtue of being the girl’s employer, uncle, or brother-in-law.

2.1 What is the gender profile of girls and accused persons in “romantic” cases?

The judicial data indicates that the POCSO Act has come into play only in cases of heteronormative relationships. All victims in “romantic” cases were girls (1715 cases) and in all but one case from Maharashtra, the primary accused was male.¹⁵ In *State of Maharashtra v. Preeti Pravin Lad*,¹⁶ the girl’s mother lodged an FIR alleging that the accused lured her daughter by promising to give her a job and asked her to stay with her, following which the girl left home to meet the accused. In her statement before the police, the girl

¹⁵ Only one case pertained to a same-sex relationship, with both the accused and the girl being female, wherein the accused pretended to be a male.

¹⁶ Special Case Pocs No. 11/2019, decided on 9/12/2020 by the Extra Joint District Judge and Additional Sessions Judge at Ratnagiri (Maharashtra).

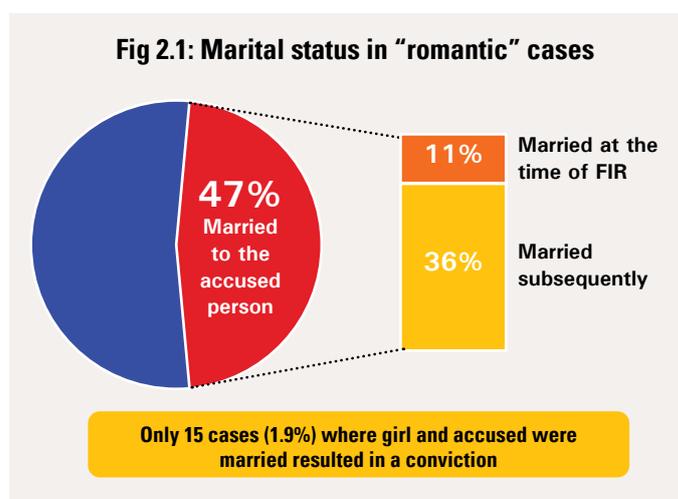
alleged that the accused claimed to be a boy on Facebook and when she met her, the accused assaulted her by touching her and took obscene photos. In her testimony before the Special Court, the girl claimed that she met the accused on Facebook, and they began chatting online. When she met the accused, the accused was dressed like a boy and had short hair, but she told the victim that she was a girl and also showed her Aadhaar Card as proof. They continued their friendship and met regularly. She later went with the accused to Mumbai and her mother filed a missing complaint based on a misunderstanding. Since she did not say anything incriminating against the accused, the Special Court acquitted the accused of charges under Section 363, 354, 420 of IPC and Section 7/8 of the POCSO Act.

2.2 What was the occupational profile of the accused persons in “romantic” cases?

A specific reference to occupation of the accused was available for cases from Maharashtra in 996 cases (84.8%). It was not available in cases in Assam and West Bengal. The data from Maharashtra revealed that 373 accused persons, i.e., nearly a third of all accused persons (31.7%) constituted labourers. The second highest category included accused persons in the service sector constituting 98 cases (8.3%) although the specific nature of the service industries were not mentioned. In 94 cases (8.0%), the accused persons were drivers (of autos, taxis, tempos or trucks). In 74 cases (6.3%), the accused persons were students. Other mentioned occupations of accused persons included masonry workers, agricultural workers, contractors, cooks, and garage workers. The occupational profile of the accused in Maharashtra indicated that majority of them were in blue collar jobs and hailed from a low-income background.

2.3 What was the proportion of girls who were married to the accused or married him subsequently?

In 798 cases out of 1715 (46.5%), the girl was married to the accused of which in 180 cases (10.5%), the girl and accused were married to each other at the time of filing of the FIR, while in 618 cases (36.0%) they married subsequently. [Refer Table 2.1: Marital Status in “romantic” cases for a state wise break-up.](#)

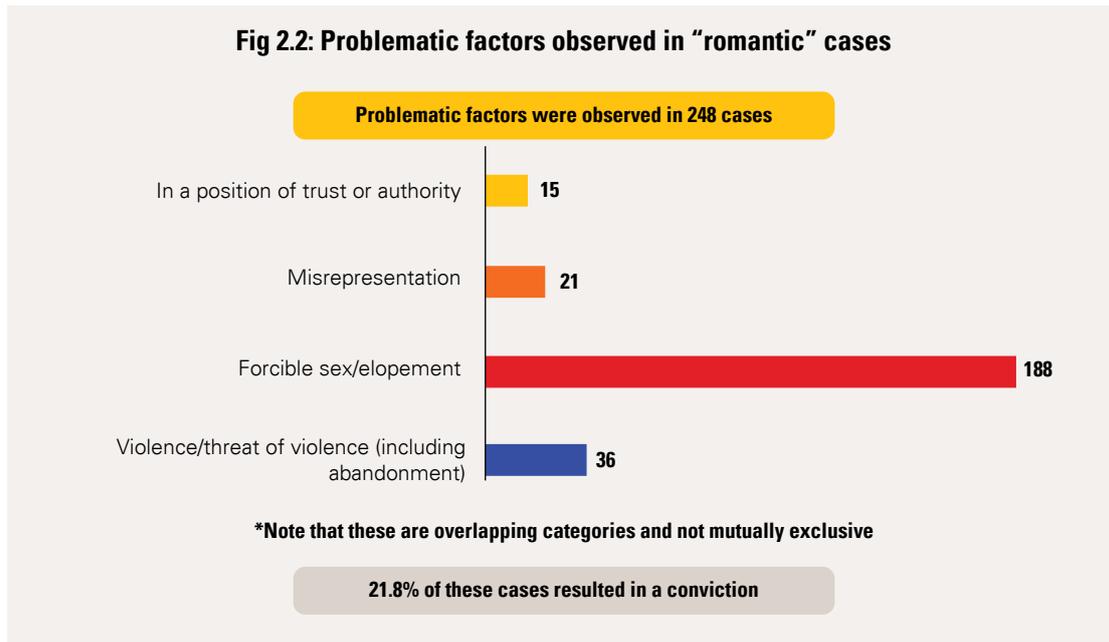


Convictions were an exception in cases in which the girl was married to the accused, and was recorded in only 15 cases (1.9%) of the total 798 cases in which they were married. In 14 of these 15 cases, the court concluded that the consent of the victim was irrelevant and recorded a conviction. In one case, the victim testified that she was forced to marry and have sex with the accused, although she admitted to the

medical officer that she had eloped with the accused and married him against the wishes of her family.

2.4 Were there any problematic factors observable in “romantic” cases?

For the purpose of this analysis, problematic factors indicate the presence of violence, coercion, force during the sexual act or “consent” given due to misrepresentation. It includes cases in which the accused was in a position of trust or authority vis-a-vis the girl as he was her employer, uncle, or brother-in-law. Based on a reading of the judgments, presence of one or more problematic factors were observable in **248 cases out of 1715 cases (14.5%)**. Out of these, **convictions were recorded in 54 (21.8%) of these cases**.



In 188 cases out of 1715 (11%), the girl testified that the accused forcibly had sex with or forcibly kidnapped her.¹⁷ The accused was violent or threatened violence or abandonment in 36 cases (2.1%). Violence included dowry harassment, verbal abuse, trafficking, and physical abuse. In 15 cases (0.9%), the accused was in a position of trust or authority by virtue of being the girl’s employer, uncle, or brother-in-law. The accused misrepresented his name or age, suppressed that he was married or stated that he belonged to a different faith in 21 cases out of 1715 cases (1.2%). **However, the facts in the large majority of cases i.e, 1467 cases (85.5%) did not reflect abuse or exploitation of the girl by the accused.** Refer Table 2.2: Problematic elements observed in “romantic” cases for state wise break-up.

¹⁷ These cases have been included under the pool of “romantic” cases because either the girl herself, her family, or prosecution witnesses stated that there was a love affair between the accused and the girl and in some of these cases, the Special Court concluded that there was a love affair between the girl and the accused

3

Girls' testimony in "romantic" cases

Highlights of Findings

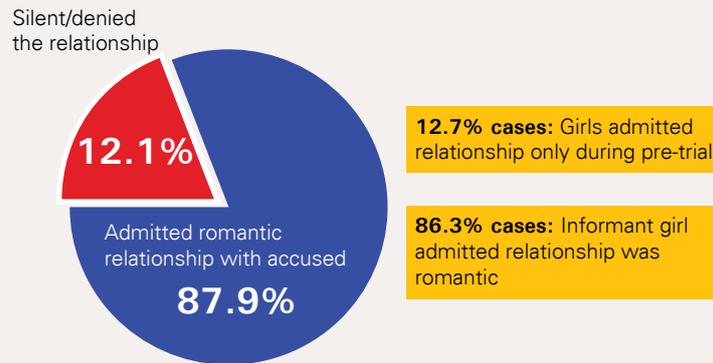
- In 1508 out of 1715 cases (87.9%), the girls admitted to being in a romantic relationship with the accused, either during the investigation stage or evidence stage, or both stages. In the remaining 207 cases, although the girls did not admit to being in a relationship with the accused, this was stated by their parents (81 cases), the prosecution (36 cases), and/or was a conclusion arrived at by the Special Court (131 cases).
- In a majority of cases, i.e., 1398 cases (81.5%), the girls did not say anything incriminating against the accused during her testimony. Of these in 40 cases the girls initially testified against the accused and later retracted during the cross-examination.
- In 295 cases (17.2%), the girls testified against the accused. In 151 (51.2%) of these cases, the testimony of the girl was held by the court to be unreliable.
- In 22 cases (1.3%), girls did not depose at all as they were untraceable, had died, or were not produced by the prosecution
- In 228 cases (13.5%), the girl was declared hostile by the prosecution.

3.1 What did the girls state about the nature of their relationship during the legal proceedings?

In an overwhelming majority of cases, i.e. 1508 out of 1715 cases (87.9%), the girls admitted to being in a "romantic" relationship with the accused, either during the investigation stage or evidence stage, or both stages. In the remaining 207 cases, although the girls did not admit to being in a relationship with the accused, this was stated by their parents (81 cases), the prosecution (36 cases), and/or was a conclusion arrived at by the Special Court (131 cases). Refer Section 5.7 What was the nature of testimony and outcomes in the cases in which the girls lodged the FIR? For more detail

In 1290 cases out of 1508 cases (85.5%), the girls expressly stated that they were in a relationship with the accused during the evidence stage. Admissions also took place during the statement to the police under Section 161, Cr.P.C; to the Magistrate under Section 164, Cr.P.C; and sometimes during medical examination while providing a case history to the registered medical practitioners. In 218 cases out of 1508 cases (12.7%), the girls admitted to the "romantic" relationship during pre-trial processes, but did not do so while deposing before the Special Court. [Refer Table 3.1: Admission of "romantic" relationship by girls for a state wise break-up.](#)

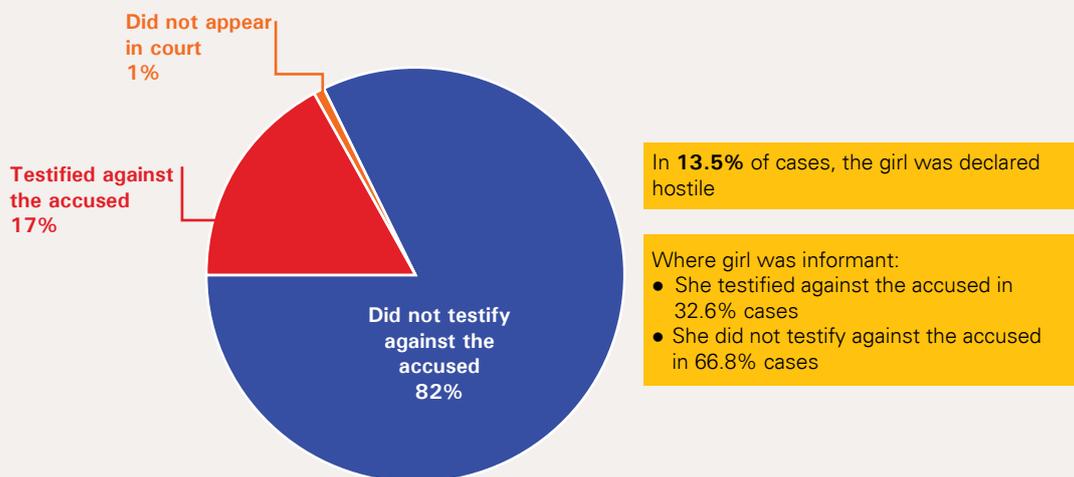
Fig 3.1: Admission of the “romantic” relationship by the girls



Of the 314 cases in which the girl was the informant, she admitted her relationship with the accused in 271 cases (86.3%). In the 42 cases the girl was silent or denied being in a relationship with the accused, and in one case she had died after the chargesheet had been filed. In some of these cases, the girl’s family member or other prosecution witnesses referred to a “love affair” between the girl and the accused, and in 33 cases the Special Court surmised that there was a relationship between them.

3.2 How did the girls testify in court in “romantic” cases?

Fig 3.2: Nature of testimony of the girls



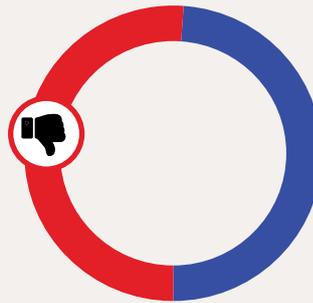
- **Did not testify against the accused:** In a majority of cases, i.e., 1398 cases (81.5%), the girls did not say anything incriminating against the accused during their testimony. Of these in 40 cases the girls initially testified against the accused and later retracted during the cross-examination. During their cross-examination, they stated that they were married to the accused or the matter had been resolved between the parties, or that they had been pressured by their family to speak against the accused during the examination-in-chief. [Refer Table 3.2: Nature of testimony by the girls for a state wise break-up.](#)

- **Testified against the accused:** In a minority of cases i.e. 295 cases (17.2%), the girls testified against the accused. In 151 (51.2%) of these cases, the testimony of the girl was held by the court to be unreliable. [Refer Table 3.3: Number of cases where girl's testimony found unreliable by the Special Court for a state wise break-up.](#)
- **Did not appear in court:** In 22 cases (1.3%), girls did not depose at all as they were untraceable, had died, or were not produced by the prosecution. In 14 cases the girl did not testify as she was dead, of which in eight cases the prosecution stated that the girl died by suicide; in one case she was murdered by the accused; in one case she died of illness, and in four cases the cause of death was not mentioned or was unclear.
- **Hostile witnesses:** In 228 cases (13.5%), the girl was declared hostile by the prosecution.

[Refer section: 5.5 Links between nature of testimony and outcomes for more details](#)

Fig 3.3: Proportion of cases where the girls testified against the accused but were found to be unreliable

In **51.2%** cases where the girl testified against the accused, her testimony was found to be unreliable



4

Age profile & Age-determination in “Romantic” cases

Highlights of Findings

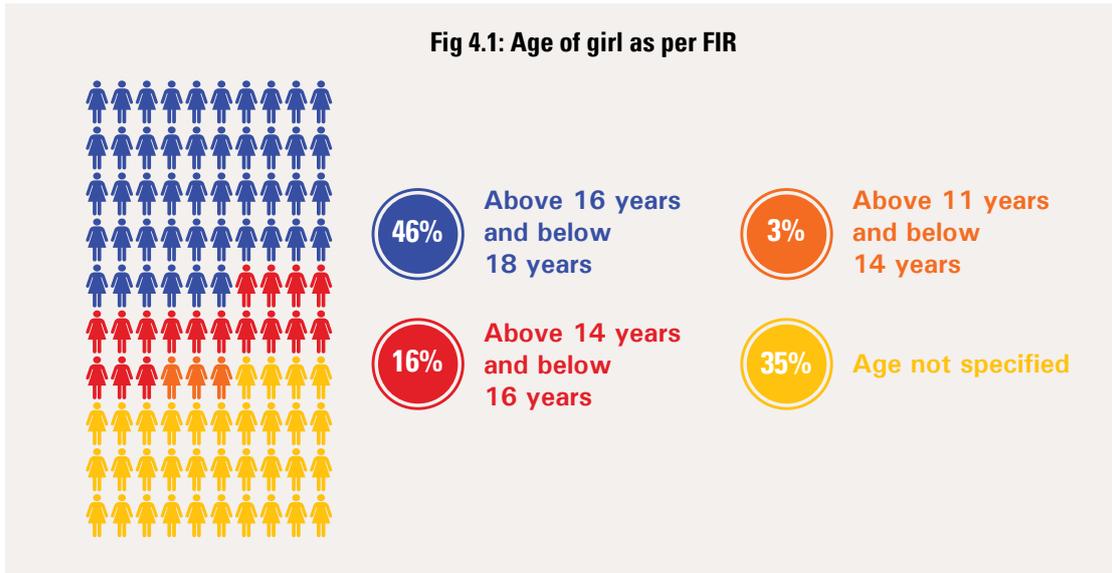
- Based on the age-related information mentioned in the FIR, which was available in 1120 cases (65.3%) out of 1715 cases, in a vast majority of cases i.e. 799 cases (46.6%), the girl was between 16 to 18 years. In 272 cases (15.9%), the girl was between 14 - 16 years, while in 49 cases (2.9%) the girl was between 11- 14 years. In 595 cases (34.7% of the total cases), the judgment copy did not specify the age of the girl.
- The proportion of girls’ family members claiming that she was a minor stood at 63.3% (1086 cases). Girls stated that they were minors in 663 cases (38.6%) and were adults in 390 cases (22.7%). In 278 cases (21.8%), the girl disputed the version of her family that she was a minor, and instead stated that she was an adult.
- In 770 cases out of 1715 cases (44.9%), the Special Courts concluded that the minority of the girls had not been established. Minority was established by the prosecution in only 399 cases (23.3%). In 502 cases (29.3%) cases, the Special Courts did not record any finding on the age of the girl and in 44 cases (2.6%) the court’s conclusion on age was not clear.
- An analysis of the age profile of the accused persons in Maharashtra as on the date of the registration of the case in court revealed that the majority, i.e., 911 accused persons (77.5%) were below the age of 25 years.

Considering the significance of age in establishing charges under the POCSO Act and statutory rape under Section 375, IPC, age-determination emerged as a highly challenging aspect of trials before the Special Court. In several cases, different figures pertaining to the age of the girl were stated by the parents of the girl, the girl herself, and other witnesses and at times there was change in stance with respect to the girl’s age during the evidence stage. These factors made the analysis of data pertaining to the age of victims challenging.

4.1 What was the age of girls in “romantic” cases?

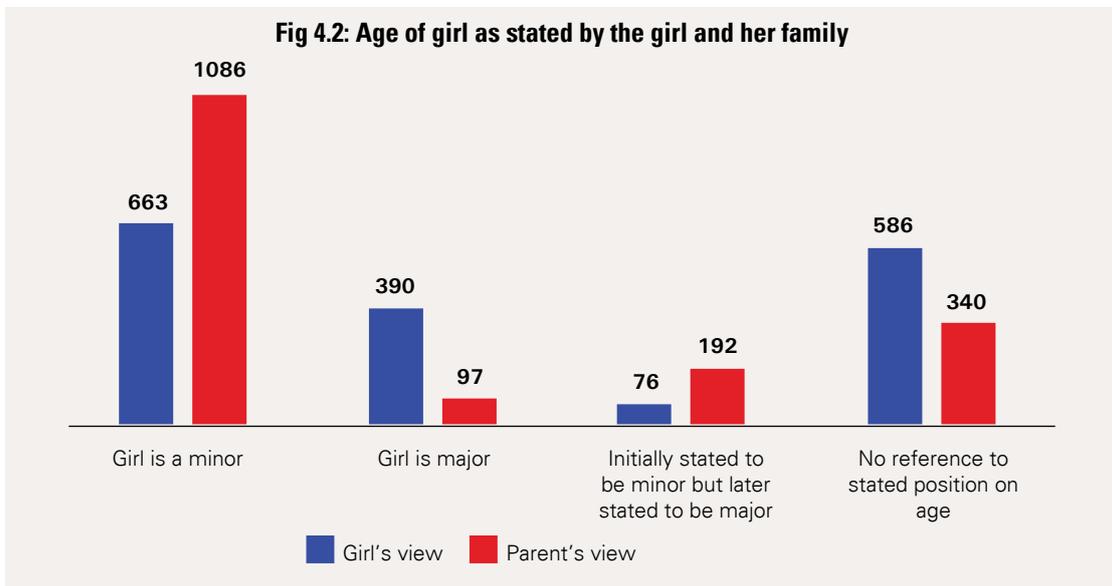
a. Age as per FIR

Age as mentioned in the FIR was available in 1120 cases (65.30%) out of 1715 cases. Of the 1715 cases, in a vast majority of cases i.e. 799 cases (46.6%), the girl was stated to be between 16 to 18 years of age. In 272 cases (15.9%), the girl was stated to be 14 -16 years, while in 49 cases (2.9%) the girl was stated to be between 11-14 years. In 595 cases (34.7% of the total cases), the judgment copy did not specify the age of the girl. The lowest age of the girl stated in FIR was 11 years while the highest age was 17 years. [Refer Table 4.1: State-wise age of girls as per FIR for state wise break-up.](#)



b. Age as per girls and their parents

The proportion of girls' family members claiming that she was a minor stood at 63.3% (1086 cases). Girls stated that they were minors only in 663 cases (38.7%) and that they were adults in 390 cases (22.7%). In 76 cases (4.4%), girls initially stated they were a minor, but testified later that they were an adult at the time of the incident. In 192 cases (11.2%), family members initially stated that the girl was a minor, but testified later that she was an adult at the time of the incident. Refer Table 4.2: Age of girl as stated by the girl and her family.



A significant number of cases witnessed a stark contrast in the claim of the girl and her family in respect of her age. Overall in a total of 1278 cases, the family stated that the girl was a minor at the time of lodging the FIR. **Of these, in 278 cases (21.8%), the girl disputed this and stated she was an adult. Further, in 192 cases (15%), the family stated that she was an adult during their testimony in court.** Refer Table 4.3: Number of cases where the family stated the girl was a minor while girl stated she was an adult for state wise break-up.

Fig 4.3: Number of cases where family stated the girl was a minor while girl stated she was an adult



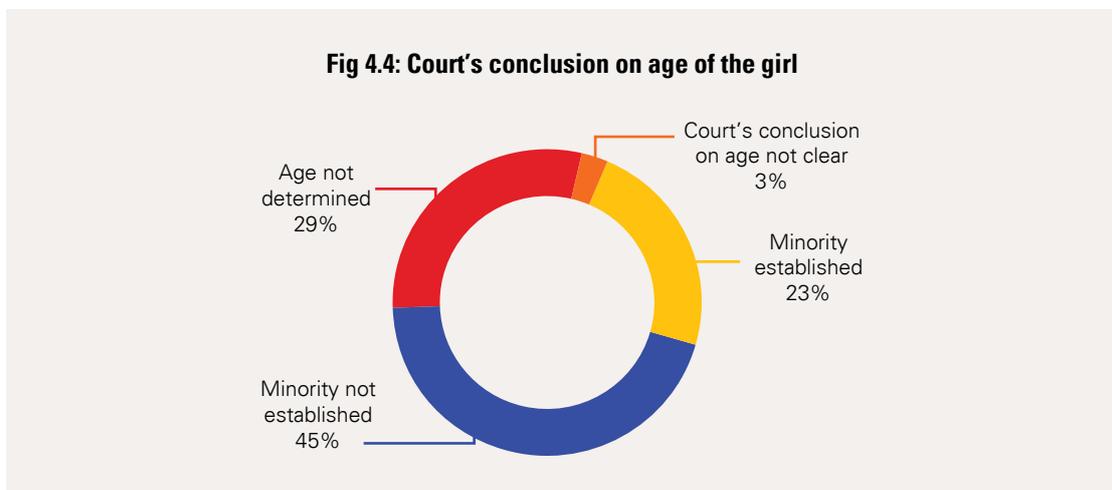
4.2 What were the conclusions of the Special Court with respect to the age of the girls?

In 770 cases out of 1715 cases (44.9%), the Special Courts concluded that the minority of the girls had not been established. This was primarily due to the lack of production of relevant documents or the failure to prove the basis on which age was recorded in the school records. Minority was considered to have been established by the prosecution in only 399 cases (23.3%). In 502 cases (29.3%), the Special Courts did not record any finding on the age of the girl and in 44 cases (2.6%) the court’s conclusion on age was not clear. Refer [Table 4.4: Court’s conclusion on age of the girl for stage wise break-up.](#)

It was observed that in 95.6% of the cases in which the court did not determine age, the girl had not testified against the accused. It is possible that the court did not enter into or elaborate upon its findings on age because of this reason.

Refer section: 5.6 What was the link between the conclusions of the Special Court with respect to the age of the girls, nature of testimony, and the outcome under the POCSO Act?

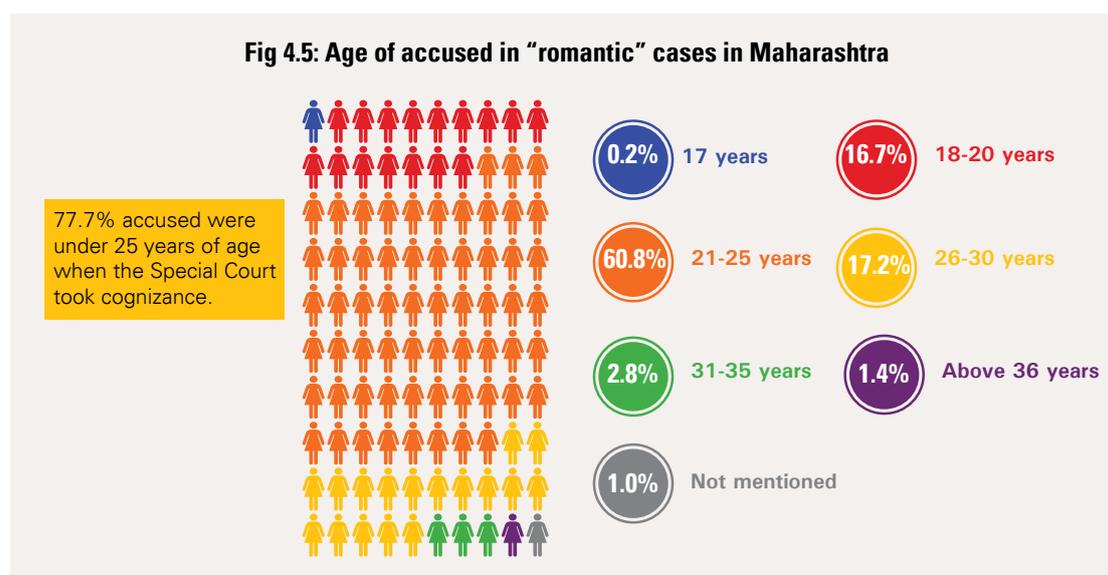
Fig 4.4: Court’s conclusion on age of the girl



4.3 What was the age profile of accused persons in “romantic” cases?

The age of accused persons was not available in all judgments from Assam and West Bengal and was available only for Maharashtra as title of the case as mentioned in the judgments expressly stated the age on the date of registration of the case before the court. It should be noted that the age of the accused as on the date of the offence was not available in the judgment.

It should be noted that the actual age of the accused persons would be lower on account of the gap between the date on which the FIR was lodged and the date of registration of the case before the court. Nevertheless, an analysis of the age profile of the accused persons as on the date of the registration of the case in court revealed that the majority, i.e., 911 accused persons (77.5%) were below the age of 25. 202 accused persons (17.2%) were between 26 to 30 years and in 33 cases (2.8%), the accused person was between 31 and 35 years. In a fraction of cases, i.e. 17 cases (1.4%), the accused persons were over the age of 36 years. In 12 cases (1%), age of the accused was not specified. The average age of accused persons based on the date of registration of the case was 23.6 years.



The highest stated age of the accused was 50 years. In *State of Maharashtra v. Ganesh @ Ghansham Udhaoo Juware*,¹⁸ the girl testified that the 50-year-old accused is her husband who she married after falling in love with him. She denied the allegation in the FIR that her mother had lodged the complaint stating that the accused performed sexual intercourse with her on many occasions under the pretext of promise of marriage. The Special Court did not make any observation on the age of the girl, or mention if any other witnesses were examined. The Special Court held that there is nothing incriminating in the C.A. report and since the girl is happily married with the accused, there is no evidence to suggest the guilt of the accused. In *State of Maharashtra v. Mohammed Hasan Abdulla Shaikh*,¹⁹ the girl lodged a FIR alleging that her landlord committed forceful sexual intercourse with her,

¹⁸ State of Maharashtra v. Ganesh @ Ghansham Udhaoo Juware, Special POCSO Case No.68/2018, decided on 30.11.2019 by the Court of Session at Chandrapur (Maharashtra).

