



PRACTICE NOTE

RIGHTS OF COMPLAINANTS IN POCSO BAIL APPLICATIONS

1. In January 2020, the Delhi High Court bench of Justice G.S. Sistani and Justice Anup Jairam Bhambhani issued guidelines to be followed in cases under the Protection of Children against Sexual Offences Act ('POCSO Act'). The provisions mandated that the presence of the victim/complainant/informant or his/her representative will be obligatory when bail applications are heard. This was a direct outcome of public interest litigation (PIL), *Reena Jha & Anr. Vs Union of India & Ors*, filed in May 2017 on behalf of aggrieved mothers of minor survivors of sexual abuse, through HAQ - Centre for Child Rights, and iProbono. The PIL emphasised Rules 4(11) and (12) of POCSO Rules, according to which, the police must inform the survivor's family about the arrests, bail hearings, the grant of bail etc.

2. It is relevant to point out that Section 439(1A) of the Code of Criminal Procedure, 1973 ('Cr.PC') mandates that, in any case under Section 376(3) or 376AB or 376DA or 376DDB of the Indian Penal Code ('IPC'), the presence of the informant or any person authorised by him shall be obligatory at the time of hearing an application for bail. The Delhi High Court issued Practice Directions to the district judges on 24.09.2019 clearly specifying how notice of the bail application was to be served on the informant/her representative by the investigating officer ('IO'), and such proof of service was directed to be annexed by the IO to their reply to the bail application. However, they were not extended to cases under the POCSO Act. Non-implementation of these provisions affects POCSO trials as it denies the victim/complainant their right to fair representation and other issues including witness protection, as there are chances that the accused may influence the victim/other material witness, which can then negatively affect the outcome of the case. An opportunity for the victim and/or the representative to put forth their point of view during the bail hearing adds another layer of safeguard for victims, their families, and the community.

INITIAL DIRECTIONS

The High Court acknowledged that specific guidelines are needed concerning bail applications under POCSO, and our lawyers submitted recommendations to that effect. On 25.11.2019, during the proceedings, the court directed that –

- The Delhi High Court Practice Directions of 24.09.2019, in compliance with Section 439 of the Cr.PC, be sent to all district judges responsible for bringing the same to the notice of all the criminal courts in Delhi under their respective jurisdictions.
- District judges should file a report in the High Court on whether these practice directions are being followed, and if not, the reason for the omission.

- These directions should be brought to the notice of the presidents and secretaries of all bar associations in Delhi and be displayed on the notice boards of all concerned criminal courts.

ADDITIONAL DIRECTIONS

At final argument stage, iProbono's lawyers submitted that these practice directions are based on amendments to Section 439 Cr.PC and apply to aggravated forms of sexual offences under Section 376(3), 376-AB, 376-DA, and 376-DB of IPC, however, they have not been extended to cases under the POCSO Act, which are equally heinous in nature. They further drew the Court's attention to Section 40 of POCSO Act read with Rules 4(11) & 4(12)(viii) of the POCSO Rules which deals with the right to legal counsel and the duty of the police to inform the child and his parent/guardian of the arrest or bail of the accused respectively. It was submitted that the Practice Directions or additional directions to the same effect should be extended and made applicable to offences under the POCSO Act. Consequently, on 27.01.2020, the Court passed the final judgment and directed that:

- The provisions of the Delhi High Court Practice Directions shall *mutatis mutandis* also apply to offences under POCSO Act.
- In relation to POCSO offences, where the crime has been perpetrated by a close family member, issuing a notice or giving information to such family members in line with the practice directions would not serve any purpose. Hence, on our lawyers' suggestion, the Court directed that in such cases, notice be issued to the concerned child welfare committee, and a copy of the notice/information also be sent to Delhi State Legal Services Authority (DSLISA).
- The National Commission for Protection of Children Rights (NCPCR) and the State Commission for Protection of Children Rights (SCPCR) must ensure that they comply with the mandate of Rule 6 of POCSO Rules in relation to monitoring and implementation of the provisions of the Act, strictly and faithfully.

3. The guidelines laid down in *Reena Jha vs Union of India* (supra) set a strong precedent for the appropriate handling of POCSO cases and better protection of the rights of child survivors. Despite these mandatory guidelines, district courts failed to follow them in many POCSO cases and bail applications continued to be heard in the absence of the Complainant. During the COVID-19 Lockdown, this happened more frequently when bail application in POCSO and rape cases were being decided by the duty sessions judges, who may or may not be familiar with the processes of the POCSO Special Courts.

