

How judicial discretion decides bail in POCSO cases

The order comes amid ongoing debates about bail jurisprudence under the Protection of Children from Sexual Offences Act, a stringent legal provision which specifically deals with sexual offences against minors (those under the age of 18).

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In recent years, courts have begun considering these nuances while granting bail. Bail may be considered favourably if the relationship appears to be consensual, and especially where the victim has recorded a statement before the magistrate to that effect.

Earlier this month, a special POCSO court in Mumbai granted bail to a 40-year-old female teacher accused of sexually assaulting a teenage boy, noting the consensual nature of their relationship.

The order comes amid ongoing debates about bail jurisprudence under the Protection of Children from Sexual Offences Act, a stringent legal provision which specifically deals with sexual offences against minors (those under the age of 18).

Note that the law departs from the standard criminal law principle of “presumption of innocence” — instead of the prosecution having to prove the guilt of an accused, as is the norm, the accused bears the burden of proving his innocence. Over the years, getting bail in POCSO cases, especially in early stages of an investigation, has been challenging.

Bail in POCSO cases

POCSO offences are cognizable and non-bailable: arrests can be made without a warrant, and bail is not automatic. But the law does not contain specific statutory guidelines on bail.

Under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (Section 439 of the erstwhile Code of Criminal Procedure, 1973), factors under consideration for bail include the nature and gravity of the offence, severity of the punishment, risk of flight, and likelihood of tampering with evidence or influencing witnesses. Over the years, courts have carved additional thresholds for bail in POCSO cases.

The [Delhi](#) High Court in *Dharmander Singh* (2020) identified the age of the victim, the age of the accused and the age gap, the relationship between the two parties, elements of coercion, conduct of the accused post-offence, etc. as factors to be considered in POCSO cases. But the court clarified that this list is not exhaustive, and serves as a “non-binding guide”.

The Supreme Court in *Deshraj @ Musa vs State of Rajasthan & Anr* (2024) granted bail to an 18-year-old boy who had been in jail for five months in a POCSO case involving a 16-year-old girl. The relationship appeared to be consensual. Since the trial would take time, and given the the age gap and the time already spent in custody, the court granted bail to the accused.

These decisions reaffirm that bail under POCSO remains a matter of judicial discretion where courts weigh constitutional liberties against the risk to the victim.

Consent under POCSO

POSO does not recognise consent below the age of 18. Any sexual act with a teen, even if voluntary, is treated as an offence. This creates a legal grey zone in cases where teenagers enter into consensual relationships that later attract criminal charges.

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victim has recorded a statement before the magistrate to that effect.

Nonetheless, securing bail is often difficult in the early stages of POCSO cases. Courts tend to wait until the victim has recorded her statement and the prosecution has collected key evidence, even if it means prolonged pre-trial custody for the accused.

In an ongoing case, Senior Advocate Indira Jaising has requested the SC to bring down the age of consent from 18 to 16. The criminalisation of adolescent relationships, she argued, is a direct infringement of fundamental rights of the person. The Centre's response stated that "such changes, even in the name of reform or adolescent autonomy, would undermine the legal protections designed to safeguard minors and potentially increase the risk of child abuse".

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