¹⁹ State of Maharashtra v. Mohammed Hasan Abdulla Shaikh, POCSO Special Case No.346 of 2017, decided on 20.03.2020 by the Special Court in Mumbai (Maharashtra).

following which she became pregnant. The girl reiterated these facts in her examination-in-chief, but retracted her statement in her cross-examination and said she was in love with the 50-year-old accused and had consented to sexual intercourse with him. The Special Court held that since it was observed that girl victim was not child under Section 2(d) of the POCSO Act and since she admitted to having a love affair and having consented to sexual intercourse with the accused, the charges leveled against the accused are not proved. In both cases, the court did not comment on the large age-gap between the girl and the accused person.

The lowest stated age of the accused was 17 years. It is important to note here that cases where the primary accused is a child, i.e., below 18 years are to be dealt with under the Juvenile Justice (Care and Protection of Children) Act, 2015 by a Juvenile Justice Board. However, in *State of Maharashtra v. XYZ*²⁰, the 17-year-old accused had been transferred by the Juvenile Justice Board (JJB) to the Special Court for trial as an adult. In this case, the prosecution alleged that the child in conflict with the law and the girl, who were both below 18 at the time, are relatives who fell in love and had physical relations. The girl became pregnant and subsequently underwent an abortion. The girl's father lodged an FIR against the accused. Subsequently the CIL was produced before the JJB, and it found that, "the CIL who was on the verge of attaining majority able to understand his acts and its consequences" and hence his case was transferred to the Special Court to be tried as an adult. In her examination-in-chief, the girl denied that she had physical relations with the accused and the father denied the material content of his report. In their cross-examination before the Special Court, both the girl and father conceded that the affair between the CIL and the girl is ongoing and they still want to marry, and her father expressed no objection to them getting married. The Court acquitted the accused under Sections 4 of the POCSO Act and 376 of the IPC.

In *State of Maharashtra v. Shaikh Afroz @ Raju S/o Shaikh Shikur and Anr.*,²¹ a 17-year-old boy was jointly tried with his elder brother for charges under Sections 376 (2)(i), 376(2) (n) of IPC, Section 3 (1) (xii), 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act), and under Section 3/4 of the POCSO Act, in contravention of Section 23, the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act)²² There was no explanation available in the judgment as to whether he was transferred by the JJB after a preliminary assessment. The girl's mother lodged a FIR alleging that when she asked her daughter about the increase in the size of her stomach, her daughter who is below the age of 14 years, told her that she had sexual intercourse with the accused No.2 (aged 17 years old). On finding about the sexual intercourse, the accused No.1 (aged 26 years), the brother of the accused No.2, threatened the girl and sexually assaulted her. The Special Court held that the oral evidence of the girl and mother shows that the girl was more than 18 years at the time of the incident. Further, the Special Court observed that according to nikahnama produced, the girl and the accused No.2 were married to each other, and had a child together. A DNA test also confirmed that the

²⁰ State of Maharashtra v. XYZ, POCSO Case no. 31/2017 decided by the Children's Court in Gadchiroli on 30-12-2017 (Maharashtra).

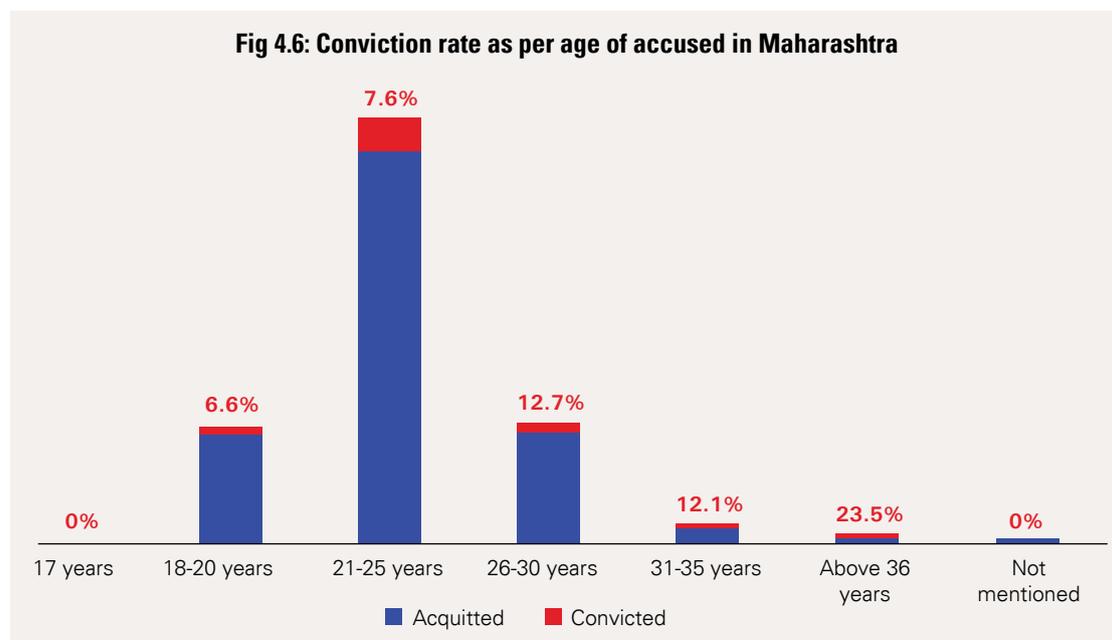
²¹ State of Maharashtra v. Shaikh Afroz @ Raju S/o Shaikh Shikur and Anr, Special Case(POCSO) No.31/2016 decided by the Court of Sessions at Parbhani on 14-05-2019 (Maharashtra).

²² Section 23 in The Juvenile Justice (Care and Protection of Children) Act: No joint proceedings of child in conflict with law and person not a child: (1) Notwithstanding anything contained in section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, there shall be no joint proceedings of a child alleged to be in conflict with law, with a person who is not a child. (2) If during the inquiry by the Board or by the Childrens Court, the person alleged to be in conflict with law is found that he is not a child, such person shall not be tried along with a child.

No.2 was the father of the child. Hence, the Special Court held that the involvement of the accused No.1 was not proved, and that the girl had consensual sexual intercourse with the accused No.2, when she was more than 18 years of age. The accused were acquitted of all charges.

4.4 Age profile of accused persons convicted in Maharashtra

Of the 86 accused persons convicted under the POCSO Act in Maharashtra, 54 (62.9%) were in the age group of 21-25 years, 13 (15.1%) were between 18-20 years, 11 (5.4%) were between 26-30 years, four (4.7%) were between 31-35 years, and four (4.7%) above 36 years. It was also seen that of the 17 accused persons above 36 years, four were convicted (23.5%), followed by 11 accused (12.7%) out of the 202 accused between 26-30 years and four accused (12.1%) out of 33 accused between 31-35 years. Although the largest number of accused persons tried and convicted under the POCSO Act were in the age category of 21-25 years, of the 713 accused in this group only 54 (7.6%) were convicted. Of the 196 accused between 18-20 years, only 13 (6.6%) were convicted. The two accused who were 17 years of age were not convicted under the POCSO Act.



5

Judicial Response to “Romantic” cases

Highlights of Findings

a. Nature of Charges in “romantic” cases

- Section 4, POCSO Act was applied in 1142 cases (66.6%), Section 6, POCSO Act was included in 613 cases (35.7%), Section 8 (sexual assault) in 327 cases (19.1% cases), and Section 12 (sexual harassment) in 258 cases (15.0%).
- In 1529 cases (89.2%) the accused was charged with atleast one penetrative offence under Section 4 or 6 of the POCSO Act, or under Section 376 of the IPC.
- In 186 cases (10.8%) charges framed were exclusively for non-penetrative offences such as sexual assault, aggravated sexual assault and sexual harassment.
- In 1623 cases (94.6%), the accused was also charged under the IPC, primarily under rape and kidnapping offences. The accused was charged for rape under Section 376, IPC in 1208 cases (70.4%).
- Along with charges under the POCSO Act, kidnapping charges were included in 1145 cases (66.8%).

b. Time taken for disposal of “romantic” cases by Special Courts

- Calculation of the time taken from FIR to disposal revealed that only 196 cases (11.4%) were disposed of within a year, while 432 cases (25.2%) took between one to two years, and 384 cases (22.4%) were disposed of between two to three years. 350 cases (20.4%) took more than three years for disposal. The data on date of registration of the FIR was unavailable in 353 cases (20.6%). The median time taken from the lodging of the FIR till disposal was 522.5 days (1.4 years) in Assam, 831 days (2.3 years) in Maharashtra, and 846.5 days (2.3 years) in West Bengal.
- Based on data on time taken from receipt of the case till disposal available in Maharashtra, 329 cases (28.0%) were disposed within a year, while 408 cases (34.7%) took between one to two years, and 280 cases (23.8%) took two to three years for disposal. About 135 cases (11.5%) took more than three years for disposal. The longest duration taken by the Special Court in Maharashtra was five years and four months, while the shortest was 15 days. The median time taken by the Special Court to dispose of a romantic case from the date of receipt in Maharashtra was 580 days (1.6 years).

c. Outcomes in “romantic” cases

- Acquittals were the norm in “romantic cases” with 1609 cases out of 1715 (93.8%) ending in an acquittal under the POCSO Act. Convictions were an exception and were recorded in only 106 cases (6.2%). West Bengal did not record any conviction under the POCSO Act.
- Acquittals under Section 376, IPC were akin to those under the POCSO Act with 1127 cases out of 1208 cases (93.3%) in which the accused was charged under Section 376, IPC ending in acquittal. Convictions were recorded only in 81 cases under Section 376, IPC (6.7%).

- 1086 cases of 1145 cases (94.8%) with kidnapping related charges ended in an acquittal whereas only 59 cases (5.2%) resulted in a conviction. In 772 out of the 1145 cases (67.4%), the Special Courts expressly concluded that the girls left home willingly.

d. Links between nature of testimony and outcomes

- The rate of conviction was higher in cases where the girl testified against the accused in contrast with cases in which she did not testify against the accused. 75 of the 295 cases (25.4%) where the girl testified against the accused resulted in a conviction. In contrast, convictions were recorded in only 30 of the 1398 cases (2.2%) where the girl did not testify against the accused, while acquittals resulted in 1368 cases (97.8%).
- 220 cases (74.6%) in which the girl testified against the accused resulted in an acquittal. In 149 (67.7%) of these 220 cases, the Special Court considered the girl's testimony unreliable.
- Of the 1508 cases in which the victim admitted the relationship, acquittals were the norm in 1421 cases (94.2%) and convictions were recorded in only 87 cases (5.8%).

e. Link between age-determination and outcomes under the POCSO Act

- In all the 770 cases in which the Special Courts held that the minority had not been established by the prosecution, the accused was acquitted under the POCSO Act.
- Of the 399 cases in which the minority of the girl was established, convictions were recorded in 105 cases (26.3%).

f. Trends observable in convictions in "romantic" cases

- Of the 106 cases that resulted in a conviction, in 75 cases (70.8%) the girl testified against the accused person and her testimony was considered reliable. In 105 of the 106 cases (99.1%), the minority of the girl was established. In 87 of the 106 convictions (82.1%), the Special Courts expressly stated that the consent of a minor was immaterial for recording a conviction under the POCSO Act.

g. Trends observable in acquittals in "romantic" cases

- In 1329 of 1609 acquittals (82.6%), the girl did not testify against the accused. In 769 of 1609 acquittals (47.8%), the Special Court noted that the prosecution had failed to establish the minority of the girl, which rendered the POCSO Act inapplicable. In 1015 cases of the 1609 acquittals (63.1%), the Special Courts concluded that the relationship between the girl and accused person was consensual in nature.

h. Trends in Sentencing

- Of the 106 convictions the accused was sentenced under the POCSO Act in 90 cases. In the remaining 16 cases although convicted under POCSO Act, the sentence was passed under the IPC, in accordance with Section 42 of the POCSO Act.
- In the 53 cases, in which the sentence was passed under Sections 4 of the POCSO Act, the Special Courts preferred to impose the minimum sentence in majority of cases i.e 37 cases (69.8%) and in 14 cases (26.4%), the sentence imposed was above the minimum sentence but below the maximum sentence. In two cases (3.7%), the Special Court imposed a sentence below the minimum.

- Of the 43 cases in which the sentence was passed under Section 6, POCSO Act, the minimum sentence was imposed in 40 cases (93%); life imprisonment was imposed in two cases (4.7%); and in one case it was below the minimum sentence (2.3%).
- In 44 cases, where the accused was sentenced under Sections 376(1) or 376(2) of the IPC, the minimum sentence was imposed in 34 cases (77.3%). In nine cases (20.5%), a sentence which is above the minimum sentence but below the maximum sentence was imposed. In one case (2.3%), the maximum sentence i.e. life imprisonment was imposed.

i. Bail Status

- At the time of disposal, in 1427 cases (83.2%), the accused persons were out on bail. In 261 cases (15.2%) the accused was in judicial custody. In 27 cases (1.6%) the bail status of the accused was not clear. In 13.2% of cases which resulted in an acquittal, the accused was not out on bail, but in judicial custody.

j. Application of Presumption

- Of the 1715 cases, 1544 (90%) cases did not include any reference to legal presumptions under Sections 29 and 30 of the POCSO Act. A reference to presumption was found in 171 (9.9%) cases.
- Of these 171 cases, presumption was applied in 53 cases (30.9% of 171 cases) and in 80 cases (46.8%) presumption was mentioned but not applied. In 38 cases (22.2%), the presumption was successfully rebutted by the accused. An application of the presumptions was seen in 45 of the 106 (42.5%) cases which resulted in a conviction.

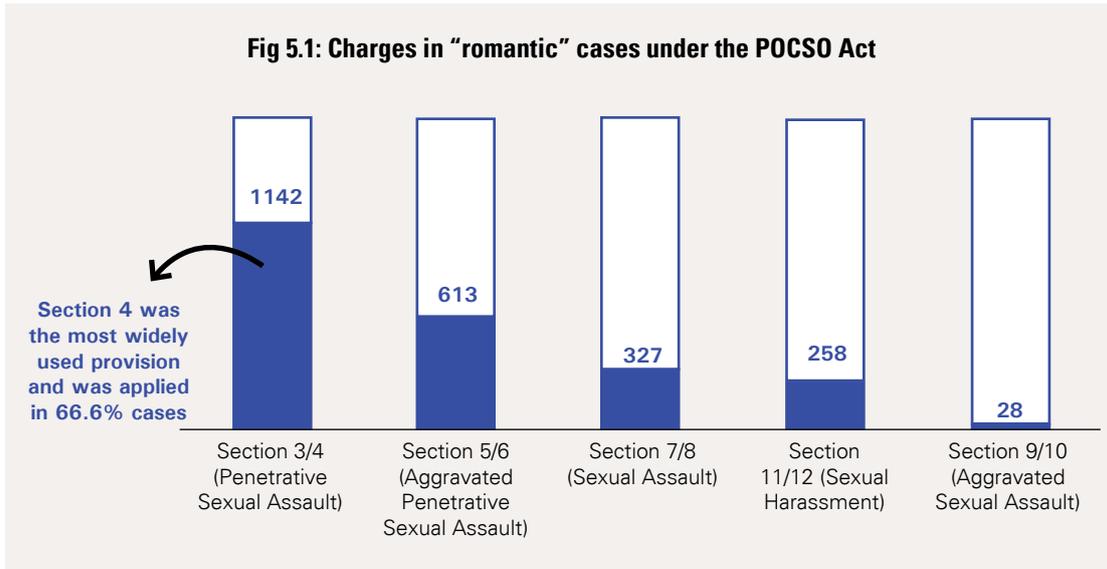
k. Private Settlement

- An express reference to settlements between the parties was found in 71 cases (4.1%). Of these, in 65 cases there was a private resolution between the families of the accused and the girl. While in six cases, there was a settlement with the assistance of village leaders or community members.
- In 265 cases out of 1715 cases (15.5%), the girl's family eventually accepted the relationship and conveyed this to the Special Court during their testimony.

5.1 What are the charges commonly applied in "romantic" cases?

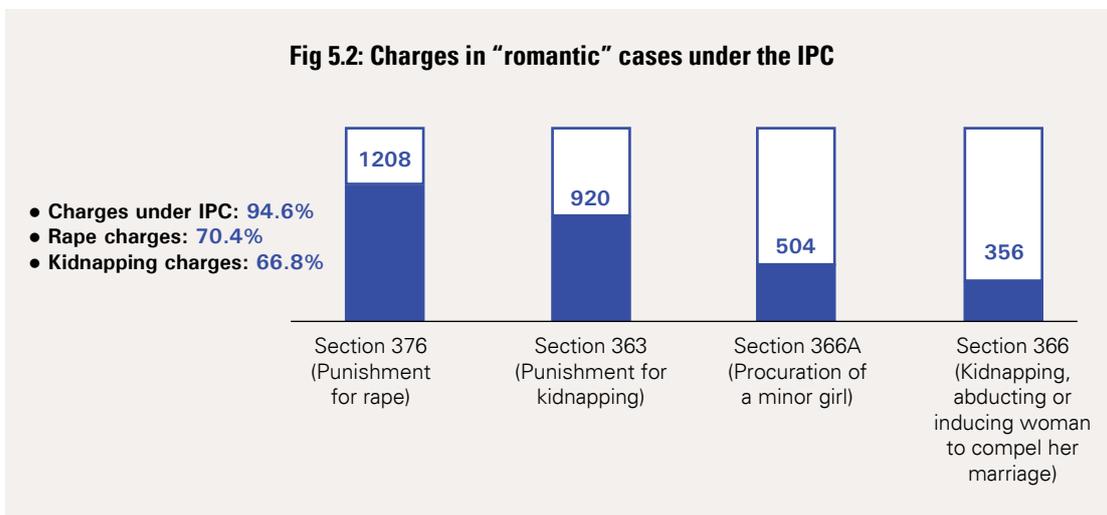
Charges in "romantic" cases were primarily filed under the POCSO Act and the Indian Penal Code, 1860 [IPC], with a small number of cases with charges under other legislations. Aggravated charges under Section 6, POCSO Act, and Sections 376(2) and 376(3) of the IPC were applied in 875 cases (51%). In 1529 cases (89.2%) the accused was charged with atleast one penetrative offence under Section 4 or 6 of the POCSO Act, or under Section 376 of the IPC. In 186 cases (10.8%) charges framed were exclusively for non-penetrative offences such as sexual assault, aggravated sexual assault and sexual harassment.

Charges under POCSO Act: Section 4 (punishment for penetrative sexual assault), POCSO Act was the most widely used provision and was applied in 1142 cases (66.6%). Section 6 (punishment for aggravated penetrative sexual assault) was included in 613 cases (35.7%), Section 8 (sexual assault) in 327 cases (19.1% cases), and Section 12 (sexual harassment) in 258 cases (15.0%). Aggravated charges under Section 5 included



sexual assault under s.5(l) and penetrative sexual assault resulting in the pregnancy of the child under s.5(j)(ii). Provisions pertaining to using a child for pornographic purposes, aggravated sexual assault, and abetment to commit an offence under the POCSO Act were applied in a small minority of cases.

Charges under IPC: In 1623 cases (94.6%), the accused was also charged under the IPC, primarily under rape and kidnapping charges. Out of the total 1715 cases, the accused was charged for rape under Section 376, IPC in 1208 cases (70.4%); for kidnapping under Section 363 in 920 cases (53.6%); for kidnapping, abducting or inducing a woman to compel her marriage under Section 366 in 356 cases (20.8%); and for the procurement of a minor girl under Section 366A in 504 cases (29.4%). Several cases also included charges relating to theft, cheating, criminal intimidation, and causing hurt. In 1171 cases, the accused was charged under Sections 4 and/or Sections 6 of the POCSO Act, as well as Section 376 of IPC. **Overall, alongwith charges under the POCSO Act, kidnapping charges under Sections 363, 366, 366A, IPC were included in 1145 cases (66.8%).** Refer Table 5.1: Charges in "romantic" cases under POCSO Act & IPC for the stage wise break-up of charges.



Only one case contained charges related to murder under Section 302 of the IPC which resulted in a conviction. In this case, the victim's family stated that there was a love affair between the deceased victim and the accused, pursuant to which he kidnapped and married her. Subsequently, the accused developed a drinking habit and quarrels started between them resulting in the murder of the girl by the accused.

In several cases where Section 376 of the IPC was applied, aggravated charges under Section 376(2) were included. The most frequently applied aggravated charges included was rape on a woman incapable of giving consent (Section 376(2)(j)); repeated rape on the same woman (Section 376(2)(n)); rape on a woman under 16 years (Section 376(3)), and rape on a woman knowing her to be pregnant (Section 376(2)(h)). In 653 of 1715 cases (38.07 %) aggravated charges were applied under Section 376(2), or Section 376(3), or Section 376D IPC.

Other legislations: In 76 cases out of 1715 cases (4.4%), charges under other statutes were seen. These included 54 cases (3.1%) under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), 1989, 11 cases (0.6%) under the Prohibition of Child Marriage Act, 2006; and seven cases (0.4%) under the Information Technology Act, 2000.

5.2 What is the time taken for disposal of “romantic” cases by Special Courts?

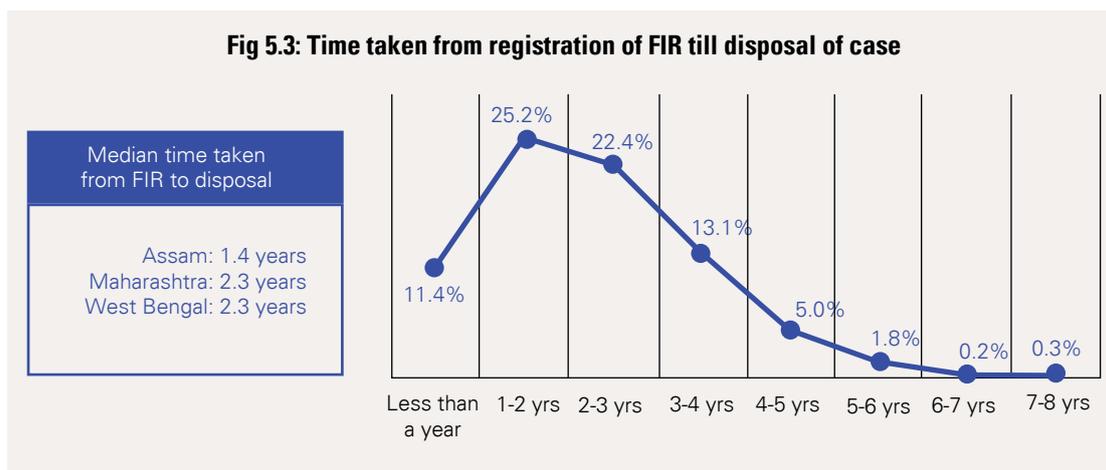
To compute the time taken for disposal of “romantic” cases, the time gap between (a) date of FIR and date of judgment in the three States; (b) date of receipt of case by the Special Court and date of judgment in Maharashtra, was examined. The date of receipt of a case by the Special Court was not available in Assam and West Bengal.

Time taken from FIR to disposal: Since all judgments did not mention the date on which the Special Court took cognisance of the case, therefore, time for disposal was calculated from the date of registration of FIR. Analysis of the data on the time taken from registration of the FIR till disposal revealed that only 196 cases (11.4%) were disposed within a year, while 432 cases (25.2%) took between one to two years, and 384 cases (22.4%) were disposed off between two to three years. 350 cases (20.4%) took more than three years for disposal. The data on date of registration of the FIR was unavailable in 353 cases (20.6%). For penetrative sexual offences, as per Section 167, Cr.P.C, the police would at the most have 90 days to complete investigation, so even if 90 days is considered as when the court took cognisance of the matter, a large number of matters are being disposed outside of the time limit set under Section 35(2), POCSO Act. [Refer Table 5.2: Time taken from registration of FIR till disposal of case for the stage wise break-up.](#)

The median time taken from the lodging of the FIR till disposal was 522.5 days (1.4 years) in Assam, 831 days (2.3 years) in Maharashtra, and 846.5 days (2.3 years) in West Bengal.²³ In Assam, the longest time taken for disposal from time of lodging of FIR or complaint was 7.4 years while the shortest time taken was only 35 days. In West Bengal, the longest time taken for disposal from time of lodging of FIR or complaint was 7.5 years while the shortest time taken was three months. In Maharashtra the longest duration was 7.4 years and the shortest time was two months.

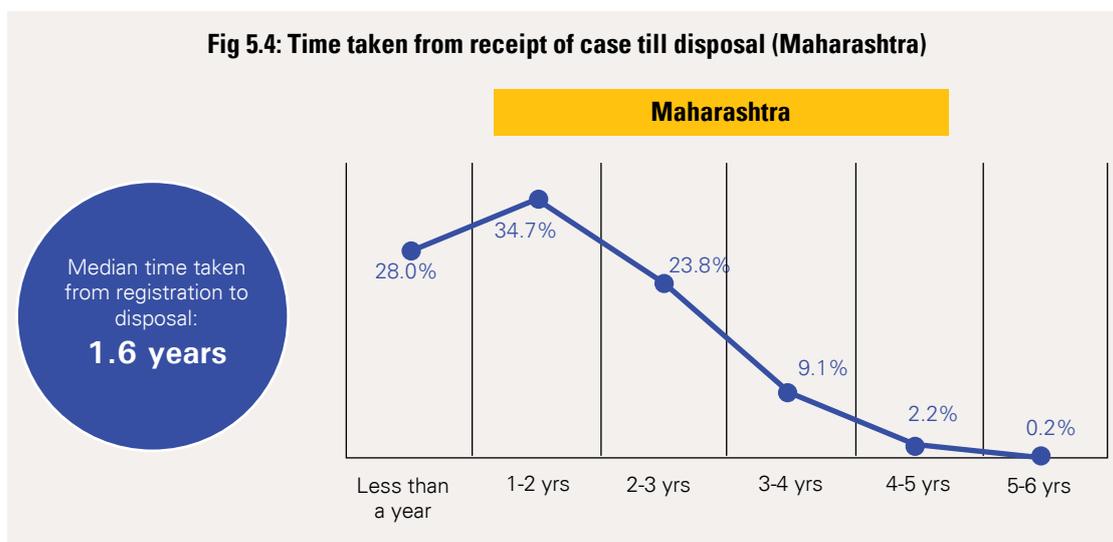
²³ The average time taken for disposal was 636 days in Assam, 951 days in West Bengal, 864 days in Maharashtra.

Fig 5.3: Time taken from registration of FIR till disposal of case



Time taken from receipt of case till disposal: In Maharashtra, 329 cases (28.0%) were disposed within a year, while 408 cases (34.7%) took between one to two years, and 280 cases (23.8%) took two to three years for disposal. About 135 cases (11.5%) took more than three years for disposal. The longest duration taken by the Special Court was five years and four months²⁴ while the shortest was 15 days. **The median time taken by the Special Court to dispose of a “romantic” case from the date of receipt in Maharashtra was 580 days (1.6 years).** Refer Table 5.3: Time taken from receipt of case till disposal (Maharashtra).

Fig 5.4: Time taken from receipt of case till disposal (Maharashtra)

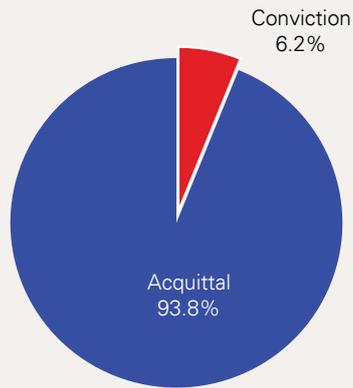


5.3 What were the outcomes in “romantic” cases?

Outcomes under the POCSO Act: Acquittals were the norm in “romantic” cases with 1609 cases out of 1715 cases (93.8%) ending in an acquittal under the POCSO Act and convictions an exception and were recorded in only 106 cases (6.2%). West Bengal did not record any conviction under the POCSO Act. Refer Table 5.4: State wise outcomes in “romantic” cases under POCSO act, IPC and other legislations and Table 5.5: State and year-wise break-up of convictions.

²⁴ The case from Latur district was initially registered in 2014 and re-registered in the year 2016 in the Special Court.