4. In May 2020, a minor victim aggrieved by the grant of interim bail in a case involving Section 6 of the POCSO Act, filed a petition, Miss G (minor) through her mother Vs State of NCT of Delhi & Anr. in the Delhi High Court seeking quashing of the bail order and issuance of directions to the Special Courts to strictly comply with Section 439(1A) Cr.PC and the Practice Directions. The Court was informed that in a majority of bail applications in POCSO cases decided by district courts in Delhi during the COVID-19 lockdown, notice was not issued to the complainant/victim. 122 publicly available orders in POCSO bail cases where the complainant's presence was not recorded were filed before the Delhi High Court. Regular/interim bail had been granted in 36 of these cases. In response, the Delhi High Court requested a report from the Ld. Registrar General which collected data for the period between 22.04.2020 and 23.05.2020, showing that of a total of 294 cases wherein bail was sought by the accused, notice was issued in only 79 cases. Observing that issuance of notice is a fundamental mandatory pre-condition which cannot be neglected in any case, Justice Pratibha M. Singh issued the following, more detailed directions:

- Whenever an accused charged under Sections 376(3), 376-AB, 376-DA or 376-DB of the IPC or the provisions of the POCSO Act, moves an application for regular bail or interim bail, notice shall be issued to the IO as also any counsel on record for the victim/complainant/informant;
- Upon receipt of the bail application or the notice of such application, the IO shall immediately issue a notice to the victim/complainant/ informant in the prescribed format as per Annexure A of the practice directions. The service of notice shall be certified by the SHO of the local police station by signing the annexure at the prescribed place.
- The duly completed Annexure A shall be filed along with the reply/ status report filed by the IO regarding the bail application and shall be presented to the Court.
- If the IO cannot trace the complainant/victim/informant, it shall be mentioned in the status report. Further, if there is any specific reason for non-appearance of the complainant/victim/informant, the same shall be recorded and placed before the Court.
- In case the complainant/victim/informant has not been traced, the IO shall try to ascertain the whereabouts of the individual and bring them before the Court.
- Before proceeding to hear the bail application, the Court will ascertain the service of notice. If the notice has not been served, either through the IO or the counsel on record, as a secondary safeguard, the Court can issue summons to the complainant/victim/informant.
- Once they appear before the Court, adequate representation shall be ensured for the victim/complainant/informant either through their own counsel or through a legal service authority counsel.
- All the relevant documents required for the victim/complainant/ informant to effectively represent the case for opposing the bail shall be provided.
- In every bail order, service of notice or reasons for non-service or non-hearing of the complainant/victim/informant shall be specifically recorded before proceeding to pass orders.

- In case interim bail is sought for an emergency such as a death in the family or a medical emergency, and awaiting notice to the complainant/victim/informant appears non-feasible, in a rare case, reasons for the same shall first be recorded in the order.

5. Both these judgments and the Practice Directions were to be circulated to the Commissioner of Police, Delhi and Director, Prosecutions and all District Judges for onward circulation to all Delhi Higher Judicial Service (DHJS) officers.

6. Unfortunately, there a number of practical difficulties in the implementation of these explicit directions including:

- Victims/complainants are repeatedly summoned for hearings on successive bail applications, whereas courts should appoint counsel in terms of Section 40 POCSO Act who can represent them where there is no private counsel engaged already;
- IOs and SHOs insisting on personal appearance of the victim/complainant, even when they are represented by a legal guardian or by counsel;
- During the lockdown, IOs insist on the physical presence of the victim/complainant in court, although courts have been functioning using video-conferencing. Routinely, victims and/or their families have been forced to wait at the police station for hours till the bail application is taken up virtually by the court. Both situations lead to unnecessary harassment and inconvenience for the victim and their family.
- In cases where the victim/complainant does not have their own lawyer, failure to secure legal representation for the victim through DSLA in terms of Section 40 POCSO Act may leave them unsure of what difficulties to state before the court.
- Failure of the Special Court and the Legal Services Authority to sufficiently secure the child's interests independently, in cases involving very young children and also in cases of incest.

7. Lawyers representing children in POCSO cases should be mindful of some of these challenges and inform the courts or the IO that the victim/complainant can be represented before the court through counsel.

8. The judgments set a progressive precedent for all criminal courts in Delhi hearing bail applications in POCSO cases. They can also be used as precedent in other jurisdictions to ensure enhanced protection for children. That said, the directions issued by the courts have to be implemented with application of mind and sensitivity. The right of hearing afforded to the victim at the bail hearing has to be meaningful, and keep in mind the best interests, limitations and particular circumstances of the child.

iProbono's mission is to enable people to access their rights in pursuit of a just society.

By promoting active citizenship and engaging a holistic model we:

- Advance justice for all by representing people in need
- Strengthen the impact of civil society
- Advocate for policies that promote social equity and end discrimination

HAQ is a human rights organisation that focuses on all rights for all children, recognising them as citizens of today and adults of tomorrow.

It aims to mainstream child rights and children's concerns in all development planning and action through knowledge creation, evidence based advocacy and communication, direct support for children in distress, collaboration and partnership.

To find out more about our work, visit
iProbono - www.i-probono.com and
HAQ Centre for Child Rights - <https://www.haqcrc.org/>

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