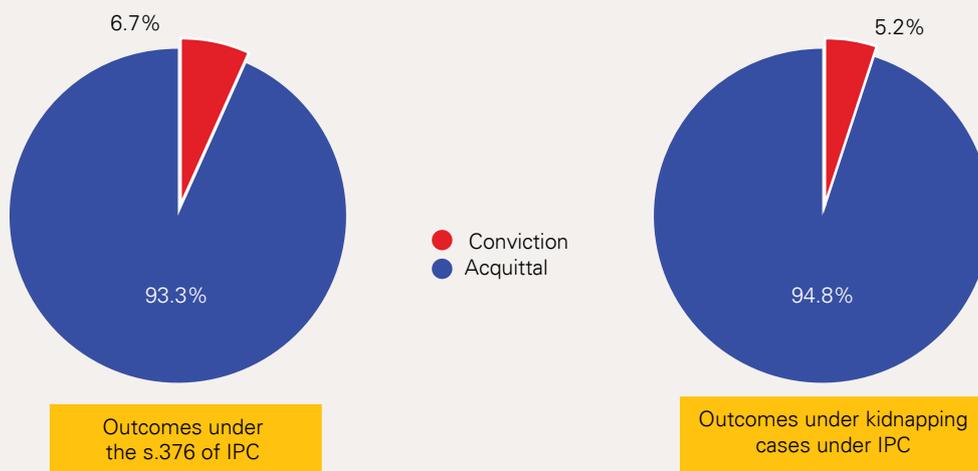
Fig 5.5: Outcomes under POCSO Act



A contrast with the charges revealed that the accused were convicted in 78 out of 1142 cases (6.8%) under Section 4 and 51 out of 613 cases (8.3%) under Section 6. Refer Table 5.6: Contrast between charges and convictions in “romantic” cases.

Outcomes under the IPC: Acquittals under Section 376, IPC were akin to those under the POCSO Act with 1127 cases out of 1208 cases (93.3%) in which the accused was charged under Section 376, IPC ending in acquittal. Convictions were recorded only in 81 cases (6.7%). Similarly, 1086 cases of 1145 cases (94.8%) with kidnapping related charges ended in an acquittal whereas only 59 cases (5.2%) resulted in a conviction. In 772 out of 1145 cases (67.4%), the Special Courts expressly concluded that the girls left home willingly.

Fig 5.6: Outcomes under rape and kidnapping provisions of the IPC

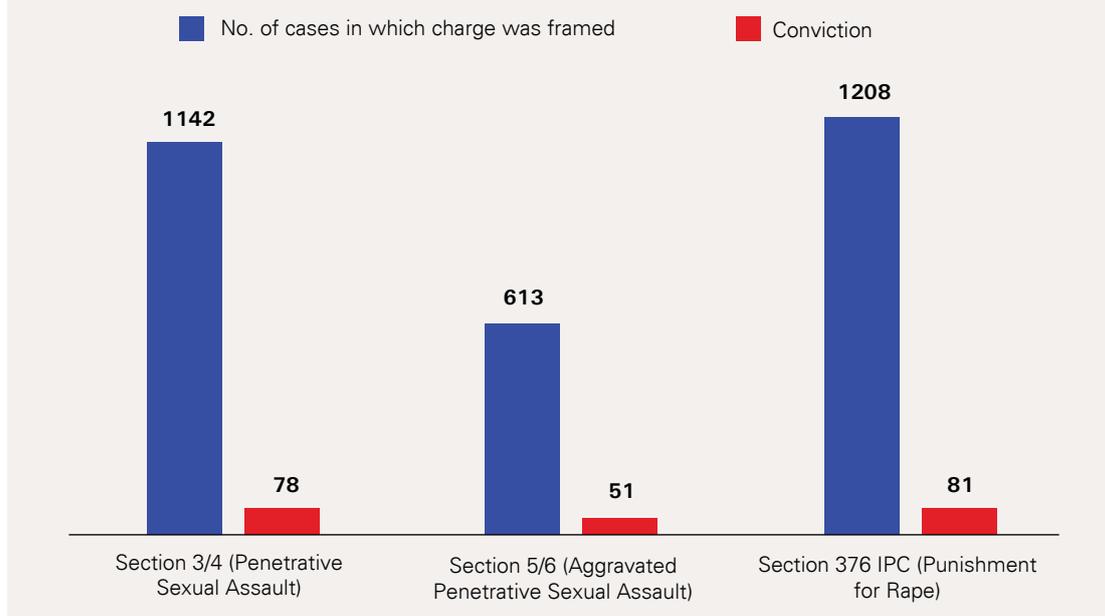


Outcomes under other legislations: Only two convictions were recorded under other legislations; In *State of Maharashtra v. Aasif Qureshi*,²⁵ the accused was convicted under Section 6, POCSO Act, Sections 376(2)(n) and 417, IPC, as well as Section 3(2)(v) of the SC/ST Act. In *State of West Bengal v. Narayan Das*²⁶, the accused was acquitted under the POCSO, but convicted under Section 14A the Foreigners Act, 1946.

²⁵ Special POCSO Case No.11/2019, decided on 31 August 2020 by the Special Court in Gadchiroli.

²⁶ POCSO Case No.120 of 16, dated 27 May 2019 by the Special Court in Cooch Behar.

Fig 5.7: Contrast between charges and conviction under penetrative provisions



* Note that the accused was convicted under multiple provisions of POCSO Act along with Section 376, IPC in some cases details of which are provided in Section 5.4.

5.4 What was the nature of convictions in “romantic” cases?

- Convictions under the POCSO Act:** Overall, there were 106 convictions under the POCSO Act of which 78 convictions were under Section 4, while 51 convictions were under Section 6 of the POCSO Act. In 26 cases in Maharashtra, the Special Courts convicted the accused both under Section 4 and Section 6. In seven cases, the accused was convicted for a penetrative sexual offence, as well as sexual assault under Section 8, POCSO Act. Only three convictions were recorded exclusively under Section 12, POCSO Act. [Refer Table 5.7: Break-up of Convictions under the POCSO Act for state wise and Section wise break up.](#)
- Convictions under the IPC:** Convictions were recorded exclusively under the IPC in 23 cases, and in 98 cases the accused was convicted both under the POCSO Act and IPC.
 - Convictions under Section 376, IPC:** Overall, 81 convictions were recorded under Section 376 of the IPC. In 79 cases, a conviction was recorded both under Section 4 or Section 6, POCSO Act as well as under Section 376, IPC. In two cases, the accused was convicted only under Section 376, IPC.²⁷ In both these cases, although a charge under Sections 4 and 6 of the POCSO Act was present, a conviction was not recorded under the POCSO Act as the minority of the girl was not established by the prosecution.

²⁷ State of Maharashtra v. Shaikh Isak Shaikh Moosa, Spl.Case (Child) No.53/2017 decided on 07 August 2020 by the Special Court in Jalna and State of Assam v. AbuTaher Prodhani, Special Case No. 14 of 2016 decided on 22 March 2017 by the Special Court in Dhubri.

- ♦ **Convictions under kidnapping charges:** Overall, convictions were recorded in 59 cases under one or more kidnapping provisions under the IPC. There were 53 convictions under Section 363, 13 under Section 366, and 11 convictions under Section 366A.
- ♦ **Other convictions under the IPC:** In a small number of cases convictions were recorded under Sections 143 (Punishment for being a member of an unlawful assembly), 147 (Punishment for rioting), 201 (Causing disappearance of evidence of offence, or giving false information to screen offender), 302 (Punishment for murder), 307 (Attempt to murder), 323 (Punishment for voluntarily causing hurt), 341 (Punishment for wrongful restraint), 354 (Assault or criminal force to woman with intent to outrage her modesty), 354A (Sexual harassment and punishment for Sexual Harassment), 377 (Unnatural offences), and 417 (Punishment for cheating).

5.5 Links between nature of testimony and outcomes

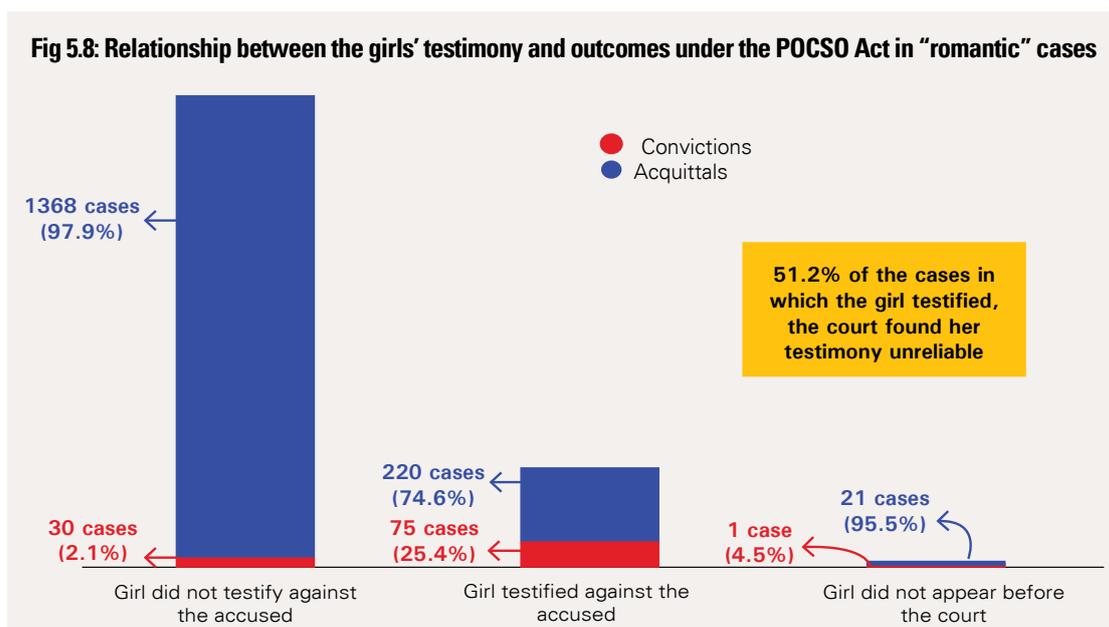
It was seen that the testimony of the girl had a direct impact on the outcome of the cases:

- The rate of conviction was higher in cases where the girl testified against the accused in contrast with cases in which she did not testify against the accused. 75 of the 295 cases (25.4%) where the girl testified against the accused resulted in a conviction.
- Acquittals were recorded in 220 cases (74.6%) in which the girl testified against the accused. An analysis of the appreciation of the girl's testimony by the Special Court revealed that of the 295 cases in which she testified against the accused, her testimony was considered wholly or partially unreliable in 151 cases (51.2%). Further, in the 220 cases that resulted in an acquittal, the girls' testimony was considered unreliable in 149 cases (67.7%). For instance, in *State of Assam v. Selim Uddin*,²⁸ the girl testified that the accused had entered her home, committed penetrative sexual assault and had applied force. She had shared the incident with her mother and her brother. When her brother went to confront the accused, they got into a scuffle and a FIR was lodged by both parties, but no reference was made to the rape of the girl by the accused. Subsequently, a second FIR was lodged by the girl alleging rape. The defence plea was that the second FIR was lodged after the girl's family realized that the previous FIR against the accused was not very strong. It was brought to light that the girl had stated to the investigating officer that she was having a love affair with the accused for about a year. Although the prosecution successfully established that the girl was a minor and raised the presumption under Section 29, POCSO Act, the Special Court held that through "effective cross-examination, the defence has succeeded in showing that the prosecution has failed to prove, even on balance of probabilities", the basic ingredients of the offence and the foundational facts. The medical evidence did not support the allegations of rape. Further, the mother, brother, and other prosecution witnesses had not stated anything to the police about the rape of the girl by the accused and the Investigation Officer confirmed that the girl had stated that she was having a love affair with the accused. The victim's testimony was considered unreliable and the accused was thus acquitted under Section 4 and 10, POCSO Act and Sections 354, 376, and 450, IPC.

²⁸ Special Sessions Case No. 25/2016 decided on 11/12/19 by the Special Court in Karimganj (Assam).

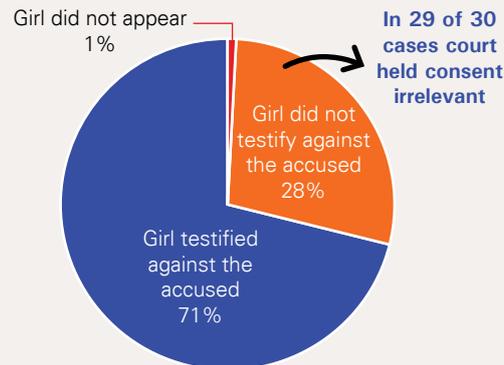
- In contrast, convictions were recorded in only 30 of the 1398 cases (2.2%) where the girl did not testify against the accused, while acquittals resulted in 1368 cases (97.8%).
- Of the 22 cases in which the girl did not appear before court, conviction was recorded in only one case and acquittals in 21 cases where the girl did not appear before court. In *State of Maharashtra v. Akshay Haridas Bobade*,²⁹ the father of a 13-year-old girl lodged a complaint after his daughter died by suicide indicating in a note that the accused's refusal to marry her was the reason. The Special Court held that the factum of sexual assault stood established based on the evidence of the medical officer, IO and the suicide note of the victim, and from the cross-examination of the lodge owner where the victim and accused had stayed. The Medical Officer deposed that the hymen was torn, and the vagina and rectum admitted two fingers. The Special Court also applied the presumptions under Sections 29 and 30 of the POCSO Act. The accused was convicted under Sections 305 and 376(2)(i), IPC and Section 4, POCSO Act. In view of Section 42, POCSO Act, he was sentenced to 10 years rigorous imprisonment and a fine of Rs 5000 under Section 376(2)(i) and seven years rigorous imprisonment under Section 305, IPC and a fine of Rs 5000. Both sentences were to run concurrently.
- The girls' admission to the "romantic" relationship also had a bearing on the outcomes in these cases. Of the 1508 cases in which the victim admitted the relationship, acquittals were the norm in 1421 cases (94.2%) and convictions were recorded in only 87 cases (5.8%).
- A review of the pattern of testimonies in cases that ended in convictions revealed that in 75 cases (70.8%) the victim testified against the accused. Although in 30 cases (28.3%), the girls did not testify against the accused, the Special Courts proceeded to convict the accused and in 29 of these cases it stated that the consent of the girl was immaterial.

Refer Table 5.8: Relationship between the testimony of the girl and the outcomes under POCSO Act.



²⁹ S.C. No. 93/2017, decided on 17/04/2019 by Special Court in Solapur (Maharashtra).

Fig 5.9: Breakup of cases which resulted in a conviction as per girls' testimony



In two cases, the girl's testimony with respect to the manner in which the accused had taken her was considered to be improbable by the Court, but her testimony with respect to the penetrative sexual assault was considered reliable. In *State of Assam v. Sudem Narzary*³⁰, the girl's father filed a police complaint alleging the accused had kidnapped and married her, and then confined her. The girl testified before the Special Court that the accused gagged her and forcefully took her on his motorcyle, married her, and had forceful sexual intercourse with her. In her cross-examination, the girl admitted to having a "romantic" relationship with the accused but denied the suggestion that the sexual intercourse was with her consent. The Special Court reached the conclusion that the girl as a witness was "partly reliable and partly unreliable". The Special Court stated that considering the fact that the victim admitted to the love affair, her statement in her deposition that she was forcefully taken by the accused is not believable, and acquitted the accused of kidnapping charges under Section 366A IPC. However, the Special Court relied on the fact that defence claimed that the sexual intercourse took place between the girl and the accused was consensual, but as the minority of the girl was proved, the Special Court concluded that the consent of the girl to sexual intercourse was irrelevant as she was a minor and convicted the accused of charges under Section 376(2)(i) IPC and Section 4 of the POCSO Act.

In *State of Maharashtra v. Balu Ganesh Borkar*,³¹ the girl's brother lodged a FIR alleging that the accused persons had kidnapped his 16-year old sister and that the primary accused had sexual intercourse with her on the promise of marriage. The girl testified before the Special Court that she went to meet the primary accused and he asked her to elope with him and get married to him. Upon her refusal, he forcefully took her and had forced sexual intercourse with her. The Special Court reached the conclusion that the fact she went willingly to meet the primary accused and that she did not raise a hue and cry when she was with him proves that they had consensual sexual intercourse and that there was a love affair between them. However, the Special Court held that since the minority of the girl is proved, her consent is irrelevant and convicted the accused under Sections 363, 376 IPC and Section 4 of the POCSO Act.

Refer to sections: 5.8 What were the trends observable in cases of convictions in "romantic" cases? and 5.9 What were trends observable in cases of acquittals in "romantic" cases? for an explanation of the trends in convictions and acquittals, respectively.

³⁰ Special (P) Case No. 16(S)/2017 decided on 04/05/2019 by the Special Court in Chirang (Assam).

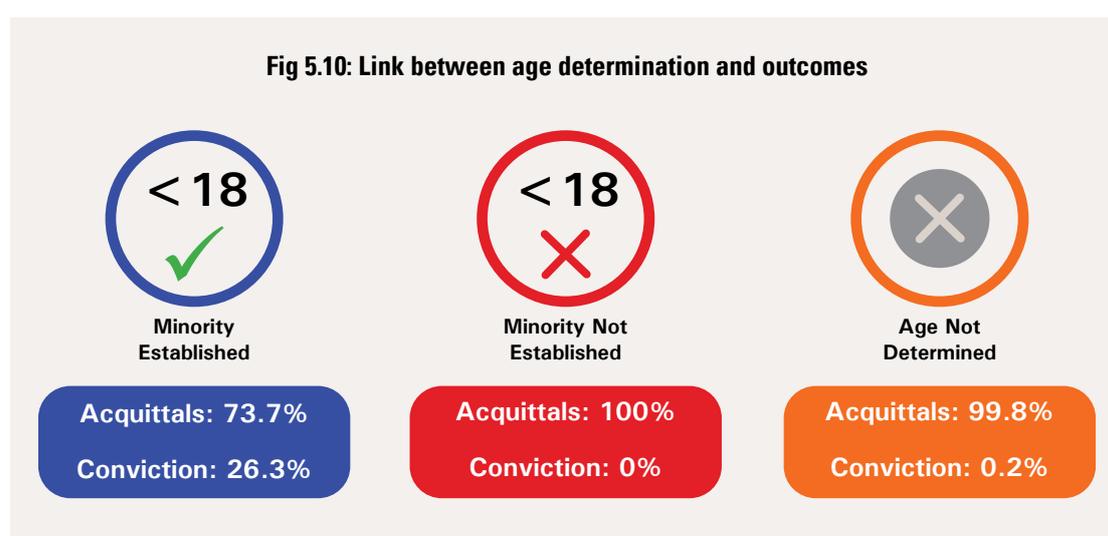
³¹ Spl. Child Case No, 59/2016 decided on 10 October 2017 by the Special Court in Washim (Maharashtra).

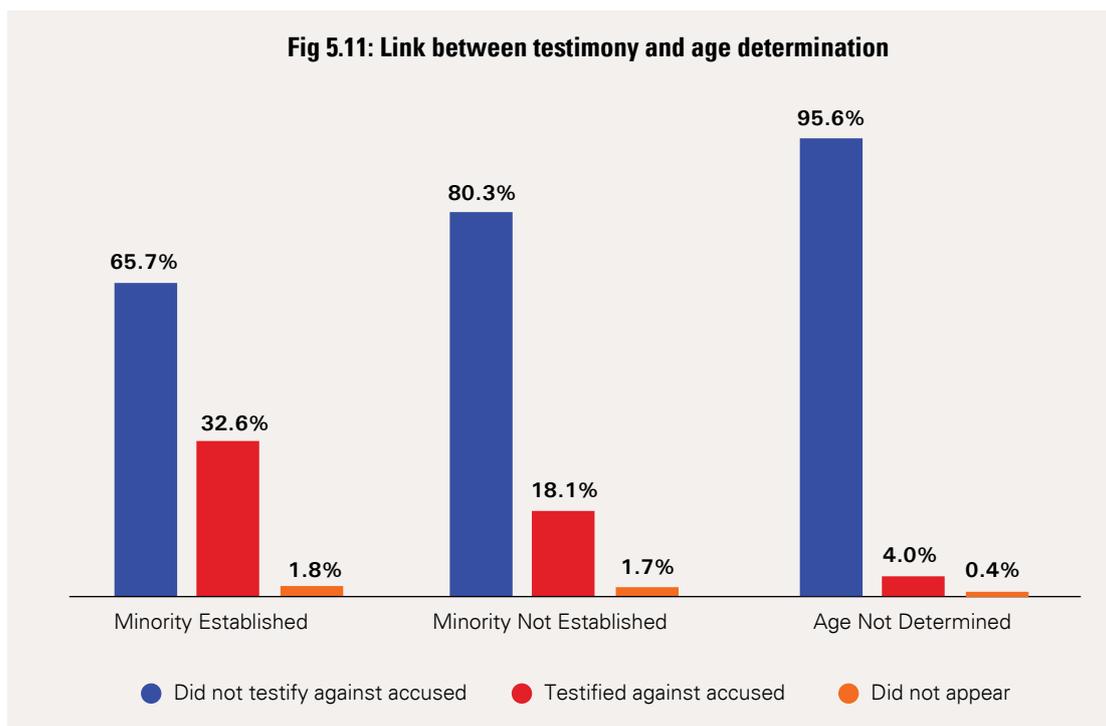
5.6 What was the link between the conclusions of the Special Court with respect to the age of the girls, nature of testimony, and the outcome under the POCSO Act?

A clear correlation was observed between the court's conclusion on age of the girl and outcomes.

- In 770 cases, the Special Court held that the minority of the girl had not been established by the prosecution. The girl did not testify against the accused in 618 cases (80.3%), testified against the accused in 139 cases (18.1%) and did not appear before the court in 13 cases (1.7%). **Owing to the failure to establish the girl's minority, in all 770 cases, the accused was acquitted under the POCSO Act.** (See Fig No. 5.11).
- In 399 cases, the minority of the girl was established. Of these, convictions were recorded in only 105 cases (26.3%). In 262 cases out of 399 cases (65.7%), the girls did not testify against the accused, in 130 cases (32.6%) they testified against the accused, and in seven cases (1.8%) they did not appear in court. Acquittals were recorded in 232 cases because the girl did not testify against the accused and in 56 cases, her testimony was found unreliable.
- **In 502 cases there was no express determination of age by the Special Court. Of these cases, acquittals were recorded in 501 cases (99.8%) and a conviction was recorded in only one case.** In 480 (95.6%) of these cases, the girl did not testify against the accused, while in only 20 cases (4%) the girl testified against the accused. In two cases (0.4%), the girl did not appear before the court for her testimony.

Refer Table 5.9: Link between testimony and age determination and Table 5.10: Link between conclusion on age of victim and outcome under POCSO Act.





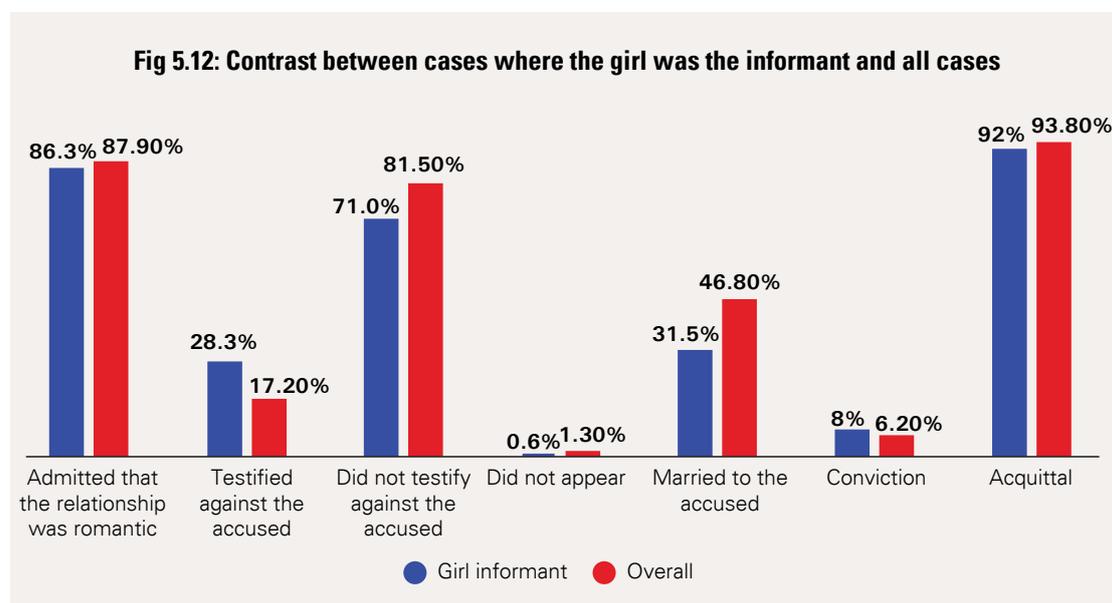
5.7 What was the nature of testimony and outcomes in the cases in which the girls lodged the FIR?

- Admission of “romantic” relationship:** In 271 cases (86.3%) out of the 314 cases in which the girl was the informant, she admitted being in a “romantic” relationship with the accused. Convictions were recorded in only 18 of these cases (6.6%). [Refer Table 5.11: Admission to the “romantic” relationship, nature of testimony and outcomes where girl was the informant and Table 5.12: Outcomes in cases where girls were informants in relation to admission, testimony, and marriage for a State-wise break-up.](#)
- Testimony & Outcomes:** Of the 314 cases in which the girl was the informant, in a majority of the cases i.e. 223 cases (71%), the girl did not testify against the accused. The girls testified against the accused in 89 cases (28.3%) and did not appear before the court in two cases. Overall, **25 cases (7.9%) resulted in a conviction and a majority i.e., 289 cases (92.0%) ended in an acquittal.**
- Marriage to accused:** In nearly a third of the cases, i.e., in 99 cases (31.5%) the girl was married to the accused person- of which in six cases she was stated to be married to him at the time of filing of the FIR, and in 93 cases, they married after the case was registered. Only two cases resulted in a conviction (2%) and acquittals were recorded in the remaining 97 cases (98%). Out of the six cases where the girl was married to the accused at the time of the incident, in two cases, the girl stated in her testimony that she was pressured to file the case by her parents or co-villagers.³² In another case, in the FIR the girl alleged that her husband and his father had inflicted

³² State of Maharashtra v. Sachin Bhaskar Bhusare, Sessions Case No. 77/2018 decided by the Special Court in Nashik on 04-07-2019 (Maharashtra). State of Maharashtra v. Ashoke Mahadeo & Ors., Sessions Case No. 131/2016 decided by the Special Court in Ahmednagar on 13-03-2018 (Maharashtra).

physical and mental cruelty but turned hostile during her testimony before the Special Court.³³ In one case the girl alleged that the accused had coerced her into marrying him, which she reiterated in her testimony.³⁴ In another case, the girl and accused eloped and married and stayed as husband and wife in a rented house for a month. However, when the couple went to the house of the accused's parents, they did not accept the girl and did not permit her to stay with them prompting her to lodge an FIR.³⁵

- In *State of Maharashtra v. Bhatiya @ Rahul Arjun Gore*,³⁶ decided in 2016, the girl did not testify against the accused and stated that she was already married to him when they had sexual intercourse and did not state that he had sex with her based on a promise of marriage. The court observed that she was above 15 years at the time of the first date of sexual assault and since she was married to the accused, the exception under Section 375 wherein sexual intercourse by a person with his own wife not being under 15 years would not amount to rape would apply.³⁷



5.8 What were the trends observable in cases of convictions in “romantic” cases?

The accused was convicted in 106 (6.2%) of 1715 cases. Some of the factors that influenced convictions were the girl’s testimony against the accused, the establishment of her minority by the prosecution, presence of problematic factors (See Section 2.4), and the Special Court’s conclusion that consent of the girl was irrelevant. Refer Table 5.13: Illustrative factors that contributed towards convictions in “romantic” cases for a stage wise break-up. An explanation of the factors is provided below.

³³ State of West Bengal v. Raju Kirtonia, Sessions Case No. 16/2017 decided by the Special Court in North 24 Parganas on 18-05-2018 (West Bengal).

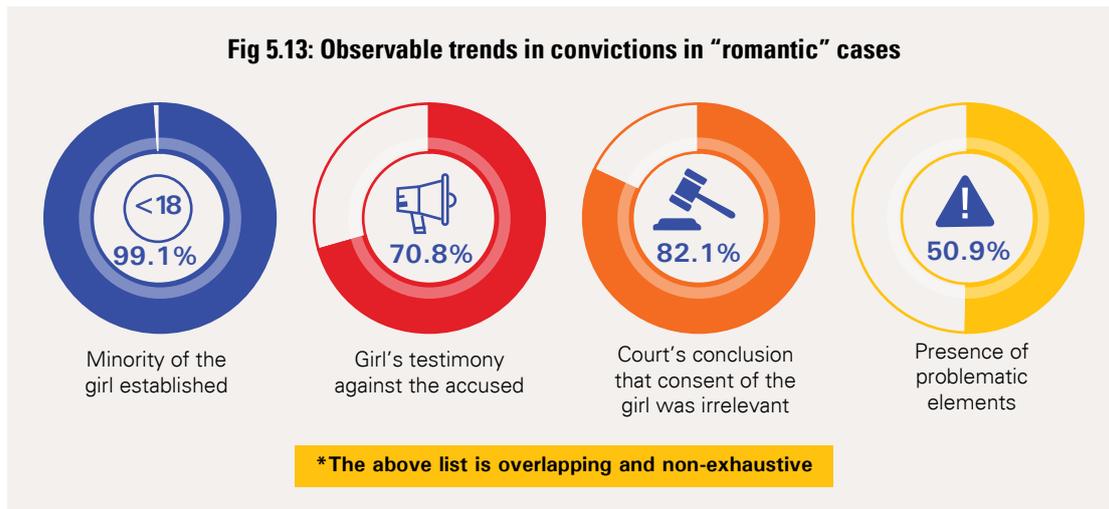
³⁴ State of Maharashtra v. Rajendra Suresh Sale & Anr., Sessions Case No. 191/2017 decided by the Special Court in Ahmednagar on 24-06-2019 (Maharashtra).

³⁵ State of Maharashtra v. Jashim Uddin Barbhuiya, Sessions Case No. 5/2019 decided by the Special Court in Silchar on 13-12-2019 (Assam).

³⁶ Sessions Case No. 85/2016 decided by the Special Court in Pune on 14-03-2016 (Maharashtra).

³⁷ Section 375 Exception 2. Note that this provision has been struck down in so far as it permits sexual intercourse with a married girl child below 18 years by the Supreme Court in Independent Thought v. Union of India, AIR 2017 SC 494.

Fig 5.13: Observable trends in convictions in “romantic” cases



Girl testified against the accused: Of the 106 cases that resulted in a conviction, in 75 cases (70.8%) the girl testified against the accused person.

Minority Established: In 105 of the 106 cases (99.1%) ending in conviction, the minority of the girl was established. In one case (from Assam) a conviction was recorded under the POCSO Act despite the Special Court not determining the age of the girl. In 74 of the 106 convicted cases (69.8%), the convictions were based both on the testimony of the girl against the accused, as well as the fact that her minority was established by the prosecution.

Presence of problematic factors: In 54 of the 106 convictions (50.9%), one or more problematic factors were observable from the facts of the case. This included cases in which the victim testified that the sexual activity was non-consensual, the accused was in a position of trust or authority or presence of violence in the relationship. In *State of Maharashtra v. Ankush Laxman Boke*,³⁸ a 13-year-old girl's family members were engaged to cut sugarcane under the accused's contractorship. The accused was also a married man. The girl's cousin brother had seen her being taken in the night by the accused on his motorcycle. Her brother alerted her father and a search was initiated, after which she was found in a pit in the accused's village. She disclosed to her family that the 30-year-old accused on the pretext of marriage had sexual intercourse with her many times. However, she did not testify against the accused in court. In her examination-in-chief she stated that she had called the accused to meet him and stayed with him the night before returning to her house. Upon being cross-examined by the APP, she stated that the accused had called her on the phone and she went with him on his motorcycle to his village and stayed one night. She stated that she had shown the police the *nala* in which she was found and that the accused had left to get eatables for her. Although she had disclosed that the accused had sexual intercourse with her two-three times in her statement under Section 164, Cr.P.C, in her testimony she stated that she had not had any sexual intercourse with anyone. Her parents also did not support the prosecution. The Special Court, however, observed that the "accused being the contractor is in dominant position" and the parents of the girl were poor labourers and,

³⁸ Spl. Case No. 19/2018 decided on 21/05/2019 by the Special Court in Yavatmal (Maharashtra).

these circumstances, it is natural for them not to support the prosecution. The accused was convicted under Sections 363, 366-A, and 376(2)(i)(n) of the IPC and Sections 4 and 6 of the POCSO Act.

In *State of Assam v. Bani Kanta Ray*³⁹, the accused person was charged with aggravated penetrative sexual assault against the 17-year-old girl. The girl testified that the accused used to speak with her over a mobile phone and gradually developed an online relationship with her. Although she had never met him in person, he lured her into leaving home and she travelled with him to Guwahati and Chandigarh. He committed penetrative sexual assault with her multiple times. Based on her father's complaint, when the police rescued her, they also found another woman living with the accused. She stated that she knew the accused by a different name and had met him when she was 16 years old. They developed intimacy and got married and had been living together as husband and wife for five years. A third girl also surfaced after seeing a newsreport on the accused person and deposed that she was also lured by the accused when she was 16 years old and the accused took her to Delhi and other cities where he had forceful sexual intercourse with her. Further, she stated that she was prostituted to other persons and was kept by the accused for five years and was subsequently abandoned on the road. Upon hearing the evidence of the girl and the two other women, the Special Court concluded that:

“... what distinctly transpires is that at different periods, the accused Bani Kanta Ray being a man of 40/45 years in different names got introduced with them the teenagers and somehow developing intimacy with those minors under the age of 18 years, on the pretext of love, had taken them to Chandigarh and did have physical relation with them.”

The Special Court rejected the defence plea that the girl had accompanied the accused willingly and had consented to sex. It held that her consent was immaterial and put the onus on the accused to take her back to her home. The accused was convicted under Section 366, IPC and Section 6, POCSO Act. He was sentenced to rigorous imprisonment for seven years and a fine of Rs 1000, in default one month simple imprisonment under Section 366 IPC and rigorous imprisonment for life and a fine of Rs 5000, in default two months rigorous imprisonment under Section 6, POCSO Act. Both sentences were to run concurrently. The DLSA was also directed to award compensation to the girl.

Irrelevance of consent: In 87 of the 106 convictions (82.1%) the court expressly stated that the consent of a minor was immaterial for recording a conviction under the POCSO Act. In 28 cases, this was one of the principal reasons for conviction even though the girl did not testify against the accused.

In *State of Assam v. Anjan Kumar Manjhi*,⁴⁰ girl's father lodged an FIR alleging that his 17-year old daughter did not return home and he suspected that the accused might have kidnapped her. The girl went willingly with the accused and stayed with him as his wife in his uncle's house and engaged in sexual intercourse. The Special Court expressly noted

³⁹ Special (P) Case No.6(BGN)/2017 decided on 09/05/18 by the Special Court in Bongaigaon (Assam).

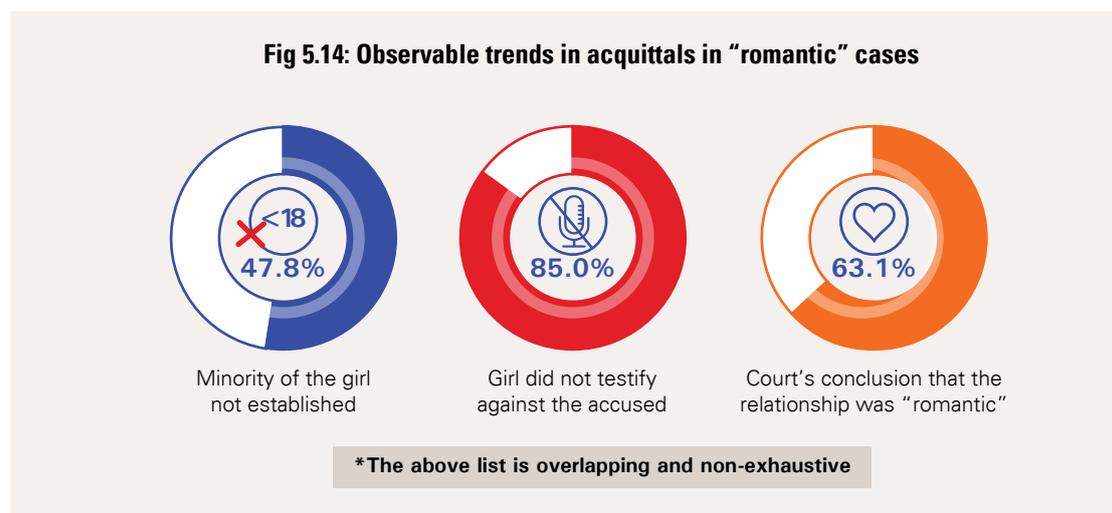
⁴⁰ POCSO Case No. 12/2018 decided on 23/09/18 by the Special Court in Karbi Anglong (Assam).

that “[t]he victim has clearly admitted” that she and the accused’s love affair “continued for 3 (Three) years and that on her sweet will she fled away with the accused to Bihar” and also that “the accused made sexual intercourse with her due consent”. The Special Court noted that the girl declared “that she does not desire the accused person to be punished.” However, it held that the girl’s consent was immaterial. It placed reliance on the Supreme Court’s decision on *Independent Thought v. Union of India*⁴¹ and concluded that “[i]t has become crystal clear that the POCSO Act is [e]nacted especially for the protection and welfare of the child. For committing penetrative sexual assault consent of the girl is immaterial. The offence committed in this instant case is against the State and as such the accused cannot go unpunished.” The accused was sentenced to rigorous imprisonment of six months under Section 363, IPC and rigorous imprisonment of seven years and a fine of Rs 1000 and two months simple imprisonment in default of payment of fine under Section 4, POCSO Act.

Other considerations for convictions in cases where the courts found a “romantic” relationship between the girl and the accused were that the consent of the girl was vitiated because of misrepresentation of fact or on a false promise of marriage and therefore not valid.

5.9 What were trends observable in cases of acquittals in “romantic” cases?

Acquittals were recorded in 1609 out of 1715 cases (93.8%) and the trends visible were the failure of the prosecution to establish the girl’s minority, the girls not testifying against the accused, or retracting during cross-examination, as well as the Special Court’s conclusion that the girls’ testimony was not reliable. Refer Table 5.14: [Observable trends in acquittals in “romantic” cases for state wise break-up.](#)



⁴¹ (2017) 10 SCC 800 (Supreme Court).

Girls did not testify against the accused person: In 1329 of 1609 acquittals (82.6%), the girl did not testify against the accused. This was cited by most Special Courts as the reason for the acquittal - as the girl did not support the prosecution's allegations and incriminate the accused in her testimony. In 1508 out of 1715 cases (87.9%), the victim admitted that she was in a consensual relationship with the accused and in 1421 (94.2%) of these cases, the Special Court acquitted the accused.

In *State of Maharashtra v. Vilas Dhanraj Nagose*⁴², the girl's father lodged a FIR alleging that the accused had kidnapped his 16-year old daughter. The girl testified that as her father did not allow her to attend school and used to abuse her, she asked the accused to take her away from her father. Further, she stated that she was now married to the accused and was residing with him. The Court held that the prosecution had failed to establish the minority of the accused, that there was a love affair between the accused and the girl and they had consensual sexual intercourse. The accused was acquitted of charges under Sections 363, 376, 376(2)(j)(n) of the IPC and Section 6 of POCSO Act.

Another reason for acquittals was the retraction of allegations by the girl during her testimony. In 39 cases (2.4%), although the girl testified against the accused during the examination-in-chief, she retracted her allegations during the cross-examination and stated that no offence had occurred. For instance, in *State of Assam v. Md. Gulzar Hussain*⁴³, the girl stated in her examination-in-chief that the accused had kidnapped her, forcibly had sex with her, and prevented her from contacting her mother. However, in her cross-examination she stated that she deposed against him because she was angry with him and found out he was poor only after she left home with him. In *State of Assam v. Al Masud Jahan @ Al Masud Hasan @ Liku*⁴⁴, an FIR was lodged by the girl's uncle alleging that she had been kidnapped and raped by the accused person. The girl deposed that the accused person along with some unknown persons gagged her mouth and kidnapped her in a white Maruti car. She was kept in a hotel room for 21 days where the accused also had forced sexual intercourse with her. However, in the cross examination, the girl stated that she went willingly with the accused and admitted to the love affair. She even admitted that she coerced the accused to take her, telling him that she would die if he did not take her. The Special Court concluded that it was hard to believe her version of events and acquitted the accused person.

Minority not established: In 769 of 1609 acquittals (47.8%), the Special Court noted that the prosecution had failed to establish the minority of the girl, which rendered the POCSO Act inapplicable. For instance, in *State of Assam v. Md. Didar Ali*,⁴⁵ the girl lodged the FIR against the accused alleging that when she was returning home after cutting straw, the accused gagged her mouth, carried her to a nearby jungle and raped her. A village *mel* had been held but since no solution could be arrived at, an FIR was lodged. In her evidence, the girl disclosed that she was in a relationship with the accused for three years. She had eloped with him and stayed with him for 10-15 days, but there was no physical relations between them. Since the accused refused to marry her, she lodged the FIR. She claimed that she was 18 years old at the time. She also stated that her mother had tutored her to depose against the accused in her statement under

⁴² State of Maharashtra v. Vilas Dhanraj Nagose, Spl. (POCSO) Case No.83/2019 decided on 26/06/19 by the Sessions Judge in Amravati (Maharashtra).

⁴³ Sessions (Spl.) Case No.35/2016 decided on 31/05/2017 by a Special Court in Morigaon (Assam).

⁴⁴ Special POCSO Case No. 14/2018 decided on 22/04/2019 by the Special Court in Barpeta (Assam).

⁴⁵ Spl. (P) Case No.26/2017 decided on 24/01/19 by the Special Court in Nalbari (Assam).

Section 164, Cr.P.C. Within a week of lodging the FIR, the accused had agreed to marry the girl and they subsequently got married. She also stated that they were living as husband and wife and had a child. Based on the evidence of the girl and her mother, the Special Court concluded that she went willingly with the accused and she was a “consenting party.” Observing that “consent of a minor does not amount to consent in the legal sense”, the Special Court proceeded to examine whether the girl was a minor. Although as per the radiological report, she was found to be above 14 years and below 16 years, the Special Court held that there can be a variation of two years on either side, “adding the variation of two years on upper side the possibility cannot be ruled out that her age is near about 18 years.” It also relied on the testimony of the girl and her mother - both stating that she was 18 years at the time of their incident and relied on the principle that if two views are possible, the view favourable to the accused should be accepted to conclude that she was a major. The accused was thus acquitted under Sections 366/376(2)(i) of the IPC read with Section 4, POCSO Act.

Girl’s testimony considered unreliable: In 149 cases in which the victim testified against the accused, her testimony was considered unreliable and the accused was acquitted. In *State of Maharashtra v. Amirkhan Mulla*⁴⁶, the girl lodged an FIR alleging that the accused used to harass her, and that one day he caught hold of her hand, told her that he liked her, wanted to marry her, and started pulling her. The Court observed that there were discrepancies between the allegations made by the girl in her FIR and her testimony before Court, regarding the date and specifics of the incident. Further, the Court observed that there was overwriting of “today” with “yesterday” in the FIR. Further, the defence produced photographs of the girl and accused hugging and sitting close to each other, and alleged that there was a love affair between them. The Court held that on the basis of these photographs, the possibility of a love affair between the girl and accused cannot be ruled out. Hence, the Special Court held that the material circumstances of the case creates reasonable doubt about the case of the prosecution and acquitted the accused of charges under Section 354(A) (i) (ii), 354(D) of IPC and Section 7 read with Section 8 of POCSO.

In *State of West Bengal v. Papon Roy*⁴⁷, the girl’s father lodged an FIR alleging that the accused raped his 17-year old daughter on the false pretext of marriage, and when the girl asked him to marry her, he refused and threatened her with dire consequences. The Special Court held that from the evidence of the girl, it is clear that the accused used to stay in her house in the presence of her guardians and the fact that the accused raped the girl in their absence was false as the girl stated that there is only one room in her house. Further, the Court observed that there were a lot of contradictions between the statement of the girl, and her parents. Further, the evidence suggested that the girl had a love affair with the accused and the case was lodged because the accused refused to marry her. It concluded that the prosecution had failed to establish the case against the accused beyond all reasonable doubt and acquitted him under Section 6, POCSO Act.

Relationship was consensual: In 1015 cases of the 1609 acquittals (63.1%), the Special Courts concluded that the relationship between the girl and accused person was consensual in nature.

⁴⁶ State of Maharashtra v. Amirkhan Mulla, Special Case No. 12/2016 decided on 13/11/2019 by the Sessions Court/Special Judge in Sangli (Maharashtra).

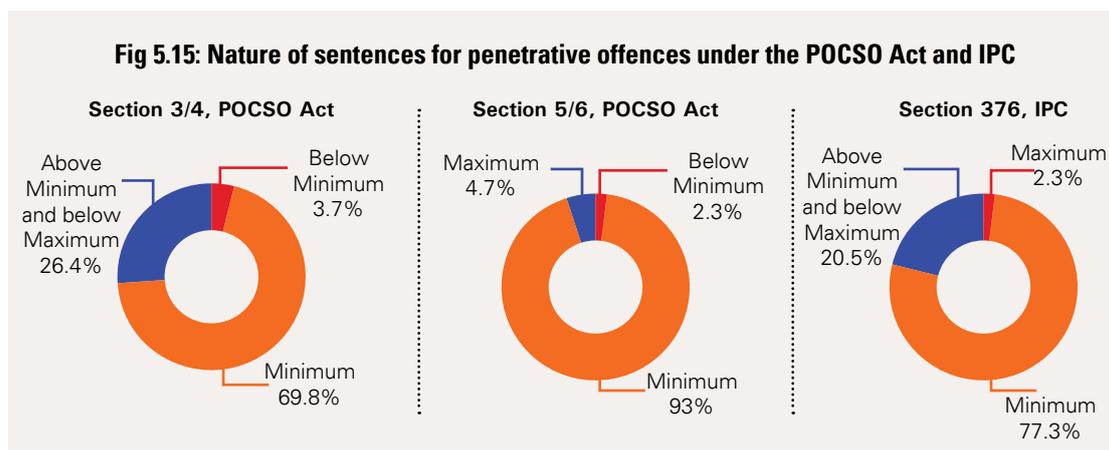
⁴⁷ State of Maharashtra v. Papon Roy, POCSO Case No. 213/2015 decided by the POCSO Court-Cum- Additional Sessions Judge, 2nd Court in Cooch Behar on 30-09-2020 (Maharashtra).

5.10 What was the sentencing pattern in “romantic” cases?

Sentencing under the POCSO Act: Of the 106 convictions, the accused was sentenced under the POCSO Act in 90 cases. In the remaining 16 cases although convicted under POCSO Act, the sentence was passed under the IPC, in accordance with Section 42 of the POCSO Act. In 12 cases, sentences were passed both under Sections 4 and 6 of the POCSO Act, alongwith the direction that they were to run concurrently.

- **Sentencing under Section 4, POCSO Act:** In the 53 cases, in which the sentence was passed under Sections 4 of the POCSO Act, the Special Courts preferred to impose the minimum sentence in the majority of cases i.e 37 cases (69.8%) and in 14 cases (26.4%), the sentence imposed was above the minimum sentence but below the maximum sentence. In two cases (3.7%), the Special Court imposed the sentence below the minimum.
- **Sentencing under Section 6, POCSO Act:** Of the 43 cases in which the sentence was passed under Section 6, POCSO Act, the minimum sentence was imposed in 40 cases (93%); life imprisonment was imposed in two cases (4.7%); and in one case it was below the minimum sentence (2.3%).
- **Sentencing under Section 376, IPC:** In 44 cases, where the accused was sentenced under Sections 376(1) or 376(2) of the IPC, the minimum sentence was imposed in 34 cases (77.3%). In nine cases (20.5%), a sentence which is above the minimum sentence but below the maximum sentence was imposed. In one case (2.3%), the maximum sentence i.e. life imprisonment was imposed.

Refer Table 5.15: Nature of sentences for penetrative offences under the POCSO Act and Section 376, IPC.



Imposition of life imprisonment under POCSO Act: In *State of Maharashtra v. Aasif Qureshi*,⁴⁸ the girl filed a complaint against the accused (age 28 years) stating that he committed aggravated penetrative sexual assault against her multiple times. On the basis of this complaint, the accused was charged under Sections 4 and 6 of the POCSO Act;

⁴⁸ State of Maharashtra v. Aasif Qureshi, Spl. POCSO CASE No.11/2019 decided by the Special Court in Gadchiroli on 31-10-2020 (Maharashtra).

Sections 376(2)(n), 417, and 506-II of the IPC; and Sections 3(1)(w)(i)(ii) and 3(2)(v) of the SC/ST Act. During the trial, the prosecution successfully established that the girl had been a minor at the time of the incident. The court also concluded that the accused committed penetrative sexual assault against the girl multiple times under the pretext of marrying her. Due to this, the girl became pregnant and the accused forced her to consume pills to abort the pregnancy. Later, the accused refused to marry her, saying that he would not marry someone belonging to the 'Gond' caste. The accused was therefore convicted under Section 6 of the POCSO Act, Section 376(2)(n) and 417 of the IPC,⁴⁹ and Section 3(2)(v) of the SC/ST Act. The accused was sentenced to one year of rigorous imprisonment and a fine of Rs. 1,000 under Section 417. Under Section 6 of the POCSO Act, the accused was sentenced to the maximum sentence of life imprisonment and was directed to pay a fine of Rs. 50,000, and in default, would have to suffer simple imprisonment for six months. Under Section 3(2)(v), SC/ST Act, the accused was once again sentenced to life imprisonment and a fine of Rs. 10,000, and in default, would have to suffer simple imprisonment for one month.

In *State of Assam v. Bani Kanta Ray*,⁵⁰ described above, the Special Court concluded that the accused, a man of 40/45 years, would develop an intimacy with teenagers below the age of 18 years, and on the pretext of love, would take them to Chandigarh and have physical relations with them. The Special Court sentenced the accused to life imprisonment under Section 6, POCSO Act.

Imposition of sentence below the minimum under POCSO Act: In three cases, a sentence below the minimum sentence was imposed in cases of penetrative sexual assault under the POCSO Act. In *State of Maharashtra v. Rahul Govind Lad*,⁵¹ it was alleged that the accused committed penetrative sexual assault against the girl after taking her to a lodge. However, the court concluded that the girl had been involved in a consensual sexual relationship with the accused. Since the prosecution succeeded in proving that the girl had been 16 years old at the time of the incident, the accused was convicted under Section 4, POCSO Act and Section 376, IPC. The Special Court concluded that once a girl reaches an age of maturity (not necessarily the age of consent), she can make decisions for herself. The Special Court held:

“When a girl has attained the age of maturity, may not be she has become major, she can take her decisions. Only because the victim girl and accused took decision to have intimate relationship and further they went for physical relationship, no severe punishment can be awarded to the accused when affair was going on with mutual understanding...”

The accused was consequently sentenced under Section 4, POCSO Act to rigorous imprisonment for three months, given that the accused had already been in prison for a four month period, and a fine of Rs. 10,000, in default of payment of which he was directed to suffer simple imprisonment of one month.

⁴⁹ Indian Penal Code 1860, s. 417- Punishment for cheating.

⁵⁰ *State of Assam v. Bani Kanta Ray*, Special (P) Case No. 6(BGN)/2017 decided by the Special Court in Bongaigaon on 09-05-2018 (Assam).

⁵¹ *State of Maharashtra v. Rahul Govind Lad*, Sessions Case No. 18/2017 decided by the Special Court in Ahmednagar on 29-11-2017 (Maharashtra).

Similarly, in *State of Maharashtra v. Sushant*,⁵² the girl's mother alleged that the accused, aged 21 years, had committed penetrative sexual assault against the girl. The accused was charged with offences under Sections 4 and Sections 363, 366A, 376(2)(n), of the IPC. The Special Court concluded that the girl had engaged in a consensual sexual relationship with the accused and the prosecution had been successful in proving that the girl had been 15 years old at the time of the incident. The accused was convicted under Section 4 of the POCSO Act and Section 376 of the IPC. However, the Special Court noted that the accused and the girl had fallen in love with each other and that a harsh punishment would ruin the accused's career. Therefore, the accused was sentenced to five weeks of simple imprisonment and a fine of Rs. 10,000 under Section 3 and 4 of the POCSO Act, and in default, would have to suffer simple imprisonment for three months.

5.11 What trends were observed in respect of bail in "romantic" cases?

Information on bail status of the accused was gathered from the final order portion of the judgments and the duration of detention could not be gleaned from the judgment. Based on the reference to bail in the final judgments, it emerged that in 1427 cases (83.2%), the accused was out on bail, and in 261 cases (15.2%) the accused was in judicial custody. In a small number of cases, i.e., in 27 cases (1.6%), the bail status of the accused was not clear. It was also seen that in 212 cases (13.2%) which resulted in an acquittal, the accused was not out on bail and was in judicial custody at the time of the disposal of the case. Refer Table 5.16: Bail in "romantic" cases for state wise break-up.

5.12 How are the presumptions under the POCSO Act being used in "romantic" cases?

Of the 1715 cases, 1544 (90%) cases did not include any reference to legal presumptions under Sections 29 and 30 of the POCSO Act. A reference to presumption was found in 171 (9.9%) cases. Of these 171 cases, presumption was applied in 53 cases (30.9%) and in 80 cases (46.8%) presumption was mentioned but not applied. In 38 cases (22.2%), the presumption was successfully rebutted by the accused. An application of the presumptions was seen in 45 of the 106 (42.5%) cases which resulted in a conviction. Refer Table 5.17: Application of Presumption in "Romantic" Cases under POCSO Act & IPC for state wise break-up.

In *State of Maharashtra v. Shaikh Isak Shaikh Moosa*⁵³, the girl's mother lodged an FIR alleging that her 15-year old daughter did not return home, and that she had a suspicion that someone had kidnapped her daughter. While it was established that the girl had willingly eloped with the accused, whether or not the sexual intercourse was consensual, was a moot point. The girl's age could not be established as her birth certificate had been misplaced by her family and the headmaster of the school in which the girl was studying had no personal knowledge about the girl's admission or the basis on which her age was recorded. The accused was thus acquitted for the kidnapping related offences and the offences under the POCSO Act. The girl had testified that the accused had sex with her

⁵² State of Maharashtra v. Sushant, Sessions Case No. 81/2016 decided by the Special Court in Ahmednagar on 26-02-2018 (Maharashtra).

⁵³ Spl. Case (Child) No.53/2017 decided on 07/08/2020 by the Special Court in Jalna

forcibly and against her will and had stated this even in her statement under Section 164, Cr.P.C. The Special Court applied the presumption under Section 114-A, Indian Evidence Act and held that except the suggestion to the girl during cross-examination about her consent for sexual intercourse, the accused had failed to adduce evidence to show that it was indeed consensual. The Special Court observed that while she may have consented to the elopement, she had maintained that the accused forcibly had sexual intercourse with her. Although he was charged under Section 376(2)(i) and (j) of the IPC, the Special Court relied on Section 222(2), Cr.P.C and convicted him under Section 376(1), IPC. He was sentenced to 10 years rigorous imprisonment and fine of Rs 10,000 in default of payment of which he had to undergo three years rigorous imprisonment.

5.13 What was the proportion of “romantic” cases that were privately settled among the parties?

An express reference to settlements between the parties was found in 71 cases (4.1%). Of these, in 65 cases there was a private resolution between the families of the accused and the girl while in six cases, there was a village settlement between the parties with the assistance of village leaders or community members. In 265 cases out of 1715 (15.5%), the girl’s family eventually accepted the relationship and conveyed this to the Special Court during their testimony. In several cases, the parties stated that the dispute was resolved by the accused either marrying the girl or agreeing to marry her, and the girl’s parents having accepted the relationship. Overall, there were six convictions in cases in which there was either a private settlement or the family of the girl had accepted the relationship. [Refer Table 5.18: State-wise proportion of “romantic” cases that were privately settled among the parties.](#)

6

Approach of the Special Courts towards “consent” of the girl

Highlights of Findings

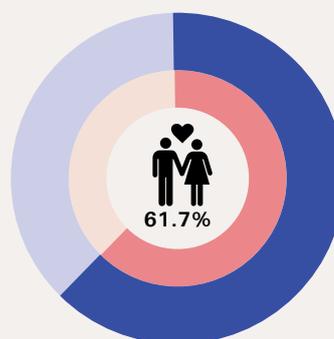
- In a majority of cases, i.e., in 1058 cases (61.7%), the Special Court expressly concluded that the relationship between the accused and the girl was consensual in nature. The Special Court accorded significant weightage to the admission of the relationship by the girl especially when the girl did not incriminate the accused in her evidence. Convictions were recorded in only 43 cases (4.1%) out of 1058 cases in which the Special Court concluded the relationship was consensual.
- In 119 cases (6.9% of total), the Special Courts explicitly noted that consent of a minor was irrelevant in cases registered under the POCSO Act. Convictions were recorded in 87 cases constituting 73.1% of these 119 cases.
- A diversity of approaches to consent of the minor girl were apparent. In several cases, the Special Court considered the girl’s assertion that the relationship was consensual to conclude that there was no sexual assault and acquitted the accused. The impact of the case on the marital life of the victim and the accused was factored, with some courts acquitting the accused stating that it did not wish to interfere with their married life. The lack of “intention” on the part of the accused to commit a sexual offence was also considered in cases where the girl was married to the accused, and was a consenting party. In a few cases the Special Courts took into account the possibility of grooming and exploitation under the garb of love, romance, or a false promise to marry. They observed that the “tender age” of the girl in these cases made her more vulnerable to deceit, and convicted the accused. However, this was not consistent across Special Courts and there were also cases in which they concluded that the relationship was consensual based on her conduct even though the girl testified against the accused. If the girl did not cry out for help over the course of several days when she was in public places with the accused, the Special Courts concluded that her behaviour indicated that she willfully went with the accused. In one case, the Special Court observed that consent was vitiated because of misrepresentation of the accused of his religion.

6.1 Acknowledgment of “Romantic” Relationships by Special Court

In a majority of cases, i.e., in 1058 cases (61.7%), the Special Court expressly observed that there was a “romantic” relationship between the accused and the girl. Of these, in 927 of 1058 cases (87.6%), the girl herself admitted to the relationship. The Special Court accorded significant weightage to the admission of the relationship by the girl especially when the girl did not incriminate the accused in her evidence.

Figure 6.1:

Proportion of cases in which the court concluded that there was a romantic relationship between the accused and the girl



Convictions were recorded in only 43 cases (4.1%) out of 1058 cases in which the Special Court concluded the relationship was consensual. Refer Table 6.1: Number of cases where the Special Court concluded that the relationship between the girl and the accused was “romantic” for state wise break-up.

In *State of Assam v. Saminur Islam*⁵⁴, the girl’s father alleged that the accused had kidnapped and raped his 17-year-old daughter. The girl deposed that the accused took her to Gauhati and had sexual intercourse with her on the assurance of marriage and admitted to her love affair with him during the cross-examination. The Special Court observed that the girl had left with the accused person willingly and did not find evidence of a false promise to marry on the part of the accused. The Special Court also held that the girl’s minority had not been established and that even if she were a minor, it could not be concluded that the accused had committed an offence. The court gave a lengthy opinion on criminalisation of consensual sex with a minor before acquitting the accused stating:

“Now, it is to be seen whether because pw-1 is less than 18 years of age, the act done by her voluntarily on own sweet will become an offence on the part of the accused of kidnapping and penetrative sexual assault on PW 1. Simply because PW 1 is short of six months for 18 years, whether the offence of kidnapping and rape is made out automatically. To the normal human thinking, the answer is ‘No’.

...Such a relationship cannot be construed as an unnatural one or alien to between relationship of opposite sexes. If we go by the POCSO Act, it prohibits minors from having any kind of sexual relationship. If that interpretation is accepted, it would mean that the human body of every individual under 18 years of age is the property of the State and no individual below 18 years can be allowed to have pleasures associated with one's body.”

In 131 cases, the Special Court concluded that the accused and the girl were in a relationship, even though the girl denied this or was silent about the relationship. Such a

⁵⁴ Special (P) Case No.6(M)/2018 decided on 05/07/19 by the Special Court in Bongaigaon (Assam).

conclusion appeared to be based on the testimony of other witnesses such as her parents who mentioned that the girl was having an affair with the accused. The conduct of the girl and her failure to protest, seek help from passersby, or report the matter immediately, also led the court to conclude that her version was unreliable and that she had gone willingly with the accused and consented to sex. Reference to a love affair by the prosecution, the defence's plea of consent, and the absence of medical evidence corroborating the girl's version were also considered to arrive upon such a conclusion.

6.2 Irrelevance of Consent

In 119 cases (6.9% of total), the Special Courts explicitly noted that consent of a minor was irrelevant in cases registered under the POCSO Act. Convictions were recorded in 87 cases (73.1% of these 119 cases).

In *State of Maharashtra v. Ashik Ramjan Ansari*⁵⁵, the 17-and-a-half year old girl was in a relationship with the 25-year-old accused, a worker in her father's factory for nearly two years. Both she and her father had received a call from a woman claiming to be the wife of the accused stating that they had two children. The accused, however, denied being married. Although her father advised her that the accused was not a good boy for marriage, she continued her relationship with him. Since the girl was pregnant, she decided to leave her home with the accused as her family was against their relationship. They were later traced in Gujarat and brought back to Mumbai. The pregnancy was terminated and the DNA report concluded that she and the accused were the biological parents of the foetus. The Special Court observed that the girl had testified that she eloped with the accused on her own and was silent about enticement or the use of threat, force, coercion or assault. The girl also admitted that she had married the accused as per Muslim Personal law. Interestingly, the Special Court considered Article 251 of Mohammedan Law which deals with capacity of marriage and recognises the capacity of a Muslim who has attained puberty to enter into a contract of marriage without the consent of guardian or parents. Based on this and the fact that there was a love affair between the parties, the Special Court concluded that the charges of kidnapping under Section 363, IPC were not made out. With respect to the charges under Section 376, IPC and Sections 4 and 6, POCSO Act, however, the Special Court held that the girl's consent was immaterial. Considering the circumstances of the case, the Special Court observed that leniency in sentencing was warranted in this case as the girl and the accused had voluntarily married each other. However, it applied Section 42, POCSO Act and sentenced the accused under Section 6, POCSO instead of Section 4, POCSO Act, as the former carried punishment that was greater in degree. The accused was sentenced to rigorous imprisonment for 10 years and fine of Rs 2000, in default of payment of which he had to undergo further rigorous imprisonment of one month.

In *State of Maharashtra v. Rushikesh Ishwar Nagle*⁵⁶, the girl's mother lodged a complaint that her minor daughter was missing. She later learnt that the accused was also missing and realised that they had both left together as they were in a relationship. During the trial, the girl admitted to the love affair and said that when her parents found out about it, they physically assaulted her. As a result, she left home with the accused based on his promise

⁵⁵ POCSO Special Case No. 203 of 2016 decided on 21/02/19 by the Court of Session for Greater Bombay (Maharashtra).

⁵⁶ Spl.(POCSO) Case No. 140/2019 dated 21/10/2020 by a Special Court in Amravati (Maharashtra).

of marriage and they subsequently engaged in penetrative sex. The Special Court held that her consent was irrelevant as she was only 14-years-old and lacked an understanding of the consequences of her act. It also observed that she was of “tender age” and “not of a marginal age” where it could be said that she had sex with the accused based on a love affair. It held:

“Though victim girl has stated that there was love affair between her and the accused and there was sexual relationship between them, victim girl is hardly 14 years and 5 months of age. Accused is aged about 22 years old. The consent of the victim girl is irrelevant. **Victim girl is also not of a marginal age wherein it can be said that out of love affair she had sexual intercourse with the accused. But here in the present case victim girl is of very tender age. She is unable to understand the consequences of her act but accused is major and knows the consequences of his act.** In spite of it that victim girl is minor he took her at Agra on the promise of marriage and subjected her for sexual intercourse. Her consent is irrelevant.” [emphasis added]

The accused was convicted under Section 4, POCSO Act and Section 376(2), IPC, and upon application of Section 42, POCSO Act, was sentenced to rigorous imprisonment of 10 years and fine of Rs 5000, in default of payment of which he was sentenced to undergo further rigorous imprisonment of one year.

6.3 Consideration of girl’s assertion that the relationship was consensual

In *State of West Bengal v. Rahul Mandal*,⁵⁷ the 15-year-old girl’s mother lodged a missing complaint with the police. The girl was found after 10-12 days and the accused was arrested. The girl testified that she was 15-years-old and was in love with the accused. She left her home voluntarily with him. Other witnesses failed to identify the accused and only testified that she left home and returned after 10-12 days. The girl had refused medical examination but was discovered to be pregnant following a urine examination conducted by the Children’s Home in which she had been placed. The Special Court observed that no medical documents regarding her pregnancy or documents regarding her age had been filed. It acquitted the accused based on the conclusion that:

“neither victim was kidnapped or abducted nor she was induced by accused to go with him. Victim categorically stated that she had love affair with accused and voluntarily went with him. There is no evidence on record that victim was subjected to any kind of sexual assault.”

In *State of Maharashtra v. Ramesh Shivaji Malache*,⁵⁸ the 17 year old girl eloped with her 30-year old partner leaving a letter at home for her parents. In court the girl unequivocally admitted to being in a relationship with the accused, leaving the house willingly to be with him, and stated that they had “physical relations”. The Special Court proceeded to acquit the accused person considering that it was not against her will and the fact that she is not supporting the prosecution. It stated:

⁵⁷ POCSO Case No.187 of 16, decided on 24/04/2019 by the Special Court in Cooch Behar (West Bengal).

⁵⁸ Special Case No. 5 of 2017, decided on 05/09/2018 by the Special Court in Ratnagiri (Maharashtra).

“In the words of the victim, she stated that, “We had physical relations”. Thus, she has not stated about active role played by accused. She has not stated anything about penetrative sexual assault or physical intercourse committed by accused against her will. One point cannot be ignored that, victim is 17 years old girl, having full knowledge of understanding. Even though, she is using the words, “We had physical relations”. Therefore, in true sense victim girl is not supporting the case of prosecution.”

In *State of Assam v. Sri Thepeng Karua @Sunil*,⁵⁹ the 17-year-old girl was in a relationship with the accused and became pregnant. Her mother detected the pregnancy and approached the accused’s family with the proposal for marriage. The accused and his family, however, refused to accept the girl and this led to the lodging of the FIR. The accused was tried under Section 6, POCSO Act. The girl stated in her examination-in-chief that she was in love with the accused and she had sexual intercourse with him ten times, after which she became pregnant. The Special Court acquitted the accused and held:

“There is no doubt that the victim was more than 16 years old, though she was below 18 years of age. Therefore, the victim had the legal competence to give consent for sexual intercourse.”

In *State of Maharashtra v. Rakesh Shyamrao Meshram*,⁶⁰ the 17-year-old girl had eloped with the 25-year-old accused. An FIR was lodged by her mother. At the time of evidence, they were married to each other and had two children. The girl and her mother, both were declared hostile as they did not say anything against the accused or the alleged incident that led to the lodging of the FIR. No other independent or material witnesses were examined and the girl’s age was also not established. The Special Court held that the prosecution had failed to prove that the accused committed forcible sexual intercourse with the girl and kidnapped her without the consent of her mother. It further observed:

“...when victim girl herself stated that, she got married with accused and now they blessed two child from their wedlock then one chance should be given to the accused for reform which is also enshrined in the criminal penology.”

6.4 Consideration of “best interest”

In *State of Maharashtra v. Imran Javed Mansoori*,⁶¹ a 14-and-a-half year old girl had left home with the 23-year-old accused as her parents were going to arrange her marriage against her will. She urged the accused to take her away because they were in a relationship and she did not want to marry someone else. Her minority and the fact that she left home with the accused and stayed with him for a few days was established by the prosecution. The girl denied having sexual relations with the accused, but the prosecution argued that the accused’s semen was found in her underwear and the medical witness had opined that the possibility of sexual intercourse could not be ruled out. The Special Court, however, acquitted the accused based on five grounds - (1) The girl herself had forced the accused

⁵⁹ POCSO Case No. 42(T)/2018 decided on 12/06/19 by the Special Court in Tinsukia (Assam).

⁶⁰ Spl.(POCSO) Case No. 47/2017 decided on 19/03/2018 by a Special Court in Gondia (Maharashtra).

⁶¹ Spl. Case Child Prot. No. 120/2018, decided on 02/01/2020 by a Special Court in Aurangabad (Maharashtra).

to take her away as her family intended to arrange her marriage against her will; (2) The girl denied having physical relations with the accused in her testimony and statement under Section 164, Cr.P.C; (3) Accused stated that their parents had solemnised their marriage in accordance with Muslim personal law and they were living happily; (4) The girl's father stated that the girl left home out of anger because she was nervous about the marriage he had fixed against her will, and (5) "...the preamble of the POCSO Act states that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child." Considering the evidence of the girl, her father, and the affidavit by the accused, the Special Court held that although the chemical evidence report is conclusive evidence, **"it does not favour to the case of prosecution in view of said preamble of the POCSO Act."** [emphasis added]

6.5 Consideration of impact on marital life

In *State of Maharashtra v. Suhas Uttam Varale*,⁶² the girl had eloped with the 24-year-old accused who was also her maternal cousin brother. A missing complaint was lodged by her own brother, following which the police traced the couple eight months later and found that the girl and accused had married each other and also had a child. Her brother then lodged a complaint against the accused under kidnapping and rape. The girl admitted to her relationship with the accused and denied that he had kidnapped her by giving false assurances or forcibly raped her. She was declared hostile by the prosecution. The Special Court placed reliance on the Bombay High Court's decision in *Mohd. Muzammil Raghiv v. State of Maharashtra and Ors.*⁶³ in which it had quashed an FIR under Section 482, Cr.P.C as "the parties have married with each other, the continuation of criminal proceeding would unnecessary come in the way of peaceful married life." The Special Court acquitted the accused and held:

"Though the victim girl was minor during the incident, she attained majority afterwards and has performed marriage with the accused. I am of the view that this case should not come in the married life of the victim girl and the accused."

In *State of Maharashtra v. Rohit Uday Kamble*⁶⁴, the 17-year-old girl had eloped with the 26-year-old accused and married him. Based on her birth certificate, she was 17 years old, although she claimed to be 19 years old. The girl deposed that their parents knew about the marriage and she was living happily with the accused. The Special Court acquitted the accused as it did not want to interfere with their married life, stating:

"Though she has deposed her birth date is 06.01.2000, however, there is no reason for me to disbelieve her birth certificate (Exhibit10), wherein her birth date is mentioned as 06.01.2002 and her birth was registered on dated 31.01.2002 within one month. However, considering that now she is above 18 and staying with the accused, as his wife, it might be the case of marrying with him before 18, to me, there is no need to interfere in her married life. As both are staying together as husband and wife, the fact is known to the parents of both, nothing remains in the case for determination."

⁶² Sessions Case No.15/2019 decided on 23/10/2019 by the Court of Additional Sessions Judge in Sangli (Maharashtra).

⁶³ 2018 ALL MR (Cri) 1069 (Maharashtra).

⁶⁴ POCSO Special Case No. 206 of 2019 decided on 01/02/2020 by a Special Court in Mumbai (Maharashtra).

6.6 Consideration of lack of “intention”

In *State of Assam v. Sri Rajesh Paharia*,⁶⁵ the accused, a married man with two children, was in love with the 16-year-old girl. They had a physical relationship and she became pregnant. When her mother found out about the pregnancy, she lodged an FIR. In her evidence, the girl said she had sex with the accused based on a promise of marriage. Following the pregnancy, the accused married her and she gave birth to their child. The girl testified that she was 20 years old and they were living together. Her mother also testified that the accused and the girl had married. The Special Court did not enter into any examination of the girl’s age. It held that “sexual intention” the “most vital ingredients of offence u/s 6 of the POCSO Act” had not been proven:

“The prosecution has failed to prove that the accused had criminally sexually assaulted the victim girl. The accused and the victim girl were in love. Therefore, they had sexual intercourse, for which the victim became pregnant. In my considered opinion, the offence u/s.6 of the POCSO Act has not been proved against the accused beyond all reasonable doubt.”

In *State of Assam v. Nazrul Ali @Tikil*,⁶⁶ the 17-year-old girl stated in her statement under Section 164, Cr.P.C and her evidence, that she was in love with the accused and had eloped, converted to Islam and married him. Her mother, who was the informant in the case, stated that she had accepted the accused as her son-in-law and that the girl was seven months pregnant. The Special Court observed that the girl was a “consenting party” and made a reference to the definition of assault under Section 351, IPC. It proceeded to observe that intention forms an important aspect in offences under the POCSO Act and held that the offence under Section 4, POCSO Act could not be proved against the accused because:

“In this case, the accused has married a 17 years old girl and according to religious rituals and thereafter the mother of the victim accepted him as her son in law. This fact clearly shows that the accused never had the intention to commit an offence under POCSO Act.”

6.7 Consideration of “tender age” and sex based on false promise of marriage

In some cases, exploitative aspects of the relationship came to light during the testimony of the girl and in few cases, Special Courts took into consideration the possibility of grooming and exploitation under the garb of love, romance, or a false promise to marry. For instance, in *State of Assam v. Asuruddin Khan*,⁶⁷ the girl’s grandfather filed a complaint that his granddaughter was taken by the accused on the pretext of marriage. In her police statement and statement under Section 164, Cr.P.C, the girl admitted the relationship and stated that the accused committed sexual intercourse with her a few times promising to marry her and later pretended that he did not know her. She also mentioned that the police complaint was filed out of anger. In her testimony before the Special Court, the girl stated that the sexual intercourse was forced. The Special Court held:

⁶⁵ POCSO Case No. 07(T)/2019 decided on 04/11/19 by the Special Court in Tinsukia (Assam).

⁶⁶ POCSO Case No. 57(T)/2017 decided on 01/09/18 by the Special Court in Tinsukia (Assam).

⁶⁷ Special POCSO Case No. 07/2017 decided on 30/04/19 by the Special Court in Barpeta (Assam).

“In the instant case, the victim is a minor girl of tender age and accused subjected her sexual intercourse on the promise of marriage. She being a minor and her mind being vulnerable easily subject to influence, she readily believe(d) the accused that he will marry her as promised. So, she consented sexual intercourse with accused on the hope of marriage and false promise, duress and helpless condition, her mind and body being vulnerable to easy pray of the culprit/accused.” [sic]

The Special Court convicted the accused under section 4 of the POCSO Act and sentenced him to rigorous imprisonment for a period of 10 years and fine of Rs 2000 and one year simple imprisonment in default.

6.8 Consideration of conduct of the girl

In *State of Maharashtra v. Anil Laxman Darkunde*⁶⁸, the 17-year-old girl’s father lodged an FIR as she did not return home after giving her exam and was seen at a bus stand with an old woman. Her father suspected the accused, who used to drive his tempo. Two days later, the accused and the girl appeared before the police. The girl stated that the accused had proposed to her via her neighbour. Her neighbour and the accused’s mother asked her to go with the accused’s parents on the day of her last exam. They took her on their motorcycle and thereafter the accused took her to his sister’s house in a village. His brother-in-law assaulted and threatened her to give a favourable statement before the police. The defence brought on record the girls previous and subsequent conduct and argued that they were in a consensual relationship. The Special Court was of the view that the girl had ample opportunities to seek help on her way from the school to the bus stand and till she reached the village. It observed,

“This conduct of prosecutrix is not natural one. Because, any child in the difficulty can naturally call for the assistance of anybody to rescue himself or herself. But prosecutrix has not done so.”

It also came to light that the girl had carried her photographs and Aadhaar Card with her and no explanation was provided by the prosecution as to why she was carrying these items. The Special Court concluded that her conduct supported the defence plea that she willfully joined the accused because of their love affair and that she may have carried the photographs and Aadhaar Card for marriage purpose. Since no evidence, except oral statements and a school certificate was brought forth to establish her age, and the girl and her father stated that she had been married off, the Special Court concluded that her minority was not established. The Special Court concluded that the girl had attained the “age of understanding” on the date of the incident and had willfully joined the accused and carried her Aadhaar Card and photographs with the intention of marrying the accused. Reliance was placed on *S. Varadarajan v. State of Madras*⁶⁹ to conclude that the offence of kidnapping was not made out. The accused was acquitted under Sections 363, 354(A), 109, 323, and 506 r/w 34 of IPC and under Sections 8 and 12, POCSO Act.

⁶⁸ Sessions Case No. 186/2016 decided on 22/01/18 by the Sessions Court in Ahmednagar (Maharashtra).

⁶⁹ AIR 1965 SC 942 (Supreme Court).

6.9 Varied consideration of exploitative elements

While there were few cases in which the Special Courts considered grooming and exploitation, there were also cases in which the Special Court concluded that the relationship was consensual even though the girl testified against the accused based on her conduct or a failure to appreciate exploitative aspects of the relationship. For instance, in *State of Assam v. Khubraj Kherua*,⁷⁰ a girl was six months pregnant when it was detected by her parents. She disclosed that her neighbour, a married man, had sexual intercourse with her on multiple occasions when her parents were away at work in a tea garden. He had threatened her with dire consequences and hence she had not disclosed this to her parents. The matter was brought to the attention of the All Adivashi Students' Association, after which an FIR was lodged. While her father mentioned her age as 11 years at the time of the FIR and 14 during his evidence, her mother stated that she was 13-14 years, and the girl stated she was below 13 years at the time of the incident. As per the date of birth in the birth certificate issued by the hospital in the tea garden, she was four years old, however the certificate was on record and contradicted the girl's testimony as per which she was between 13-14 years of age. As per her radiological examination, she was 16-17 years of age. The Special Court concluded that her minority had not been established and considered the margin of error of two years to give benefit to the accused. Even though the girl testified against the accused, the Special Court concluded that the relationship was consensual. It questioned the conduct of the girl and held her failure to disclose the matter to her parents, against her. It observed:

“...it is easily demonstrable that though the victim PW7 has claimed that she was subjected to sexual intercourse by the accused at the age of her minority but she had not made a whisper even before her parents that she was subjected to forceful intercourse by the accused from time to time during the absence of her parents. Had she been forcefully raped by the accused from time to time till her detection of pregnancy before the doctor she would have definitely narrated the incident before her parents after their return from work. That aside the victim ... also knew prior to the incident that accused was married who resides adjacent to their house across the road. It is beyond comprehensible as to what prevented her from disclosing about commission of rape by the accused person time to time against her will or consent. Rather she had kept mum till her pregnancy was detected after 6 months from the first day of occurrence of sexual intercourse with the accused.”

In *State of Assam v. Annas Ali*,⁷¹ girl's father lodged an FIR alleging that the accused took his minor daughter under threat of her life and promise of marriage, kept her into his house for about four days and repeatedly raped her during this duration. In her examination-in-chief, the girl said the accused had sexual intercourse with her on the promise of marriage, but later married someone else. The Special Court held the girl's evidence to be reliable, and that the fact that the accused married another girl shows that he had a "criminal conscience to exploit the innocence and tenderness of a minor girl" Further, the Court mentioned and applied presumption, stating that:

⁷⁰ SPI. (POCSO) Case No.11/2016 decided on 24/07/18 by the Special Court in Udalgiri (Assam).

⁷¹ Special POCSO Case No. 20/2018 decided on 23/07/19 by the Special Court in Barpeta (Assam).

“ [T]his court can very well draw the presumption as provided in section 29 and 30 of the POCSO Act, 2012 that accused had the culpable mind in taking the victim girl to his residence in the name of love with her and having sexual intercourse with her. So, accused has the intention or knowledge that he is committing a crime against a minor which is an act punishable under section 4 of POCSO Act. Accused not only put a strain in the faith and innocent relationship but also invaded into the privacy and sexuality of the victim girl and violated her dignity as a person. The act of the accused is certainly an aggression into her privacy and sexuality.”

In *State of Assam v. Tadek Nisso*,⁷² the girl was taken by the accused to work in his house with the promise to educate her, when she was 9 years old. A year after she left home, the girl stopped communicating with her family. Her parents brought her back home, four years after she had left home. A blood test conducted for her weakness revealed she was pregnant. The girl disclosed that the accused had been raping her daily. The accused was charged under Section 6, POCSO Act and Section 370(4), IPC. However, during the trial, the girl's father claimed she was a major, and the girl stated that she was in love with the accused and their sexual relationship was consensual. Her father also stated that people in his locality compelled him to lodge the FIR and he put his thumb impression on the FIR and did not know its contents. The accused was a married man with children and his family knew about his relationship with the girl. During the trial, the girl gave birth to a child and also married the accused. The Special Court considered the radiological examination as per which the girl was 16-17 years and her father's testimony to conclude that she was a major. The margin of error of two years in the context of medical opinion on age was considered to give the benefit of doubt to the accused. The court also concluded that the relationship was consensual and acquitted the accused.

In *State of Maharashtra v. Ramesh Ashok Wagh*,⁷³ the Special Court considered the age and lack of maturity of the girl. It was alleged that the accused had kidnapped her against her will. Although the girl deposed against the accused and never admitted to a love affair, the court observed that she was a consenting party in all likelihood as she has several opportunities to escape and need not have been with the accused. The Special Court however, refused to accept the consent of a child particularly in the present case as the girl was only 14 years old. It stated:

“The age of victim was around 14 years. She was not having sufficient maturity to understand what was love, what was the intention of the accused, what was kidnapping. The accused came on the spot, showed his love towards the victim, thus enticed the victim and caused her to sit on the motor cycle. Because of impression made by the accused on her about love of accused, she did not make any hue and cry and had not sought assistance from general public and Police. The unnatural conduct of victim in that circumstances is because of her immature age and enticement of accused. Therefore, only because there is no hue and cry, not seeking any assistance or help from general public or Police, the evidence of victim cannot be seen with doubt. A girl was kidnapped by enticement, inducing her to go with the accused.”

⁷² Special (POCSO) 17/2018 decided on 14/03/19 by the Special Court in Udalgiri (Assam).

⁷³ Spl. (POCSO) Case No.7/2018 decided on 03/05/2019 by the Special Court in Buldana (Maharashtra).

Observing the above, the Special Court convicted the accused under section 363 and 366 of the IPC as well as under section 12 of the POCSO Act, 2012. Under section 363 of the IPC, the accused was sentenced to rigorous imprisonment of three years and fine of Rs.5,000 (in default to undergo rigorous imprisonment for six months). Under section 366 of the IPC, the accused was sentenced to rigorous imprisonment of four years and fine of Rs.10,000 (in default to undergo rigorous imprisonment of one year). Under section 12 of the POCSO Act, the accused was sentenced to rigorous imprisonment of one year and to pay a fine of Rs.500 (in default to undergo simple imprisonment of one month).

6.10 Consideration of misrepresentation by the accused

In *State of Assam v. Abu Taher Prodhani*,⁷⁴ the prosecution's case was that the 21-year-old accused had taken the 16-year-old girl away at knife point and repeatedly raped her. The court concluded that the girl had a love affair with the accused person, eloped with him in the belief that he was a Hindu. When the girl discovered that he was a Muslim and that he had lied about his religion to her, she refused to live with him and lodged the FIR. The accused was charged under Sections 366A and 376, IPC and Section 4, POCSO Act. The girl denied that she had a love affair with the accused and that the case had been lodged because her parents and the members of a student union were against their inter-faith relationship. Since the IO did not collect her school certificate or ask the Medical Officer to ascertain her age, the Special Court held that her minority had not been established. The Special Court was of the view that the girl had eloped with the accused under the misconception that he was a Hindu, although he was a Muslim. It held that "the alleged consent said to have obtained by the accused was not voluntary consent and the accused indulged in sexual intercourse with the prosecutrix by suppressing his true identity." The accused was acquitted under Section 366A, IPC and Section 4, POCSO Act, but convicted under Section 376, IPC. The Special Court noted that despite the accused being 21 years of age and his family's sole breadwinner, there were "no grounds for inflicting a lesser sentence" and that the accused was "not an innocent man inasmuch as he had played with the religious sentiment of an innocent girl and committed the alleged offence by concealing his religion." The accused was sentenced to rigorous imprisonment for life and a fine of Rs 50,000 in default of payment of which he was sentenced to undergo further one-year simple imprisonment.

6.11 Approach of Special Courts in cases of sex based on promise to marry

In 231 cases (13.4%) a breach of promise to marry was alleged by the girl or her family. 36 of the 106 convictions under the POCSO Act pertained to a breach of promise to marry. The Special Court took a case-to-case based approach.

In *State of Assam v. Asuruddin Khan*,⁷⁵ the girl's grandfather lodged an FIR alleging that the accused No.1 enticed his 14-year-old granddaughter on the false promise of marriage. He further alleged that the accused No.2 assisted the accused No.1 by calling the girl to her house, and that the accused No.1 committed sexual intercourse with the girl there. While medical examination report showed no signs of sexual intercourse, the Special Court held

⁷⁴ Special Case No. 14 of 2016 decided on 22/03/17 by the Special Court in Dhubri (Assam).

⁷⁵ Special POCSO Case No. 07/2017 decided on 30/04/2019 by the Special Court in Barpeta (Assam).

that this could be due to the fact that the girl was examined 3-4 days after the incident. On the basis of the testimony of the girl and an ossification test, the Special Court held that the girl was below 18 at the time of the offence. In her statements under Sections 161 and 164 Cr.P.C. the girl said that the accused No.1 committed sexual intercourse with her on the promise of marriage. Further, the girl testified before the Special Court that the accused No.1 had forceful sexual intercourse with her. The Special Court held that the girl consented to sexual intercourse on the false promise of marriage:

“In the instant case, the victim is a minor girl of tender age and accused subjected her sexual intercourse on the promise of marriage. She being a minor and her mind being vulnerable easily subject to influence, she readily believe the accused that he will marry her as promised. So, she consented sexual intercourse with accused on the hope of marriage and false promise, duress and helpless condition, her mind and body being vulnerable to easy pray of the culprit/accused.”

The Special Court convicted the accused under Section 4, POCSO Act to ten years rigorous imprisonment and fine of Rs.2000/ in default of payment of which he was sentenced to undergo one year simple imprisonment.

In *State v. Sushanta Manki*,⁷⁷ the Special Court considered the intention of the accused and the nature of the promise. An FIR was lodged after the girl's mother found out about her pregnancy and the accused refusing to marry her. The girl and the accused were in a relationship for five years and they developed physical intimacy after the accused promised to marry her. In their testimony, both the girl and her mother stated that the FIR had been lodged due to misunderstanding and that the accused and his family members had assured them that his marriage would be solemnized with the girl after his release from custody. The girl and the accused got married subsequently. Since the minority of the girl could not be established, the Special Court acquitted the accused under Section 6, POCSO Act. Further, on the point of consent, the Special Court considered Section 90, IPC – Consent known to be given under fear or misconception and observed that “if consent is given by the Victim [X] under a misconception of fact, it is vitiated.” While the accused had sexual intercourse with the girl on the assurance that he would marry her, and initially refused to marry her after she became pregnant; he later agreed to marry her, and this was considered by the Special Court to conclude that his assurance was not false and that his intention “right from the beginning was bona fide.” Based on the evidence of the girl, her mother and the statement of the accused, the Special Court concluded that the accused intended to marry her, and the consent procured was not solely for the reason of having sexual relations with her. In the absence of “misconception of fact” or “fear of injury”, the Special Court held that the accused could not be convicted under Section 376, IPC as the girl's consent was not hit by Section 90, IPC. The accused was thus acquitted under Section 376, IPC.

In *State of Maharashtra v. Vaibhav Rajendra Mundlik*,⁷² the girl and the accused belonged to different castes. The accused was an electrician and came from a poor family. The girl was 17-year-old when their relationship commenced. The girl alleged that he took her to a lodge in June 2015 and forcibly had sex with her based on a promise to marry her after her Class

⁷⁶ Special Case No. 08/2019 decided on 27/01/20 by the Special Court in Jorhat (Assam).

⁷⁷ State of Maharashtra v. Vaibhav Rajendra Mundlik, Special Case No. 16/2017, 04-04-2019 (Maharashtra).

12 exams. On her birthday in 2016, when she turned 18 years, he took her to the same lodge and had sex forcibly. Thereafter, he started avoiding her and refused to marry her, hence, prompting her to lodge the complaint with the police. The Special Court held that there was no evidence to corroborate sex between the girl and the accused when she was a minor as the IO had not seized the lodge register for 2015. Since the girl did not specify any date on which the incident took place, the Special Court regarded her testimony to be vague and baseless. While the register maintained by the lodge for 2016 contained the accused's name, the Special Court observed that she was a major at the time and the POCSO Act would not apply. The Special Court also noted that the accused was not ready to marry the girl as his economic status was weak, but the girl was insistent on marriage and this caused a strain in the relationship. It also observed that the prior conduct of the accused indicated "that he had publicly proclaimed his relationship with the girl (P.W.1) coupled with his intention to perform marriage. When it is so, it cannot be believed that his declaration to marry the victim girl (P.W.1) was a false promise or a false statement." It also came on record that the incident alleged to have taken place in June 2015 was added to the complaint after consultation with the girl's maternal aunt and a leader of her community. Placing reliance on the apex court's decision in *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra*,⁷⁸ the accused was acquitted under Section 376, IPC as the court concluded that he did not have sex with the girl based on a false promise of marriage.

In *State of Maharashtra v. Asif Babu Quereshi*,⁷⁹ the 17-year-old girl lodged a FIR alleging that the accused had forcefully committed sexual intercourse with her, and then subsequently committed sexual intercourse with her several times on the false promise of marriage. The girl further alleged that she became pregnant and the accused forcefully made her consume a tablet to abort her pregnancy, refused to marry her and abused her on the account of her caste. The Special Court held that the birth certificate was proved according to which the girl was 17 years old at the time of the incident. The girl testified against the accused. The Special Court held that the girl did not consent to sexual intercourse with the accused "consciously":

"In such facts and circumstances, it cannot be observed that her consent was free from any lure or influence or free from deceitful promise. She has not consciously consented. Thus accused failed to rebut presumption raised under Section 114A of Evidence Act. Consequently, it is hard to believe that PW1 victim was consenting party to the act of committing sexual intercourse with him."

The Special Court held that the accused had failed to rebut the presumption under Section 29 of the POCSO Act. The accused was convicted, and sentenced under Section 417 of the IPC with rigorous imprisonment for one year with a fine of Rs.1000/, in default of payment of which he was ordered to undergo simple imprisonment for ten days. He was convicted and sentenced under Section 6, POCSO Act with imprisonment for life and a fine of Rs.50,000/, in default of which he had to undergo simple imprisonment for 6 months. He was also convicted and sentenced under Section 3(2)(v) of the SC/ST Act, with imprisonment for life with a fine of Rs.10,000/-, in default of which he had to undergo simple imprisonment for one month. All sentences were to run concurrently.

⁷⁸ *Dr. Dhruvaram Murlidhar Sonar v. The State of Maharashtra & Ors.*, 2019 ALL MR (Cri.) 771 (Supreme Court).

⁷⁹ *State of Maharashtra v. Asif Babu Quereshi*, Spl. POCSO CASE No.11/2019, decided by the Additional Sessions Judge/Judge, Special Court on 31/08/2020 in Gadchiroli (Maharashtra).

7

Conclusion & Way Forward

“Romantic” cases constituted a significant proportion of cases under the POCSO Act being decided by Special Courts in Assam, Maharashtra and West Bengal. Police complaints were predominantly registered by family members of adolescent girls across all geographies when the girls left their homes with their partners or to marry or be with their partners. Cases were also filed when pregnant adolescent girls approached the healthcare system for services. Elopements were a common feature of “romantic” cases and this was evident from the high proportion of kidnapping-related charges included along with charges under the POCSO Act. It was also seen that criminal law is being used against penetrative as well as non-penetrative sexual acts with adolescents. The judgments also provided insights into the difficult domestic situations of the girls and the circumstances in which they decided to elope with their partner. Faced with family disapproval of their love affair, violence, or quarrels and disagreements at home, or an arranged marriage against their wishes, several girls sought to reclaim or exercise their autonomy by leaving home and marrying their partners.

In few cases, girls themselves approached the criminal justice system alleging rape or in some cases sexual intercourse on the promise of marriage. Abandonment by the accused after a marriage, ill-treatment by in-laws, or domestic violence also prompted the lodging of cases by girls. In some cases, the girls later stated that the cases were filed because of family or community pressure, particularly when the accused refused to marry her or where they were pregnant. Cases entailing allegations of non-consensual sexual activity or indicating the presence of exploitative circumstances constituted a miniscule proportion of all “romantic” cases. In certain regions in Assam, it was apparent that the police were approached in such cases only when the village and community level redress systems failed to forge a mutually acceptable solution such as a marriage between the parties.

On the whole in the context of “romantic” cases, it emerged that the justice system was rarely triggered to report sexual harm or violence. The might of the criminal justice system was instead invoked more often to control and deter girls from being in relationships against the wishes of their family, and to coerce the girls to return home if they had eloped. In a few cases, it also served as a device to compel the accused to honour his promise of marriage.

The majority of the girls admitted to the “romantic” relationship and did not testify against their partners before the Special Court. An overwhelming majority of cases ended in acquittal, principally because the girls did not say anything incriminating against the accused person. Family members also backed down at the evidence stage and expressed that they had accepted the relationship or marriage and did not want any action to be taken against the accused. It was also seen that the girls’ age was an area of contention between the girl and her parents with a number of girls stating that they were not minors at the time of incident. The girl’s minority could not be successfully established by the prosecution in most cases and in a sizable number of cases, the Special Courts did not appear to have determined the age of the girls at all, particularly where the girl did not testify against the accused.

Convictions were recorded only in exceptional cases and acquittals were the norm in “romantic” cases. Convictions were predominantly seen in cases where the minor girl testified against the accused, stating that the sexual activity was non-consensual. Convictions

were also recorded in a few factually consensual and non-exploitative cases wherein the court took a strict view of the law and held that consent of the girl was irrelevant owing to her minority. Interestingly, however, the majority of Special Courts in all three States acknowledged the presence of a “romantic” relationship between the girl and accused.

The Special Courts also adopted diverse approaches towards consent. While a few Special Courts cited the black letter of the law and observed that consent is irrelevant under the POCSO Act, several others took into consideration the girls’ views on the relationship, her best interests, impact of criminalisation on her marital life with the accused, and the lack of an intention to commit an offence on the part of the accused to justify acquittals. Yet, in a few cases, the Special Courts failed to consider the girls’ testimony about the absence of consent, and went further to assume that there was a “romantic” relationship between the girl and the accused despite the girls’ denial.

Where courts have opted for a strict interpretation of the law, it largely resulted in the imposition of the minimum mandatory sentences under the POCSO Act or the IPC, which are quite high. The law does not afford the courts any discretion to impose a sentence below the prescribed minimum sentence. Pursuant to the implementation of the National Database on Sexual Offenders, accused persons convicted under a POCSO offence will also be registered as a sex offenders.

“Romantic” cases also consumed significant judicial time, as the majority of cases took more than a year to dispose of and also resulted in the prolonged detention of some accused persons who were denied bail, although the matter eventually resulted in an acquittal.

The overall findings and judicial trends in “romantic” cases raise concerns about the futility of blanket criminalisation of developmentally normative sexual behaviour of adolescents. The costs and implications of criminalisation on an overburdened criminal justice system, as well as on adolescents demands deeper examination. Cases that do not prima facie entail any elements of exploitation and lack of consent, go through the entire cycle of investigation and trial, consuming considerable time and resources of the police, prosecution and judiciary, and eventually end in an acquittal. In this process, the adolescent girls and their partners are subjected to the ignominy of a criminal investigation and trial, which has severe implications on their dignity, education, mental health, interpersonal relationships, and employment opportunities.

Finally, this Analysis raises the question of whether an overtly penal framework is appropriate to address adolescent sexuality and whether blanket criminalization of developmentally normative sexual behaviour among older adolescents is a policy measure that advances their best interests. It calls for a re-examination of the age of consent for sexual activity in India with a view to ensure balance between protection from exploitation and acknowledgment of normative sexual behaviour among adolescents.

For a comprehensive analysis of the implications of criminalisation of consensual adolescent sexual activity on the rights of adolescents and suggested reforms refer to Annexure II: Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief [Enfold Proactive Health Trust, UNFPA & UNICEF, 2022]

Annexure I - Reference Tables

Chapter 1: "Romantic" Cases in the Criminal Justice System

Table 1.1: Proportion of "Romantic" Cases

	Total Cases	"Romantic" cases	Proportion of "Romantic" Cases
Assam	1133	341	30.1%
Maharashtra	5157	1175	22.8%
West Bengal	770	199	25.8%
Total	7060	1715	24.3%

*Only cases registered after 2016 and disposed between 2016 and 2020 were considered.

Table 1.2: Year-wise disposal of "Romantic" Cases

	2016	2017	2018	2019	2020	Total
Assam	3	30	82	165	61	341
Maharashtra	27	144	299	479	226	1175
West Bengal	6	29	61	74	29	199
Total	36	203	442	718	316	1715

*Only cases registered after 2016 and disposed between 2016 and 2020 were considered.

Table 1.3: State-wise profile of informants

Profile of Informants	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Parents	269 (78.9%)	789 (67.1%)	157 (78.9%)	1215 (70.8%)
Siblings & relatives	37 (10.9%)	111 (9.4%)	14 (7.0%)	162 (9.4%)
Girls	31 (9.1%)	257 (21.9%)	26 (13.1%)	314 (18.3%)
Others	1 (0.3%)	17 (1.4%)	0 (0%)	18 (1.0%)
Not clear	3 (0.9%)	1 (0.1%)	2 (0.08%)	6 (0.3%)

Table 1.4: Circumstances that contributed to the lodging of an FIR

Factors	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Girl was missing or eloped with the accused	223 (65.4%)	768 (65.4%)	122 (61.3%)	1113 (64.9%)
Girl was pregnant	47 (13.8%)	202 (17.2%)	17 (8.5%)	266 (15.4%)
Breach of promise to marry	47 (13.8%)	147 (12.5%)	37 (18.6%)	231 (13.4%)

*In some cases more than one factor may have contributed to the lodging of an FIR. The above listed factors are not exclusive. They are also not exhaustive.

Table 1.5: What prompted the girls to lodge an FIR

	Assam	Maharashtra	West Bengal	Total
Refusal by accused to marry or breach of promise to marry or the accused was married/was going to marry someone else	15	122	18	155
Accused raped/committed sexual assault against the girl	3	144	7	154
Pressure from family/community	8	43	1	52
Sexual Harassment	0	24	0	24
Other forms of violence	0	5	9	14
Quarrel/misunderstanding with the accused person or his family	3	8	2	13
Deception/misrepresentation by the accused	2	2	0	4

*In some cases more than one factor may have contributed to the lodging of an FIR. The above listed factors are not exclusive and are non-exhaustive.

Table 1.6: Number of girls leaving home

	Assam	Maharashtra	West Bengal	Total
Number of cases in which girls left home	223 (65.4%)	768 (65.4%)	122 (61.3%)	1113 (64.9%)

Table 1.7: Reasons cited by girls for leaving home

Common reasons cited	Assam	Maharashtra	West Bengal	Total
Parental disapproval of relationship	28	212	40	280
Arrangement of marriage to another person	9	92	12	113
Violence or threat of violence at home	6	53	6	65
Disagreement/quarrel with family members	5	44	10	59

*In some cases more than one factor may have contributed to the girls leaving home. The above listed factors are not exclusive and are non-exhaustive.

Table 1.8: Who stated the relationship between the girl and accused was “romantic”?

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Girl admitted to a “romantic” relationship with accused	310 (90.9%)	1012 (86.1%)	186 (93.5%)	1508 (87.9%)
Family stated girl and accused were having a “love affair”	142 (41.6%)	310 (26.4%)	126 (63.3%)	578 (33.7%)
Prosecution presented to the court that the girl and accused were having a “love affair”	5 (1.5%)	148 (12.6%)	17 (8.5%)	170 (9.9%)
Special Court concluded there was a “love affair” or the relationship was consensual	176 (51.6%)	758 (64.5%)	124 (62.3%)	1058 (61.7%)

* Note that in several cases, more than one entity stated that the relationship was romantic.

Chapter 2: Nature of “Romantic” cases

Table 2.1: Marital Status in “romantic” cases

Marriage between the accused and the girl	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Girl and accused married at the time of filing the FIR	50 (14.7%)	104 (8.9%)	26 (13.1%)	180 (10.5%)
Girl and accused married each other subsequent to the filing of the FIR but prior to disposal of the case	89 (26.1%)	445 (37.9%)	84 (42.2%)	618 (36.2%)
Total number of girls who were married to the accused	139 (40.8%)	549 (46.7%)	110 (55.3%)	798 (46.5%)

Table 2.2: Problematic elements observed in “romantic” cases

	Assam	Maharashtra	West Bengal	Total
Total cases with a problematic factor	24	202	22	248
Violence/threat of violence (including abandonment)	1	25	10	36
Forcible sex/elopement	15	162	11	188
Misrepresentation	11	10	0	13
In a position of trust or authority	1	14	0	17

*In some cases, there may be multiple problematic elements present. The above list is non exhaustive and not exclusive.

Chapter 3: Girls' Testimony in "Romantic" cases

Table 3.1: Admission of "romantic" relationship by girls

Admission of "romantic" relationship by the girls*	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Evidence stage	286 (83.9%)	840 (71.5%)	164 (82.4%)	1290 (75.2%)
Pre-evidence stage only, but not during evidence in court	24 (7.04%)	172 (14.6%)	22 (11.1%)	218 (12.7%)
Total girls admitting the "romantic" relationship	310 (90.9%)	1012 (86.1%)	186 (93.5%)	1508 (87.9%)
Girls were silent or denied the relationship	31 (9.1%)	163 (13.9%)	13 (6.5%)	207 (12.1%)

*For the purpose of calculation of admission, a case-wise approach was taken. However, there were five cases, wherein there was more than one "victim" girl. In one of these cases involving three girls, one admitted the relationship and two did not. This case has been classified as "Girls were silent or denied the relationship".

Table 3.2: Nature of testimony by the girls

Nature of testimony by the girls	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Girl did not testify against the accused	272 (79.8%)	943 (80.3%)	183 (92.0%)	1398 (81.5%)
Girl testified against the accused	64 (18.8%)	217 (18.5%)	14 (7.04%)	295 (17.2%)
Girl did not appear in court	5 (1.5%)	15 (1.3%)	2 (1.0%)	22 (1.3%)

Table 3.3: Number of cases where girl's testimony found unreliable by the Special Court

n = number of cases in which the girl testified against the accused	Assam n = 64	Maharashtra n = 217	West Bengal n = 14	Total n = 295
Girl's testimony found unreliable by the Special Court	33 (51.6%)	110 (50.7%)	9 (57.1%)	151 (51.2%)

Chapter 4: Age profile and Age-Determination in “Romantic” cases

Table 4.1: State-wise age of girls as per FIR

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Above 11 years and below 14 years	22 (6.5%)	20 (1.7%)	7 (3.5%)	49 (2.9%)
Above 14 years and below 16 years	60 (17.6%)	180 (15.3%)	32 (16.1%)	272 (15.9%)
Above 16 years and below 18 years	92 (27%)	653 (55.6%)	54 (27.1%)	799 (46.6%)
Minority of the girl is alleged but specific age not mentioned	167 (49%)	322 (27.4%)	106 (53.3%)	595 (34.7%)
Total	341	1175	199	1715

* In cases where there were more than one victim girls, the age of the youngest girl was considered for this table. Further, cases in which the girl’s age was specified to be within an age-bracket, the lower age was considered.

Table 4.2: Age of girl as stated by the girl and her family

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Age as stated by the girl				
Girl said she was a minor	98 (28.6%)	526 (44.8%)	39 (19.6%)	663 (38.7%)
Girl said she was a major	111 (32.4%)	242 (20.6%)	37 (18.6%)	390 (22.7%)
Girl initially stated she was a minor and later said she was an adult	18 (5.2%)	55 (4.7%)	3 (1.5%)	76 (4.4%)
No reference to girl’s position on her age in the judgment	114 (33.4%)	352 (30.0%)	120 (60.3%)	586 (34.2%)
Age as stated by the girl’s family				
Girl was a minor	229 (66.8%)	739 (62.9%)	118 (59.3%)	1086 (63.3%)
Girl was a major	9 (2.62%)	70 (6%)	18 (19.0%)	97 (5.7%)
Girl’s family initially stated she was a minor and later said she was an adult	78 (22.74%)	93 (7.9%)	21 (10.6%)	192 (11.2%)
No reference to family’s position on girl’s age in the judgment	25 (7.3%)	273 (23.2%)	42 (21.1%)	340 (19.8%)

*Where a case has more than one victim girl or an age range has been provided, the lower age of the girl has been taken into consideration for the purpose of this analysis

Table 4.3: Number of cases where the family stated the girl was a minor while girl stated she was an adult

Who alleged minority	Assam n = 307	Maharashtra n = 832	West Bengal n = 139	Total n = 1278
Family stated the girl was a minor* while girl stated she was an adult	103 (33.6%)	154 (18.5%)	21 (15.1%)	278 (21.8%)

*This count includes cases where the family initially stated that the girl was a minor, but later retracted and said she was a major.

Table 4.4: Court's conclusion on age of the girl

Determination by court	Assam	Maharashtra	West Bengal	Total
Minority established	44 (12.9%)	334 (28.4%)	21 (10.6%)	399 (23.3%)
Minority not established	177 (51.9%)	514 (43.7%)	79 (39.7%)	770 (44.9%)
Age not determined	118 (34.6%)	286 (24.3%)	98 (49.2%)	502 (29.3%)
Court's conclusion on the age not clear	2 (0.6%)	41 (3.5%)	1 (0.5%)	44 (2.6%)
Total	341	1175	199	1715

Chapter 5: Judicial Response to “Romantic” cases

Table 5.1: Charges in “romantic” cases under POCSO Act & IPC

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Charges under the POCSO Act				
Section 3/4 (Penetrative Sexual Assault)	267 (78.3%)	755 (64.3%)	120 (60.3%)	1142 (66.6%)
Section 5/6 (Aggravated Penetrative Sexual Assault)	53 (15.5%)	485 (41.3%)	75 (37.7%)	613 (35.7%)
Section 7/8 (Sexual Assault)	23 (6.7%)	298 (25.4%)	6 (3.0%)	327 (19.1%)
Section 9/10 (Aggravated Sexual Assault)	1 (0.3%)	26 (2.2%)	1 (0.5%)	28 (1.6%)
Section 11/12 (Sexual Harassment)	3 (0.9%)	251 (21.4%)	4 (2.0%)	258 (15.0%)
Section 14/15 (Using child for pornographic purposes/ Storage of pornographic material involving child)	1 (0.3%)	2 (0.2%)	0 (0%)	3 (0.2%)
Kidnapping & Rape Charges under the IPC				
Section 376 (Punishment for Rape)	100 (29.3%)	990 (84.3%)	118 (59.3%)	1208 (70.4%)
Section 363 (Punishment for Kidnapping)	33 (9.7%)	797 (67.8%)	90 (45.2%)	920 (53.6%)
Section 366 (Kidnapping, abducting or inducing woman to compel her marriage)	90 (26.4%)	249 (21.2%)	17 (8.5%)	356 (20.8%)
Section 366A (Procurator of a minor girl)	89 (26.1%)	347 (29.5%)	68 (34.2%)	504 (29.4%)
Charges under other legislations				
Prohibition of Child Marriage Act, 2006	5 (1.5%)	5 (0.4%)	1 (0.5%)	11 (0.6%)
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989	0 (0%)	54 (4.6%)	0 (0%)	54 (3.1%)
Information Technology Act, 2000	2 (0.6%)	4 (0.3%)	1 (0.5%)	7 (0.4%)

Table 5.2: Time taken from registration of FIR till disposal of case

	Assam	Maharashtra	West Bengal	Total
Less than one year	73 (21.4%)	99 (8.4%)	24 (12.1%)	196 (11.4%)
1 year - 2 years	115 (33.7%)	261 (22.2%)	56 (28.1%)	432 (25.2%)
2 year - 3 years	59 (17.3%)	284 (24.2%)	41 (20.6%)	384 (22.4%)
3 years - 4 years	23 (6.7%)	169 (14.4%)	32 (16.1%)	224 (13.1%)
4 years - 5 years	6 (1.8%)	61 (5.2%)	19 (9.5%)	86 (5%)
5 years - 6 years	4 (1.2%)	13 (1.1%)	14 (7.0%)	31 (1.8%)
6 years - 7 years	1 (0.3%)	2 (0.2%)	1 (0.5%)	4 (0.2%)
7 years - 8 years	1 (0.3%)	1 (0.1%)	3 (1.5%)	5 (0.3%)
Data not available	59 (17.3%)	285 (24.3%)	9 (4.5%)	353 (20.6%)
Total	341	1175	199	1715

Table 5.3: Time taken from receipt of case till disposal (Maharashtra)

Maharashtra	Time taken in days	Percentage
Less than 1 year	329	28.0%
1 year - 2 years	408	34.7%
2 year - 3 years	280	23.8%
3 years - 4 years	107	9.1%
4 years - 5 years	26	2.2%
5 years - 6 years	2	0.2%
Data not available	23	2.0%
Total	1175	100%

Table 5.4: State wise outcomes in "romantic" cases under POCSO act, IPC and other legislations

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Outcomes under the POCSO Act				
Acquittals	321 (94.1%)	1089 (92.7%)	199 (100%)	1609 (93.8%)
Convictions	20 (5.9%)	86 (7.3%)	0 (0%)	106 (6.2%)
Outcomes under Section 376 of the IPC				
Acquittals	97 (97.0%)	912 (92.1%)	118 (100%)	1127 (93.3%)
Convictions	3 (3.0%)	78 (7.9%)	0 (0%)	81 (6.7%)
Outcomes in Kidnapping charges under the IPC Under sections 363, 366, and 366A				
Acquittals	193 (92.3%)	786 (94.8%)	107 (100%)	1086 (94.8%)
Convictions	16 (7.7%)	43 (5.2%)	0 (0%)	59 (5.2%)
Outcomes in other legislations				
Acquittals	7 (100%)	65 (98.5%)	2 (66.7%)	74 (97.4%)
Convictions	0 (0%)	1 (1.5%)	1 (33.3%)	2 (2.6%)

Table 5.5: State and year-wise break-up of convictions

	2016		2017		2018		2019		2020	
	Conv	Acq	Conv	Acq	Conv	Acq	Conv	Acq	Conv	Acq
Assam	0	3	2	28	8	74	9	156	1	60
Maharashtra	1	26	12	132	12	287	40	439	21	205
West Bengal	0	6	0	29	0	61	0	74	0	29
Total	1	35	14	189	20	422	49	669	22	294

Table 5.6: Contrast between charges and convictions in "romantic" cases

	No. of cases in which charge was added	Conviction
Section 3/4 (Penetrative Sexual Assault)	1142	78 (6.8%)
Section 5/6 (Aggravated Penetrative Sexual Assault)	613	51 (8.3%)
Section 376 (Punishment for Rape)	1208 IPC	81 (6.7%)

Table 5.7: Break-up of Convictions under the POCSO Act

	Assam	Maharashtra	West Bengal	Total
Section 3/4 (Penetrative Sexual Assault)	15	63	0	78
Section 5/6 (Aggravated Penetrative Sexual Assault)	5	46	0	51
Section 7/8 (Sexual Assault)	0	7	0	7
Section 9/10 (Aggravated Sexual Assault)	0	0	0	0
Section 11/12 (Sexual Harassment)	0	4	0	4

*Note that some cases contain convictions on multiple charges under POCSO Act. The above table denotes the number of convictions and not number of cases.

Table 5.8: Relationship between the testimony of the girl and the outcomes under POCSO Act

Nature of testimony of the girl	Conviction	Acquittal	Total
Girl did not testify against the accused	30 (2.1%)	1368 (97.9%)	1398
Girl testified against the accused	75 (25.4%)	220 (74.6%)	295
Girl did not appear before the court	1 (4.5%)	21 (95.5%)	22

Table 5.9: Link between testimony and age determination

	Assam	Maharashtra	West Bengal	Total
Minority Not Established				
Total cases in which minority was not established	n = 77	n = 514	n = 79	770
Did not testify against accused	141 (79.7%)	407 (79.2%)	70 (88.6%)	618 (80.3%)
Testified against Accused	32 (18.1%)	99 (19.3%)	8 (10.1%)	139 (18.1%)
Did not appear before Court	4 (2.3%)	8 (1.6%)	1 (1.3%)	13 (1.7%)
Minority Established				
Total cases in which minority was established	n=44	n = 334	n = 21	n=399
Did not testify against accused	23 52.3%	222 66.5%	17 81.0%	262 (65.7%)
Testified against Accused	21 47.7%	106 31.7%	3 14.3%	130 (32.6%)
Did not appear before Court	0 (0%)	6 (1.8%)	1 (4.8%)	7 (1.8%)
Age Not Determined				
Total cases in which the age of the girl was not determined	118	286	98	502
Did not testify against accused	107 (90.7%)	278 (97.2%)	95 (96.9%)	480 (95.6%)
Testified against Accused	10 (8.5%)	7 (2.4%)	3 (3.1%)	20 (4.0%)
Did not appear before Court	1 (0.8%)	1 (0.3%)	0 (0%)	2 (0.4%)

*In 44 cases the determination of the court on the age of the girl was not clear. These cases have been excluded from the above table.

Table 5.10: Link between conclusion on age of victim and outcome under POCSO Act

Determination by court on age and outcomes	Minority Established n = 399	Minority Not Established n = 770	Age Not Determined n = 502	Court's conclusion on age not clear n = 44
Conviction	105 (26.3%)	0 (0%)	1 (0.2%)	0
Acquittal	294 (73.7%)	770 (100%)	501 (99.8%)	44 (100%)

Table 5.11: Admission to the “romantic” relationship, nature of testimony and outcomes where girl was the informant

Cases where the girl was the informant	Assam	Maharashtra	West Bengal	Total
	n = 31	n = 257	n = 26	n = 314 cases
Admission to the “romantic” relationship				
Girl admitted the “romantic” relationship with the accused	31 (100%)	215 (83.7%)	25 (96.2%)	271 (86.3%)
Testimony in Court				
Girl did not testify against the accused	20 (64.5%)	178 (69.3%)	25 (96.2%)	223 (71%)
Girl testified against the accused	10 (32.3%)	78 (30.4%)	1 (3.8%)	89 (28.3%)
Girl did not appear in court	1 (3.2%)	1 (0.4%)	0 (0%)	2 (0.6%)
Marriage with Accused				
Girl was already married to the accused at the time of filing FIR	1 (3.2%)	4 (1.6%)	1 (3.8%)	6 (1.9%)
Girl subsequently married the accused	9 (29.0%)	73 (28.4%)	11 (42.3%)	93 (29.6%)
Outcomes in Court				
Acquittal	30 (96.8%)	233 (90.7%)	26 (100%)	289 (92.0%)
Conviction	1 (3.2%)	24 (9.3%)	0 (0%)	25 (8.0%)

Table 5.12: Outcomes in cases where girls were informants in relation to admission, testimony, and marriage

Cases where the girl was the informant	Conviction	Acquittal	Total
	25	289	314
Admission to the "romantic" relationship			
Girl admitted the "romantic" relationship with the accused	18 (6.6%)	253 (93.3%)	271
Testimony in Court			
Girl did not testify against the accused	5 (2.2%)	218 (97.7%)	223
Girl testified against the accused	20 (22.4%)	69 (77.5%)	89
Girl did not appear in court	0	2	2
Marriage with Accused			
Girl was already married or married the accused subsequently	2 (2%)	97 (97.9%)	99

Table 5.13: Illustrative factors that contributed towards convictions in "romantic" cases

Illustrative Factors	Assam n = 20	Maharashtra n = 86	Total n = 106
Minority of the girl established	19 (95%)	86 (100%)	105 (99.1%)
Girl's testimony against the accused	15 (75%)	60 (69.8%)	75 (70.8%)
Court's conclusion that consent was irrelevant	14 (70%)	73 (84.9%)	87 (82.1%)

Table 5.14: Observable trends in acquittals in "romantic" cases

	Assam n = 321	Maharashtra n = 1089	West Bengal n = 199	Total n = 1609
Minority not established	177 (55.1%)	514 (47.2%)	79 (39.7%)	770 (47.9%)
Girl did not testify against the accused	267 (83.2%)	918 (84.3%)	183 (92.0%)	1368 (85.0%)
Girls declared a hostile witness	9 (2.8%)	191 (17.5%)	24 (12.1%)	224 (13.9%)
Court concluded a "romantic" relationship between the girl and accused	168 (52.3%)	723 (66.4%)	124 (62.3%)	1015 (63.1%)

Table 5.15: Nature of sentences for penetrative offences under the POCSO Act and Section 376, IPC

	Below Minimum	Minimum	Above minimum below maximum	Maximum	Total
Sentences under s.3/4 of POCSO Act					
Assam	0	12	2	0	14
Maharashtra	2	25	12	0	39
Total	2	37	14	0	53
Sentences under s.5/6 of POCSO Act					
Assam	0	3	0	1	4
Maharashtra	1	37	0	1	39
Total	1	40	0	2	43
Sentences under s.376(1) and (2) of the IPC					
Assam	0	1	1	1	3
Maharashtra	0	33	8	0	41
Total	0	34	9	1	44

Table 516: Bail in “romantic” cases

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Bail granted to accused	241 (70.7%)	993 (84.5%)	193 (97%)	1427 (83.2%)
Bail not granted	98 (28.7%)	157 (13.4%)	6 (3%)	261 (15.2%)
Bail status not clear	2 (0.6%)	25 (2.1%)	0 (0%)	27 (1.6%)
Total	341	1175	199	1715

Table 5.17: Application of Presumption in “Romantic” Cases under POCSO Act & IPC

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Presumption not mentioned	328 (96.2%)	1031 (87.7%)	185 (93.0%)	1544
Presumption applied	6 (1.8%)	47 (4%)	0 (0%)	53
Presumption applied and rebutted	2 (0.6%)	30 (2.5%)	6 (3.0%)	38
Presumption mentioned, but not applied	5 (1.5%)	67 (5.7%)	8 (4.0%)	80
Total	341	1175	199	1715

Table 5.18: State-wise proportion of “romantic” cases that were privately settled among the parties

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Private settlement arrived at between the parties	19 (5.6%)	44 (3.7%)	2 (1.0%)	65 (3.8%)
Village settlement arrived at between the parties	4 (1.2%)	2 (0.2%)	0 (0%)	6 (0.3%)
Families accepted the relationship	82 (24.0%)	145 (12.3%)	38 (19.1%)	265 (15.5%)

Chapter 6: Approach of the Special Court towards “consent” of the girl

Table 6.1: Number of cases where the Special Court concluded that the relationship between the girl and the accused was “romantic”

	Assam n = 341	Maharashtra n = 1175	West Bengal n = 199	Total n = 1715
Court concluded that the relationship between the girl and the accused was “romantic”	176 (51.6%)	758 (64.5%)	124 (62.3%)	1058 (61.7%)



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1. BACKGROUND

India enacted the Protection of Children from Sexual Offences Act (POCSO Act) in 2012 to plug the legislative gaps concerning sexual violence against children and prescribe child-friendly provisions during investigation and trial. This was influenced by civil society efforts, government data on child sexual abuse,¹ exhortation for a legislation by the Supreme Court,² as well as obligations under the Constitution and the United Nations Convention on the Rights of the Child, 1989 (UNCRC). The POCSO Act defines “child” to mean “any person below the age of eighteen years” and effectively increased the age of consent for sexual acts from 16 years to 18 years.

With 253 million adolescents,³ India is home to the largest adolescent population in the world, and public health surveys indicate that a significant proportion of Indian teenagers are sexually active.⁴ According to the National Family Health Survey-5, 2019-21 (NFHS-5), 10% of women in the age group of 25-49 years had their first sexual intercourse before the age of 15, and 39% had their first sexual intercourse before the age of 18 years.⁵ The POCSO Act, however, does not recognise the possibility of consensual sexual activity among or with older adolescents above 16 years. A five-state study based on judgments of Special Courts under the POCSO Act revealed that “romantic” cases i.e. cases in which the victim admitted to a relationship with the accused, constituted 21.2% cases in Andhra Pradesh, 15.6% in Assam, 21.5% in Delhi, 21.8% in Karnataka (in 3 districts), and 20.5% of the decided cases in Maharashtra.⁶ A three-state study of “romantic cases”⁷ decided by Special Courts in Assam, Maharashtra and West Bengal, indicated that such cases constituted 24.3% of the total cases disposed between 2016-2020.⁸

In recent years, some High Courts have questioned whether the POCSO Act was enacted with the intention of regulating adolescent sexuality, and have recommended legal reform.⁹ In *Vijayalakshmi v. State Rep. the Inspector of Police*,¹⁰ the Madras High Court observed that the use of the POCSO Act could lead to irreversible damage to the reputation and livelihood of youth whose actions were only a consequence of “biological attraction” and questioned the wisdom of criminalising such acts.¹¹ In *Sabari v. Inspector of Police*,¹² the Madras High Court observed that relationships amongst teenagers or with slightly older persons, was not unnatural or alien but a result of natural biological attraction, and recommended that the age of consent be reduced to 16 years.

The criminalisation of adolescents and young people and their entanglement in the criminal justice and juvenile justice systems necessitates a review of the existing legislative framework. This policy brief unpacks the implications of 18 years as the age of consent on adolescents’ rights under domestic law and international human rights law, and proposes a policy alternative that advances rights and strikes a balance between their protection and evolving autonomy. It draws upon legal standards, empirical studies, judicial precedents, as well as focus group

¹ Ministry of Women and Child Development, Study on Child Abuse: India, 2007, p.74

² Sakshi v. Union of India, AIR 2004 SC 3566 at para 35.

³ Census of India, 2011, Table C13, available at http://www.censusindia.gov.in/2011census/Age_level_data/Age_level_data.html

⁴ International Institute for Population Studies, ‘National Family Health Survey (NFHS-5) 2019-21: India’ (Ministry of Health and Family Welfare, Government of India) 210 (NFHS-5); Swagata Yadavar, Why India is unprepared for its gathering teen sexual revolution, https://www.business-standard.com/article/current-affairs/india-is-unprepared-for-its-gathering-teen-sexual-revolution-118011200170_1.html

⁵ NFHS-5, p.210.

⁶ See “Study on the working of Special Courts under the POCSO Act, 2012 in Delhi”, Centre for Child and the Law, National University of India University, Bangalore, pg. 18, 29 January 2016, “Study on the working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh”, Centre for Child and the Law, National University of India University, Bangalore, pg. 35, 28 November 2017, “Study on the working of Special Courts under the POCSO Act, 2012 in Assam”, Centre for Child and the Law, National University of India University, Bangalore, pg. 63, 13 February 2017, “Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra”, Centre for Child and the Law, National University of India University, Bangalore, pg.38, 7 September 2017, “Study on the working of Special Courts under the POCSO Act, 2012 in Karnataka”, Centre for Child and the Law, National University of India University, Bangalore, pg. 66, 8 August 2017.

⁷ A case was considered to be a “romantic” case where the victim, her family members or any prosecution witness states that the relationship with the accused was romantic in nature. It also includes cases where the court concluded that the relationship was romantic or consensual.

⁸ Ramakrishnan & Raha, “Romantic” Cases under the POCSO Act, p.6, Enfold Proactive Health Trust: 2022.

⁹ *Vijayalakshmi v. The State Rep. the Inspector of Police CrI.O.P.No.232 of 2021* [Madras High Court], decision dated 27 January 2021; *Atul Mishra v. State of UP, Criminal Misc. Bail Application No. 53947 of 2021* (Allahabad High Court); *Shembhalang Ryngang v. State of Meghalaya, CrI. Petn. No. 64 of 2021* (High Court of Meghalaya); *Kuldeep v. State of Himachal Pradesh 2019 SCC OnLine HP 2659* (Himachal Pradesh High Court).

¹⁰ *Vijayalakshmi v. The State Rep. the Inspector of Police CrI.O.P.No.232 of 2021* [Madras High Court], decision dated 27 January 2021

¹¹ *Ibid* at para 28.

¹² *Sabari v. Inspector of Police, Criminal Appeal No.490 of 2018, decided on 26.04.2019* [High Court of Madras]

discussions with Investigating Officers, and interviews with Child Welfare Committee Members, Juvenile Justice Board Magistrates and Members, Special Court Judges, lawyers, mental health experts, medical practitioners, public prosecutors, academicians, and NGOs working in the area of children's rights

2. LEGAL CONTEXT

Since the 19th century, age of consent laws have been marked by shifts in the understanding of childhood, adolescence and adulthood, fuelled by developments in women's and child rights discourse, as well as multiple socio-cultural and political factors. The legislative provisions have been reflective of a colonial and patriarchal understanding of females as properties of their father or their husband.¹³ In India, the age of consent was blurred with the age of marriage, and social reformers often sought to increase the age of consent, with the explicit aim of raising the age of marriage.¹⁴

In 1860, the Indian Penal Code stipulated 10 years as the age of consent for both married and unmarried girls.¹⁵ In 1889, the death of Phulmoni Dossee, a 10-year-old girl in Calcutta, after her much older husband tried to consummate the marriage,¹⁶ served as a trigger to raise the age of consent for sexual intercourse to 12 years with the objective of protecting "female children from immature prostitution and from premature cohabitation".¹⁷ In 1925, the age of consent was further raised to 14 years for girls and 13 years for rape within marriage. In 1940, it was once again raised to 16 years and to 15 years for marital rape. For 72 years, the age of consent for sexual intercourse stood at 16 years, until the POCSO Act, 2012 raised it to 18 years. The POCSO Act is also gender neutral and for the first time introduced an age of consent for children of all genders. Significantly, when it was first introduced in the Rajya Sabha, the POCSO Bill, 2011¹⁸ recognised the possibility of consensual sexual activity with a child between 16-18 years and specified grounds such as the use of force, violence, threats, intoxicants, drugs, coercion, fraud, and others, in the presence of which consent would be vitiated.¹⁹ The Ministry of Women and Child Development (MWCD) justified the exception on the ground that the law cannot be blind to social realities and criminalisation of adolescents for such acts would be detrimental.²⁰ However, following concerns raised by the Parliamentary Standing Committee (PSC), that the exception would inevitably shift focus on the conduct of the victim during trial,²¹ it was withdrawn when the Bill was placed before Parliament.²²

In 2013, despite the recommendations by the Justice Verma Committee that the age of consent be reduced to 16 years, Section 375, IPC was amended and the age of consent was increased to 18 years. Where two underage minors are involved in a sexual relationship, the Juvenile Justice (Care and Protection of Children) Act, 2015 is applicable with the possibility of a child above 16 years being tried as an adult for heinous offences.²³

¹³ Dr. Matthew Waites, *The age of consent: young people, sexuality and citizenship* Basingstoke: Palgrave Macmillan (2009), p.62. Amita Pitre & Lakshmi Lingam, "Age of consent: challenges and contradictions of sexual violence laws in India", *Sexual and Reproductive Health Matters*, 29:2.

¹⁴ Pitre & Lingam, *ibid*.

¹⁵ Government of India, *Report of the Age of Consent Committee, 1928-1929*, Central Publication Branch, 1929.

¹⁶ Subhashri Ghosh, "Coming of Age in Colonial India: The Discourse and Debate over the Age of Consummation in the Nineteenth Century" in: K. Moruzi and M. J. Smith, ed., *Colonial Girlhood in Literature, Culture and History, 1840-1950*, London: Palgrave Macmillan (2014), p.87.

¹⁷ *Supra* n.15, p. 10.

¹⁸ *The Protection of Children from Sexual Offences Bill, 2011*, as introduced in the Rajya Sabha.

¹⁹ The proviso to Clause 3 on penetrative sexual assault of the POCSO Bill, 2011 stated: "Provided that where such penetrative sexual assault is committed against a child between sixteen to eighteen years of age, it shall be considered whether the consent for such an act has been obtained against the will of the child or the consent has been obtained by use of violence, force, threat to use force, intoxicants, drugs, impersonation, fraud, deceit, coercion, undue influence, threats, when the child is sleeping or unconscious or where the child does not have the capacity to understand the nature of the act or to resist it.

Explanation I.— For the purposes of this section,— (a) "consent" means the unequivocal voluntary agreement where the person has by words, gestures, or any form of non-verbal communication, communicated willingness to participate in the act referred to in this section; (b) "unequivocal voluntary agreement" means willingness given for specific and be limited to the express act consented to under this section.

Explanation II.— A child, who does not offer actual physical resistance to penetrative sexual assault is not by reason only of that fact, to be regarded as consenting to the sexual activity."

²⁰ Department-related Parliamentary Standing Committee on Human Resource Development, 240th Report on *The Protection of Children from Sexual Offences Bill, 2011*, 21 December 2011, para 6.7.

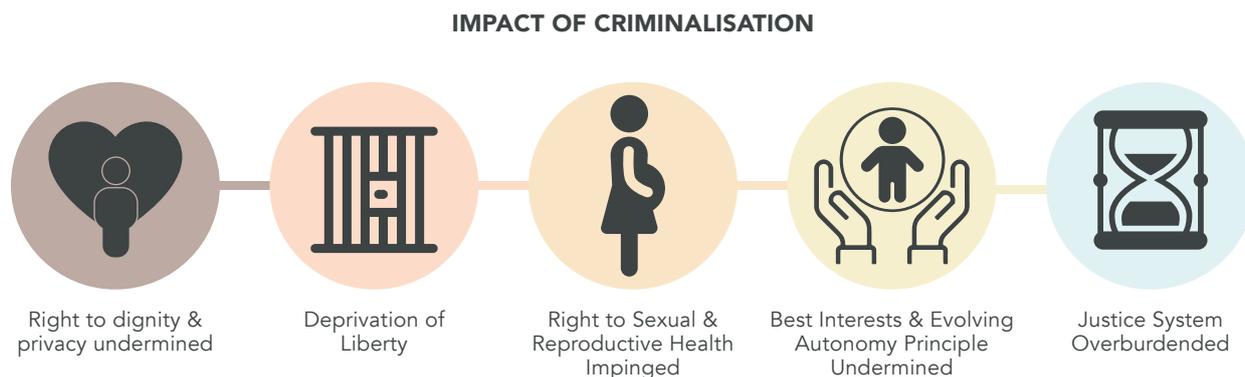
²¹ *Ibid*, para 6.6.

²² Statement by Ms. Krishna Tirath, Minister of the State of Ministry of Women and Child Development when the Protection of Children from Sexual Offences Bill, 2011 was moved in the Rajya Sabha on 10.05.12.

²³ JJ Act, 2015, Sections 15, 18(3).

In 2018, the marital rape exception in the IPC, as per which sexual intercourse by a man with his wife not below 15 years would not constitute rape, was read down by the Supreme Court of India for being unconstitutional and violative of the rights of children and the POCSO Act.²⁴ Thus, although a child marriage is valid under personal law and the Prohibition of Child Marriage Act, 2006, except in certain circumstances, sex within such a marriage constitutes rape or aggravated penetrative sexual assault. In 2019, following gruesome incidents of sexual violence against children, the minimum punishment for penetrative sexual offences under the POCSO Act was enhanced,²⁵ and the death penalty was introduced for aggravated penetrative sexual assault.

3. ADVERSE IMPACT OF CRIMINALISATION ON RIGHTS OF ADOLESCENTS AND THE JUSTICE SYSTEM



The lack of recognition of consensual sexual behaviour of older adolescents has resulted in their automatic criminalisation, as well as a conflation of consensual acts with non-consensual acts. While all children and adolescents are entitled to protection from sexual exploitation and violence, the approach adopted under the POCSO Act renders adolescents vulnerable to criminal prosecutions for normative sexual behaviour. This section examines the implications of such criminalisation on their right to dignity, personal liberty, privacy, health, and their best interests and the impact on the justice system.

Right to dignity and privacy of adolescents undermined

Sexual behaviour in adolescents, particularly from the onset of puberty, is widely established as being natural, normative, and an integral part of adolescent development and their transition into adults.²⁶ All persons, including children, are entitled to the right to dignity and privacy and these rights also apply in the context of their personal relationships.²⁷ By ignoring adolescent development, social realities, and diverse tribal and cultural practices which recognise adolescent sexuality,²⁸ the law disproportionately affects adolescents in consensual and non-exploitative relationships and renders them vulnerable to criminal prosecution. While the law has primarily been used against adolescents in heteronormative relationships, the possibility of its use against adolescents in non-heteronormative consensual relationships remains.

By equating consensual and non-exploitative sexual acts with rape and (aggravated) penetrative sexual assault, the law undermines the bodily integrity and dignity of adolescents. In *Anoop v. State of Kerala*,²⁹ while dealing with a bail application, the Kerala High Court remarked about the faulty conflation of consensual acts involving adolescents with rape:

²⁴ AIR 2017 SC 494.

²⁵ POCSO (Amendment) Bill, 2019, Statement of Objects and Reasons.

²⁶ Veenashree Anchan, Navaneetham Janardhana, and John Vijay Sagar Kommu, "POCSO Act, 2012: Consensual sex as a matter of tug of war between developmental need and legal obligation for the adolescents in India," *Indian J Psychol Med.* 2020;42:1–5 at 1. CRC, GC 20, para 9. Deborah L. Tolman, Sara I. McClelland, "Normative Sexuality Development in Adolescence: A Decade in Review, 2000–2009," *Journal of Research on Adolescence*, 15 February 2011; WHO Regional Office for Europe and BZgA, *Standards for Sexuality Education in Europe*, 2010, Megan Price, et al., "Young Love: Romantic Concerns and Associated Mental Health Issues among Adolescent Help-Seekers", *Behav Sci (Basel)*, 2016 Jun; 6(2): 9.

²⁷ Section 3(xi) of the JJ Act, 2015; Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

²⁸ M. Santhanaraman, "Branded a criminal for following custom", *The Hindu*, 13 April 2022.

²⁹ Bail Appl. No. 3273 of 2022 decided by the Kerala High Court on 08.0622.

“Unfortunately, the statute does not distinguish between the conservative concept of the term rape and the sexual interactions arising out of pure affection and biological changes. The statutes do not contemplate the biological inquisitiveness of adolescence and treat all ‘intrusions’ on bodily autonomy, whether by consent or otherwise, as rape for certain age group of victims.”

The ensuing criminal investigation and trial, and a simultaneous inquiry under the child protection system has a stigmatic and disruptive impact on their development, education, employment, as well as their self-esteem, social reputation, and family life. Long-term damaging consequences of a conviction for statutory rape are incarceration and inclusion in the Sex Offenders Registry.³⁰

The Constitutional Court of South Africa in *Teddy Bear Clinic for Abused Children & Anr. v. Minister of Justice and Constitutional Development & Anr*³¹ has held that legal provisions criminalising consensual sex amongst adolescents offended their dignity, even if they are rarely enforced. It concluded that “[i]f one’s consensual sexual choices are not respected by society, but are criminalised, one’s innate sense of self-worth will inevitably be diminished.” Further, “the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents.”³²

In the Indian context, the blanket criminalisation of consensual sex among or with adolescents in gross oversight of their sexual development, bodily integrity and autonomy, and normal desires for attachments and relationships, undermines their fundamental right to life, privacy, and dignity.

Deprivation of liberty

While the ostensible objective may be to protect all children below 18 years from sexual exploitation, the law’s unintended effect has been the deprivation of liberty of young people in consensual relationships. Although convictions in “romantic” cases are an exception,³³ the accused men and boys are predominantly charged with non-bailable offences such as rape and penetrative sexual assault,³⁴ and are inevitably taken into custody.³⁵ As per an analysis based on judgments of three States, in 15.2% of romantic cases the accused remained in judicial custody till the end of the trial.³⁶ In *Rama @ Bande Rama v. State*,³⁷ the 20-year-old accused in a “romantic” case was in judicial custody for 18 months. While quashing the case, the Karnataka High Court observed that the criminal process itself inflicted pain on the parties and despite an acquittal, “the sword of crime would have torn the soul of the accused.” In stray cases, a strict view that the consent of a minor is irrelevant, coupled with the lack of sentencing discretion, has resulted in the imposition of high minimum mandatory sentences such as 10 years for engaging in consensual sex.³⁸ With the amendment in 2019, such cases will attract a higher minimum sentence of 20 years if it is a case of repeated sex, or if it has resulted in a pregnancy.

The law also undermines the identity of adolescent girls by unidimensionally casting them as “victims”, rendering them voiceless, and without any agency to enter into relationships or choose their partners. Adolescent boys, on the other hand, are discriminatorily treated as children in conflict with the law,³⁹ and can even be tried as adults. The liberty of adolescent victim-girls is compromised as they are institutionalised in Children’s Homes when they refuse

³⁰ Press Trust of India, “National Registry Of Sex Offenders Adds 5 Lakh Names To Database”, 24 February 2019

³¹ (CCT 12/13) [2013] ZACC 35 decided on 3rd October 2013 by the Constitutional Court of South Africa.

³² Ibid, para 55.

³³ Supra n.8, p.28.

³⁴ 89.2% of accused in “romantic” cases were charged with a penetrative offence under Section 4 or 6 of the POCSO Act, or under Section 376 of the IPC. Supra n.8, p. 25.

³⁵ Supra n.8, p.44.

³⁶ Supra n.8, p.44.

³⁷ Crim. Pet. 6214 of 2022, decided by the Karnataka High Court on 2.08.2022.

³⁸ State of Gujarat v. Ashokbhai, 2018 GLH 792 [Gujarat High Court].

³⁹ ICCW, Children apprehended under POCSO Act for Elopement in Tamil Nadu (2017), UNICEF, p.40.

to return to their parents and insist on being with their partner. A study on their plight reveals that “they are shamed, humiliated, and stigmatised for their acts, alienated from their partners and society, and at times not released even after they turn 18. Such institutionalisation harms their physical and mental health, as well as overall development, and they have little or no recourse to challenge or seek review of such decisions.”⁴⁰ Administrative confusion about whether the girls should be released by the court or Child Welfare Committees prolonged their detention even after many of them had attained majority.⁴¹ Girls who are pregnant or have given birth to a child are compelled to reside in a Children’s Home where access to sexual and reproductive health services and familial care is limited.⁴²

Best interests and evolving autonomy principle undermined

The POCSO Act lumps all persons below 18 years together without consideration for their developing sexuality, evolving capacity, and the impact of such criminalisation on their best interests. It fails to strike an effective balance between protecting adolescents against sexual abuse and recognising their normative sexual behaviour. The result is that a law aimed at addressing child sexual abuse, is instead being used against adolescents, especially to curtail the sexual expressions of adolescent girls to safeguard family honour.⁴³ An analysis revealed that 80.2% of the complainants in “romantic” cases were parents and relatives of adolescent girls who registered a case after she eloped or her pregnancy was discovered.⁴⁴ Pointing to the possibility of further misuse of the POCSO Act, it showed that in 21.8% of romantic cases, the girls disputed the claim by their families that they were minors.⁴⁵

The use of the law to target adolescents in romantic relationships was also evident in a study on the Prohibition of Child Marriage Act (PCMA) which revealed that “[t]he PCMA is used twice as much against elopements or self-arranged marriages, than it is used in relation to “arranged marriages”, with girls’ parents lodging the complaints in elopement cases.⁴⁶ The law also renders young couples in inter-caste and inter-faith relationships at greater risk of harm and criminalisation and becomes an oppressive tool in the hands of those against such relationships⁴⁷ to enforce patriarchal norms on the choice of a partner instead of “prosecuting arranged customary marriages”⁴⁸ or addressing the root causes of elopements. Studies explain that the primary reasons for girls leaving their homes were parental disapproval of the relationship, arrangement of a marriage against their will, unreasonable restrictions on their mobility and social life, and violence at home.⁴⁹ Structural factors such as poverty, uneven development, discriminatory treatment of girls, and the lack of meaningful educational opportunities exacerbate the situation and prompt elopements in the hope of a better future.

While all children are entitled to protection from sexual violence, such protection should “enable young people to extend their boundaries, exercise choices and engage in necessary risk-taking, while not exposing them to inappropriate responsibility, harm and danger....”⁵⁰ The POCSO Act, however, reflects a protectionist approach that pushes adolescents out of the safety net and into the criminal justice system. It erodes their best interest, reflects scant regard for their evolving autonomy, and results in their victimisation within the criminal justice system under the garb of “protection”.

⁴⁰ Raha, Mehendale, et.al., *Girls Involved in “Romantic Cases” and the Justice System: A Study Based on the Experience of Girls in Child Care Institutions in Bihar*, Enfold Proactive Health Trust (2021) 223.

⁴¹ *Ibid.*, p.224.

⁴² *Ibid.*, p.225.

⁴³ Geeta Ramaseshan, *Control & Freedom: Women & The Age of Sexual Decisions*, AALI (2012), p.32.

⁴⁴ *Supra* n.8, pp.6,7 See also, CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra*, (2017) p.76.

⁴⁵ *Supra* n.8 .p.18

⁴⁶ Partners for Law in Development, *Who uses the Prohibition of Child Marriage Act 2006 (PCMA) Most and Why?*, p.6.

⁴⁷ Vivek Kumar @ Sanju and Anjali @ Afasana v. the State, CrIMC No 3073-74/2006, decided by the Delhi High Court on 23.02.2007. The Hindu Bureau, “Girl allegedly killed for inter-caste relationship in Mysuru”, *The Hindu*, 7 June 2022.

⁴⁸ *Supra* n.67, p.7. Neetika Vishwanath, “Ethnographic Study of Rape Adjudication in Lucknow’s Trial Court” (2020) 16(2) *Socio-Legal Review* 55, at 66. As a part of her study, 52 out of the 95 trials that Neetika Vishwanath observed involved runaway marriages between consenting couples, which was followed by a criminal complaint against the man by the woman’s parents/guardians. Some of these cases preceded the POCSO Act.

⁴⁹ Madhu Mehra & Amrita Nandy, *Why Girls Run Away To Marry: Adolescent Realities And Socio-Legal Responses in India* (2019), p.37. *Supra* n.61, p.63.

⁵⁰ Gerison Lansdown, *The Evolving Capacities of the Child*, UNICEF (2005), p.32.

Adverse impact on the right to sexual and reproductive health

The penal approach towards adolescent sexuality has impeded adolescents' right to barrier-free access to sexual and reproductive health (SRH) services. Policy initiatives such as the Rashtriya Kishor Swasthya Karyakram (RKSK), School Health Program (SHP),⁵¹ and the Adolescence Education Program (AEP), recognise sexual and reproductive health services as an integral component of adolescent health and aim to provide confidential and barrier-free information and services.⁵² The National Policy for Children, 2013 also requires the State to "provide adolescents access to information, support and services essential for their health and development".⁵³ While the RKSK emphasizes unrestricted counseling and support to adolescents for prevention of pregnancies and safe-sex methods, the POCSO Act complicates it by obligating any person having the knowledge of commission of a sexual offence or an apprehension of the likelihood of commission of a sexual offence involving minors to report to the police.⁵⁴ The Medical Termination of Pregnancy Act, 1971 also requires authorisation by a guardian for termination of pregnancy of a minor, making it challenging for adolescents to seek these services confidentially. A Rapid Programme Review of Adolescent Reproductive and Sexual Health Program (ARSH) and RKSK by the WHO revealed that the mandatory reporting obligation and absence of an exception for consensual sexual relationships between minors, resulted in confusion among service providers who are "inclined to deny SRH services to young people in some states."⁵⁵

Mandatory reporting combined with the lack of recognition of adolescent sexuality results in insurmountable barriers and a hostile environment for adolescents seeking confidential sexual and reproductive health services.⁵⁶ The fear of their partner being reported to the police also deters girls from availing medical services from a professional and inadvertently pushes them towards unsafe abortions.⁵⁷ Evidence shows that the "risk of death from an abortion related complication in India is highest in the case of underage girls (aged 15-19)".⁵⁸ It also affects adolescents who are in need of diagnostic tests to confirm pregnancy, STIs, or HIV status. The current legal regime also contravenes the CRC's recommendation to India to "[t]ake measures to ensure that adolescent girls and boys have effective access to confidential sexual and reproductive health information and services such as modern contraception as well as girls' access to legal abortions in practice."⁵⁹

In *X v. Principal Secretary, Health & Family Welfare Department*,⁶⁰ the Supreme Court observed that there is a conflict between the POCSO Act, the privacy obligation under the Medical Termination of Pregnancy Act, 1971, and the reproductive autonomy of minors. It clarified that in the case of minors below 18 years engaging in consensual sexual activity and seeking a termination of pregnancy, the registered medical practitioner (RMP) "only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act." The apex court also clarified that the RMP will be exempt from disclosing the identity of the minor in criminal proceedings which may ensue based on the RMP's report under Section 19. While this is a step towards ensuring their access to termination services, cases of adolescents in a consensual relationship who wish to retain the pregnancy will continue to be reported.

⁵¹ Operational Guidelines on School Health Programme under Ayushman Bharat, April 2018, p.3.

⁵² Ministry of Health and Family Welfare, Strategy Handbook, RKSK, (2014), p.40; National Aids Control Organisation, Adolescence Education Programme & Life Skills Development - Facilitator's Guide, at p.viii.

⁵³ National Policy for Children, 2013, para 4.4(ix).

⁵⁴ POCSO Act, 2012, Sections 19(1) and 21.

⁵⁵ Alka Barua, et.al, Adolescent health programming in India: a rapid review, *Reprod Health* 17, 87 (2020). <https://doi.org/10.1186/s12978-020-00929-4>

⁵⁶ CCL-NLISU, "An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children" (2018), p.14-15; Aparna Chandra, et.al, Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study, (2021) 140-142; *Supra n.14*; International Planned Parenthood Federation, "Over-protected and under-served :A multi-country study on legal barriers to young people's access to sexual and reproductive health services", (2014).

⁵⁷ Susheela Singh et al., The incidence of abortion and unintended pregnancy in India, 2015, VOL. 6, ISSUE 1, PE111-E120, JANUARY 01, 2018, the *Lancet Global Health*. See also Vrinda Grover, "Criminalisation of even consensual sex between adolescents obstructs access to safe abortion for girls," *Times of India*, 19 October 2019.

⁵⁸ Aparna Chandra, et.al, 142 citing Ryo Yokeo and others, 'Unsafe abortion and abortion-related death among 1.8 million women in India' (2019) 4(3) *BMJ Global Health* 7

⁵⁹ Committee on the Rights of the Child, Concluding observations on the consolidated third and fourth

periodic reports of India, CRC/C/IND/CO/3-4, 13 June 2014, Para 66(b). Committee on the Rights of the Child, General Comment No.3, 'HIV/AIDS and the rights of the child', CRC/GC/2003/3, [17 Mar 2003].

⁶⁰ Civil Appeal No 5802 of 2022, decided by the Supreme Court on 29.09.22.

Criminalisation while accessing reproductive health services

In *State of Maharashtra v. Mohsin Basuddin Pakhali and Ors.*⁶¹, a young couple sought medical care for their pregnancy and after the girl confirmed she was 18 years, the doctors provided treatment until her delivery. Following an inspection of the records by an Officer from the Central Adoption Resource Authority and members of the Child Welfare Committee to verify pregnancy treatments sought by young women of 18-19 years, the hospital staff was directed to procure age proof of the girl. The Aadhar card revealed that she was a minor when she accessed treatment and based on the direction of the Inspection Committee, an FIR was lodged by the doctor. The case, however, ended in an acquittal as the girl did not say anything incriminating against the accused and her minority could not be established.

As per a report in *On Manorama* dated 28 October 2021, a teenager delivered her baby at home with the help of Youtube videos after being impregnated by her 21-year old partner.⁶² The matter came to light after the sounds of the baby's cries alerted others and led to the filing of a POCSO case against her partner. She eventually developed an infection necessitating medical treatment at a hospital. A 17-year-old tribal girl was hospitalised in Banswara, Rajasthan after developing complications following an illegal abortion.⁶³ After discovering her pregnancy, her 21-year-old partner took her to a hospital in Madhya Pradesh for an abortion. A POCSO case was filed against him. A 16-year old girl died in the same district after consuming abortion pills provided by an ayurvedic practitioner.⁶⁴ Her 20-year-old partner was arrested and charged under the POCSO Act and under Section 314 of the IPC (death caused by act done with intent to cause miscarriage).

These cases exemplify the impact of the POCSO Act on adolescent girls seeking reproductive health services. They point to the need for legislative reform and provision of help-oriented services to ensure adolescents can access health services without any fear or criminal consequences.

Adverse impact on justice delivery

An analysis of 1715 decisions in "romantic" cases by Special Courts from Maharashtra, West Bengal, and Assam evinces the disconnect between the law and ground realities. Acquittals were the norm and were recorded in 93.8% of such cases.⁶⁵ In 87.9% of the 1715 romantic cases, the victim herself admitted to a romantic relationship with the accused and in 81.5% cases she did not say anything incriminating against the accused. In 46.5% of the "romantic" cases, the victims were married to the accused persons⁶⁶ and in these cases, the Special Courts were reluctant in convicting the accused and disturb their marital life. Some courts were also of the view that a conviction would not be in the best interest of the victim and the acquittal rate in cases where the parties were married stood at 98.1%.⁶⁷

The accused's lack of intention to sexually assault the victim was also considered in cases that ended in acquittal. Similar trends were observed in other studies wherein the accused in "romantic" cases were acquitted as the victim was "mature enough to understand the nature and consequences of her actions";⁶⁸ the victim "was capable of consenting";⁶⁹ or due to the lack of culpable mental state of the accused person.⁷⁰ In a few romantic cases, the Special Courts

⁶¹ Special Case Pocso No. 24/2019, decided on 20/07/2019 by the Special Court in Kolhapur (Maharashtra).

⁶² Anon, "17-yr-old girl delivers baby watching YouTube videos in Kerala, lover arrested under POCSO Act," *On Manorama* [Oct 27, 2021].

⁶³ Anon, "Minor hospitalised after illegal abortion", *Times of India*, 3 June 2019.

⁶⁴ Anon, "Minor girl dies after taking abortion pills", *Times of India*, 9 June 2019.

⁶⁵ *Supra* n.8, p.28

⁶⁶ *Supra* n.8, p.12

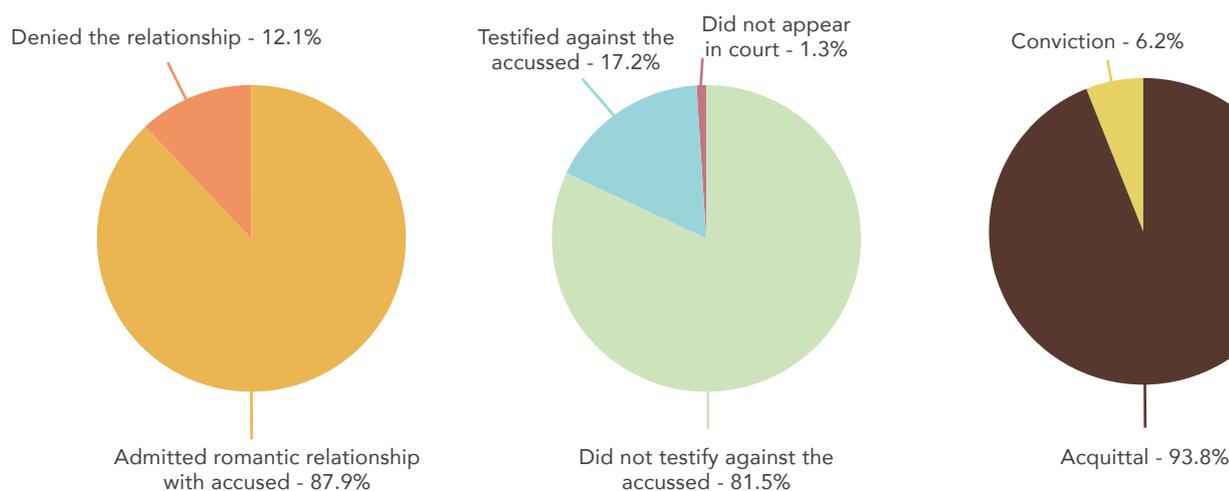
⁶⁷ *Supra* n.8, p.12

⁶⁸ CCL-NLSIU, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra (2017), 81 citing *State v. Akshay Balu Bacchav*, Sessions Case No. 338 of 2015, Decided on 03.09.2016 (Nashik).

⁶⁹ *Ibid* citing *State v. Rupesh @ Banti Bajirao Mokhal*, Sessions Case No. 302 of 2015, decided 20.10.2016 (Nashik).

⁷⁰ CCL-NLSIU, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Assam (2017), 67 citing *State v. Geenya Gupta*, Special (POCSO) Case No. 41 of 2015

NATURE OF TESTIMONY AND OUTCOMES IN ROMANTIC CASES



noted elements of exploitation and misrepresentation, particularly where the victim was under 16 years, taking into account the possibility of exploitation and grooming, and convicted the accused. Overall, the evidence categorically points to the consideration of social realities of teenage sexuality by Special Courts.

“Romantic” cases are thus overburdening an already-strained criminal justice system by consuming significant time of the judiciary, police, child protection system, forensic science laboratories, and medical practitioners. In 2021, for instance, 92.6% of POCSO cases were pending disposal by the courts.⁷¹ The futility of using criminal law to regulate adolescent sexuality is evinced by the abnormally high acquittal rates in such cases. An analysis reveals that only 11.4% of such cases were disposed of within a year of the FIR, while the large majority i.e., 60.7% cases took between one to four years to be disposed of.⁷²

These cases have also consumed the time of the higher judiciary which has been flooded with appeals and petitions to quash criminal proceedings; habeas corpus petitions; bail applications; and petitions from couples seeking protection from their families in the context of romantic cases. Finally, the inclusion of factually consensual and non-exploitative acts involving adolescents is detracting from the purpose of the POCSO Act and is diverting time, resources, and energy away from the investigation and trial of actual cases of sexual violence and exploitation.

4. NORMATIVE BASIS FOR DECRIMINALIZATION OF ADOLESCENT SEXUALITY

The Indian Constitution recognises that children deserve special protection and the State has an obligation to ensure that children are protected from exploitation and are given the opportunity to develop in a healthy manner.⁷³ Pursuant to these constitutional obligations, the POCSO Act was enacted to fill the legislative lacunae in addressing child sexual abuse. All children in India are entitled to fundamental rights such as the right to equality, right against discrimination, right to freedom of speech and expression, right to life and personal liberty, among others.⁷⁴ The National Policy for Children, 2013 recognises that “children are not a homogenous group and their different needs need different responses.”⁷⁵

⁷¹ NCRB, Crime in India 2021, Table 4A.5, Court Disposal of Crime against Children (Crime Headwise) 2021, p.357.

⁷² Supra n.8, pp.27, 28.

⁷³ The Constitution of India 1950, Articles 15(3) and 39(e).

⁷⁴ The Constitution of India 1950, Articles 14, 15, 19, 21, 21A, 23, and 24.

⁷⁵ National Policy for Children, 2013, para 2.1.

NORMATIVE BASIS FOR DECRIMINALIZATION OF ADOLESCENT SEXUALITY

Fundamental rights to life, dignity and privacy are available to adolescents and the Indian Constitution requires that measures are taken to enable children to develop in a healthy manner.

High Courts have quashed consensual cases under POCSO Act and made observations about the inappropriateness of criminalisation of adolescents in consensual cases

Indian health policies and school health programmes recognize adolescent sexuality and health programs emphasize barrier free access to services and information.

UN Committee on Rights of the Child has asked States to "avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity."

UN treaty bodies and special mechanisms, as well as the World Health Organisation have consistently recognised the unique nature of adolescence as a development phase that entails physical, behavioural, emotional, and neurological changes and the need to balance protection needs with their evolving capacity.⁷⁶ Emphasising the need for comprehensive sexuality education, the WHO and several UN agencies have underlined that "[a] lack of high-quality, age- and developmentally-appropriate sexuality and relationship education may leave children and young people vulnerable to harmful sexual behaviours and sexual exploitation."⁷⁷

With respect to the minimum age of consent for sexual intercourse, the UN Committee on the Rights of the Child (CRC) in General Comment No. 20 on the implementation of the rights of the child during adolescence, has urged States to strike a balance between protection of children from sexual exploitation and abuse and respect for their evolving autonomy. It has recommended that:

"States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity."⁷⁸ [emphasis added]

In 2016, the CRC expressly recognised that adolescence is a distinct developmental stage, and urged States to ensure that "[a]pproaches adopted to ensure the realization of the rights of adolescents differ significantly from those adopted for younger children."⁷⁹ It also cautioned that "generic policies designed for children or young people often fail to address adolescents in all their diversity and are inadequate to guarantee the realization of their rights."⁸⁰ In 2019, in General Comment No. 24 on Children in the Justice System, the CRC urged States to remove status offences, which criminalize adolescents who engage in consensual sexual acts with one another.⁸¹

The international human rights law framework thus acknowledges adolescents' sexuality and encourages States to strike a balance between protection and evolving autonomy by ensuring that consensual sexual activity among adolescents is not criminalized.

Several High Courts have recognised that adolescent relationships are normal and criminalisation of such acts affects both parties and is not in keeping with the objectives of the POCSO Act.⁸² In

⁷⁶ Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, paras 3, 9, 20 (GC 20). Youth and human rights: Report of the United Nations High Commissioner for Human Rights, A/HRC/39/33, Para 31 (28 June 2018). Human Rights Council, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/32/32, paras 9, 11 (4 April 2016). WHO, Assessing and supporting adolescents' capacity for autonomous decision-making in health-care settings (2021), pp.5-6. Gerison Lansdown, The Evolving Capacities of the Child, UNICEF (2005), p.39.

⁷⁷ UNESCO, UNAIDS, UNFPA, UNICEF, UN-Women, & WHO, International technical guidance on sexuality education- An evidence-informed approach (2018), p.18.

⁷⁸ GC 20, para 40

⁷⁹ GC 20, para 1.

⁸⁰ GC 20, para 3.

⁸¹ CRC, General Comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019, para 12.

⁸² *Kajal v State of Uttar Pradesh* 2019 SCC OnLine All 3909; *Atul Mishra v. State of UP*, Criminal Misc. Bail Application No. 53947 of 2021 decided by the Allahabad High Court on 25.01.22; *Sunil Mahadev Patil v. State of Maharashtra*, Bail Application No. 1036 of 2015 decided by the Bombay High Court on 03.08.15; *Sabari @ Sabarinathan v. The Inspector of Police*, 2019 (3) MLJ (CrI) 110; *Vijayalakshmi v. State Rep, The Inspector of Police*, CrI.O.P.No.232 of 2021 decided by the Madras High Court on 27.01.21; *Xxxxxxx v. The State*, CrI.O.P.(MD)No.18064 of 2019 decided by the Madras High Court on 05.12.2019, *Kuldeep v. State of Himachal Pradesh* 2019 SCC OnLine HP 2659, *Chander Vir Kaundal v. State of H.P.*, 2017 SCC OnLine HP 95, *Aarti v. State of U.P.*, Misc. Bench No. 5503 of 2018, decided by the High Court of Allahabad on 30.05.2018;; *Sunilkumar Dilipbhai Patel v. State of Gujarat*, R/CR.MA/19567/2020 decided by Gujarat High Court on 22.12.20; *Shembhalang Rynghang v. State of Meghalaya*, CrI. Petn. No. 64 of 2021 decided by Meghalaya High Court on 23.03.22; *Skhemborlang Suting v. State of Meghalaya*, CrI. Petn. No. 63 of 2021 decided by Meghalaya High Court on 23.03.22.

Vijayalakshmi v. State Rep, The Inspector of Police,⁸³ the Madras High Court quashed proceedings of kidnapping, penetrative sexual assault, and child marriage against a man in his early 20s, observing that the POCSO Act did not intend to punish “an adolescent boy who enters into a relationship with a minor girl by treating him as an offender”. It cited evidence that “adolescent romance is an important developmental marker for adolescents’ self-identity, functioning and capacity for intimacy” and concluded that criminalisation would be counterproductive.⁸⁴ It drew attention to the persecution that would result from incarceration and emphasised the need for support and guidance instead.⁸⁵ Similarly, in *Agavai v. the State*,⁸⁶ the petitioner child in conflict with the law was 15 years old and the victim girl was 17 years old when they entered into a sexual relationship. The Madras High Court observed that the issue of consensual sex between minors is a legal grey area in India and concluded that, “punishing the minor boy who enters into a relationship with a minor girl who were in the grips of their hormones and biological changes which is otherwise normative development in the children, is against the principles of the best interest of the child.” In *Skhemborlang Suting v. State of Meghalaya*,⁸⁷ the petitioners were a married couple and a case was lodged after a medical check-up when the wife became pregnant. The High Court of Meghalaya quashed the proceedings reasoning that the act could not be termed an “assault”, as no threat or attempt to inflict offensive physical or bodily harm on the minor wife had been made out.

While marriage between the parties appears to have influenced several High Courts and resulted in the quashing of romantic cases under the POCSO Act, sexual behaviour is normative during adolescence, and relationships may not always end in marriage. Thus, this calls for a reconsideration of the age of consent.⁸⁸

5. WAY FORWARD: LEGAL, EDUCATIONAL, AND POLICY REFORMS

“Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions.”

Justice D.Y.Chandrachud in *Justice K.S.Puttaswamy v. Union of India*, AIR 2017 SC 4161

1. Comprehensive sexuality education

Concerns that adolescents are predisposed to making impulsive and poor decisions can be effectively mitigated through the provision of age-appropriate, evidence-informed, comprehensive, and rights-based sexuality education.⁸⁹ Comprehensive sexuality education will help bridge knowledge gaps, build positive skills and attitudes needed to make informed decisions and navigate through interpersonal relationships, and empower children and adolescents to “realize their health, well-being and dignity; develop respectful social and sexual relationships; consider how their choices affect their own well-being and that of others; and, understand and ensure the protection of their rights throughout their lives.”⁹⁰ Contrary to the belief that such education will trigger sexual behaviour among minors, evidence supports that it actually delays sexual activity and promotes responsible sexual behaviour.⁹¹

⁸³ CrI.O.P.No.232 of 2021 decided by the Madras High Court on 27.01.2021.

⁸⁴ Ibid, paras 15-16.

⁸⁵ Ibid, para 18.

⁸⁶ Criminal Revision Case No. 877 of 2021, Decided by the Madras High Court on 29.04.2022. ⁸⁷ CrI. Petn. No. 63 of 2021, decided by the High Court of Meghalaya on 23.03.2022

⁸⁸ Swagata Raha & Shruthi Ramakrishnan, “Changing the age of consent”, The Hindu, 5 October 2022.

⁸⁹ GC 20, para 61. Committee on Economic Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 49(f).

⁹⁰ Supra n.77, p.16.

⁹¹ Dolores Ramirez-Villalobos, et.al., “Delaying sexual onset: outcome of a comprehensive sexuality education initiative for adolescents in public schools”, BMC Public Health volume 21, Article number: 1439 (2021). Laura Duberstein Lindberg and Isaac Maddow-Zimet, “Consequences of Sex Education on Teen and Young Adult Sexual Behaviors and Outcomes”, Journal of Adolescent Health, Vol.51, Issue 4, October 2012, pp. 332–338.

There is an obligation to create awareness and inculcate gender sensitivity and gender equality under the POCSO Act and Rules,⁹² and based on the recommendation by the CRC to India to ensure that “sexual and reproductive health education is part of the mandatory school curriculum”.⁹³ The government’s initiative to develop a curriculum on health and wellness of school-going adolescents is a step towards “inculcat[ing] positive and progressive attitudes and enhanc[ing] life skills to promote informed, responsible and healthy behaviors among school going children.”⁹⁴ Concerted efforts are needed to monitor its implementation in schools across India and ensure that the content pertaining to sexual and reproductive health is comprehensive and rights-based, and also include appropriate inputs on the legal framework. Equal efforts need to be directed towards imparting knowledge, skills and attitudes to vulnerable groups such as children with disabilities, children out of schools, and children in tribal or conflict-affected areas, with the support of grassroot workers, local authorities, and civil society organisations, so that all children and adolescents are equipped to make “free, informed and positive decisions and life choices, and successfully navigate the transition into adulthood.”⁹⁵

2. Resolving of the dichotomy between health programs and the legal regime

Government health programs such as the RKSK stress on the provision of accessible SRH information and services⁹⁶ and the need to educate adolescents on contraception and safe sex methods, while requiring their clinics to provide adolescents with emergency contraceptives.⁹⁷ Efforts need to be directed towards ensuring that the Adolescent Friendly Health Clinics (AFHCs) are accessible and functional, and that the provision of information and services such as pregnancy care and abortion, as well as diagnostic services for HIV, STIs, and pregnancy are not hindered by the mandatory reporting obligation under the POCSO Act. Suitable legal reforms have to be initiated to ensure that service providers are not constrained and adolescents’ access to such information and services is confidential and unrestricted. An amendment may also be required for the operationalisation of the clarification given by the Supreme Court on mandatory reporting in the context of termination of pregnancies in consensual cases,⁹⁸ while ensuring protection of children against sexual exploitation.

3. Decriminalization of adolescent sexuality

The current legal regime disregards the evolving capacity of adolescents and their normative sexual behaviour. While the age of consent varies across jurisdictions, the age of 16 appears to be the common threshold across different countries.⁹⁹ In addition to several western countries, South Asian countries like Sri Lanka,¹⁰⁰ Bangladesh,¹⁰¹ and Bhutan¹⁰² have also set their age of consent at 16 years. It must be considered that the age of consent was 16 years from 1940 to November 2012, till the POCSO Act came into force. The Justice Verma Committee and the Madras High Court have also recommended that the age of consent under the POCSO Act be lowered to 16 years. The age of consent should also be distinguished from the age of marriage, as the latter entails responsibilities, expectations, implications and legal liabilities, and sexual acts do not occur only within the confines of marriage.

While countries such as the USA, South Africa, and Canada have incorporated close-in-age exceptions which prescribe proximate age gaps within which consent is recognised,¹⁰³

⁹² POCSO Act, 2012, Section 43 and POCSO Rules, 2020, Rule 3.

⁹³ Committee on the Rights of the Child, Concluding observations on the consolidated third and fourth periodic reports of India, CRC/C/IND/CO/3-4, 13 June 2014, para 66.

⁹⁴ NCERT, Curriculum on Health and Wellness of School-going Adolescents, under the aegis of School Health Programme of Ayushman Bharat, p.6.

⁹⁵ GC 20, para 16.

⁹⁶ Strategy Handbook, RKSK, p.40.

⁹⁷ Implementation Guidelines, RCH-II ARSH strategy at pg 12-13

⁹⁸ X v. Principal Secretary, Health & Family Welfare Department, Civil Appeal No 5802 of 2022, decided by the Supreme Court on 29.09.22.

⁹⁹ Legal Ages of Consent by Country. The age of consent is 16 years in the United Kingdom, Norway, Canada, South Africa and Spain, as well as several States in Australia and the USA.

¹⁰⁰ Sri Lankan Penal Code 1883, Section 363(e).

¹⁰¹ Bangladesh Penal Code 1860, Section 375.

arbitrariness is inherent in determining the suitable age gap. Such an approach may also not be viable as relationships with significant age gaps are socially acceptable in India. The introduction of a close-in-age exception will also increase the likelihood of age-related litigation, which in turn will protract trials and result in an enhanced period of incarceration for the accused. More significantly, a close-in-age exception will not spare the parties in a consensual and non-exploitative relationship the humiliation and trauma of a criminal investigation and trial.

An amendment to the POCSO Act and the IPC is needed to decriminalize consensual acts involving adolescents above 16 years, while also ensuring that those above 16 years and below 18 years are protected against non-consensual acts under the POCSO Act. A distinct provision recognising consent by those above 16 years may be considered, while criminalising acts against them if it is against their will, without their consent, or where their consent has been obtained through fear of death or hurt, intoxication, or if the accused is in position of authority such as a public servant, staff of a Child Care Institution or educational institution in which the adolescent is placed or is accessing education. Till such time as the law is amended, law enforcement agencies,¹⁰⁴ Child Welfare Committees¹⁰⁵ and Juvenile Justice Boards¹⁰⁶ may consider exercising the discretion available under existing legal provisions, in the best interest of children, so as to avoid or minimise the harm caused by arrest, apprehension, and institutionalisation of adolescents and young persons in consensual cases.

6. CONCLUSION

The balance between protection and evolving autonomy is central to ensuring the best interests of adolescents,¹⁰⁷ but the current legal framework fails to do so and unjustly conflates normative consensual acts among adolescents with sexual abuse. Instead of protecting adolescents from abuse, the law exposes those in factually consensual and non-exploitative relationships to the risk of a criminal prosecution and compromises the child protection mandate. The significant proportion of romantic cases in the criminal justice system also raises concerns about overcriminalization and overburdening of the criminal justice and child protection systems with cases that do not include any elements of “rape” or exploitation.

A legal amendment is, therefore necessary to decriminalise consensual sexual acts involving adolescents above 16 years, while also ensuring that all children below 18 years are protected from sexual offences under the POCSO Act. All children and adolescents need to be provided rights-based comprehensive sexuality education. Legal and policy reforms are also needed to ensure confidential and barrier-free access of adolescents to sexual and reproductive health services. Comprehensive sexuality and life skills education should also be integrated into the school curriculum. This would be an essential step towards safeguarding the rights and interests of adolescents and ensuring that their health, dignity, and overall developmental potential are advanced.

¹⁰² Penal Code (Amendment) Act of Bhutan of 2021, Section 183 <https://www.nab.gov.bt/assets/uploads/docs/acts/2021/Peal_Code_Amendment_Act_of_Bhutan_2021.pdf> accessed 27 October 2022.

¹⁰³ South African Criminal Law (Sexual Offences and Related Matters) Amendment Act 2015, Sections. 15 & 16. Canadian Criminal Code (R.S.C., 1985) Section 150.1(2.1).

¹⁰⁴ The Hindu Bureau, “Police should exercise restraint, while arresting young people in cases of love marriage, under POCSO: Judge”, The Hindu, 19 November 2022. Cr.P.C, 1973, Section 41-A.

¹⁰⁵ JJ Act, 2015, Sections 3(xii), 37, and 39.

¹⁰⁶ JJ Act, 2015, Sections 3(xii), 3(xv), 12,

¹⁰⁷ Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013, para 84.

