

## CONSENT: A CAVEAT IN POSCO – BALANCING JUSTICE AND ADOLESCENTS' RIGHTS

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### ABSTRACT

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was enacted in India to curb cruel and barbarous acts of sexual offenses against minors. It aims to protect children from sexual assault, sexual harassment, and pornography, establishing Special Courts to handle related cases. The Act defines a child as any person below the age of eighteen years, making it gender-neutral and inclusive of all sexual abuses irrespective of gender. However, a growing concern arises regarding consensual relationships between adolescents close to the age of majority, where sexual activity might occur with mutual consent. The Act does not consider consent in prosecuting sexual assault cases involving minors. This has led to the criminalization of romantic relationships and poses a significant challenge to the criminal justice system.

Several high courts have expressed reservations about the stringent application of the Act in cases of consensual adolescence sexual activity. They have emphasized understanding adolescents' psychology and the complexities of teenage relationships. In various judgments, the courts have highlighted that the Act's aim is to protect children from abuse and not to punish adolescents involved in romantic relationships. The courts advocate distinguishing cases of teenage relationships from cases of sexual assault on younger children below sixteen. While the POCSO Act is vital in protecting children, it must be balanced with respecting adolescents' rights, including their sexual autonomy and decision-making abilities.

The question of consent becomes crucial, as consensual relationships are inadvertently being classified as sexual offenses under the Act. Courts have recognized that mere submission or resignation does not constitute consent. True consent requires voluntary, informed, and free agreement from both parties, involving both mental and physical willingness.

**KEYWORDS:** POSCO ACT, AGE UNDER POSCO ACT, CONSENT AND POSCO, JUDICIAL TREND IN POSCO, CONTEMPORARY JUDGEMENTS IN POSCO ACT

### I. INTRODUCTION

“the duty of the State is to safeguard the ability to take decisions—the autonomy of the individual – and not to dictate those decisions.”

Lordship Dr. D.Y. Chandrachud in the case of Justice K.S. Puttaswamy (Retd). v. Union of India<sup>712</sup>

India as a country has come so far since its independence. India as a country can be best defined as conjunction of culture, ideals, superstition and modernity. We preach the idea of "children are God," the concept of children being connected to the divine or representing the divine presence can be found in various Hindu teachings and traditions. Yet the mountain of crime against these godly embodiments keeps achieving new peaks in

<sup>712</sup> AIR 2017 SC 4161

terms of numbers as well as in terms of cruelty and barbarism in its conduct. It was to curb such cruel and barbarous act Indian parliament introduced THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (ACT NO. 32 OF 2012) also referred in common parlance as POSCO Act. The act was supplemented with PROTECTION OF CHILDREN FROM SEXUAL OFFENCES RULES, 2012 then again with POSCO RULES 2020 for better implementation of the act and make to make the punishment for child abuse more stringent. However, this strictness has caused problems in many aspects. The problems and the creative solution by the Indian judiciary are discussed in this paper

## II. THE POSCO ACT 2012

The preamble of the act mentions its aim which is "to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto."<sup>713</sup> The preamble also mentions that the act was in conformity Convention on the Rights of the Child, adopted by the General Assembly of the United Nations and its goals to prevent sexual abuses, sexual activity prostitution and pornography involving children.

The first question which has to be asked is who is a child? The act has in it section 2(d) defines "child" means any person below the age of eighteen years." So, anyone does anything prohibited by this act with a person below 18 years will face the wrath of the statute. It is also pertinent to note that child is defined in a gender-neutral term so the act is gender neutral and will take all act of sexual abuses, sexual activity prostitution and pornography under its ambit irrespective of gender. The age concerned is the physical age of the child.

The act defines and punishes various crimes involving sexual abuses of the children which includes penetrative sexual assault, aggravated penetrative sexual assault, sexual assault,

aggravated Sexual assault, sexual harassment, use of child for pornographic purposes, abetment of an offence.

A summarise version of major offences defined and punished under the act is as follows:

\*All the information in the table is taken from THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (ACT NO. 32 OF 2012)

<sup>713</sup> THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (ACT NO. 32 OF 2012), s 2(d)

S. NO.	Section	Crime	Punishment
1	3	Penetrative sexual assault	<p>Punishable under section 4</p> <p>imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.</p> <p>If the victim is below sixteen years imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.</p>
2	5	Aggravated penetrative sexual assault	<p>Punishable under section 6</p> <p>rigorous imprisonment for minimum twenty years, but which may extend to imprisonment for life and fine</p> <p>and fine</p> <p>or death punishment</p>
3	7	Sexual assault	<p>Punishable under section 8</p> <p>imprisonment of either description for minimum three years but which may extend to five years, and shall also be liable to fine.</p>
4	9	Aggravated Sexual assault	<p>Punishable under section 10</p> <p>Imprisonment of either description for minimum five years but which may extend to seven years, and shall also be liable to fine.</p>
5	11	Sexual harassment	<p>Punishable under section 12</p> <p>Imprisonment of either description for a term which may extend to three years and shall also be liable to fine.</p>

6	13	Use of child for pornographic purposes	<p>Punishable under section 14</p> <p>Imprisonment for a term which shall not be less than five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment for a term which shall not be less than seven years and also be liable to fine.</p> <p>For pornographic purpose commits any offence under section 3 or section 5 or section 7 or section 9 by directly participating in such pornographic acts then in addition of the punishment above mentioned the respective punishment for said sections.</p>
7	15	Punishment for storage of pornographic material involving child	<p>Any person who has child pornography but does not delete, destroy, or report it to the designated authority with the intention of sharing or transmitting it will be fined a minimum of five thousand rupees.</p> <p>For repeat offenses, the fine will be at least ten thousand rupees.</p> <p>Anyone possessing child pornography with the intention of transmitting, propagating, displaying, or distributing it, except for reporting purposes or as evidence in court, will be punished with imprisonment for up to three years, a fine, or both.</p> <p>Those storing or possessing child pornography for commercial purposes will face severe penalties.</p> <p>First conviction: Imprisonment for a minimum of three years, up to five years, a fine, or both.</p> <p>Second or subsequent conviction: Imprisonment for a minimum of five years, up to seven years, and a fine</p>

The act also provides under section 28 for establishment of special court to provide speedy trial of the offences perceived within the act. The act in some special circumstances negatives the maxim *Ei incumbit probatio qui dicit, non qui negat* as it provides for the presumption of guilt. Under section 29 of the act “where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”<sup>714</sup>

The act has been a sigh of relief for minors who face abuses not only outside the home rather with in the confinement of their home by some close relatives and sometimes even by their parents. According to NCRB there were 47,221 POCSO cases out of 1,28,531 cases of crime against children in 2020 (36.73 per cent) and 47,335 of 1,48,185 such cases in 2019 (31.94 per cent). The data keeps increasing every year and the law need to be in its full force to tackle such heinous crimes.

### III. CONSENT

It is necessary to understand consent because cases under POSCO Act are generally prosecuted along with section 376 of the Indian Penal Code (IPC). Section 375 of IPC which defines rape has one of its essentials that the rape should have been done without the consent of victim. As we are aware that rape law under IPC is not a gender-neutral law as POSCO the victim under IPC can be only girl. Explanation 2 to section 375 lays down “*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act*”<sup>715</sup>

The above section defines consent explicitly in context of rape. However, the general

conception of consent is defined under the section 90 of the IPC which has defined rape in a negative terminology. Section 90 is as follows “*Consent is not consent in the sense intended by any section of this Code if it is given by a person under fear of injury or under a misconception of fact, and the person doing the act knows or has reason to believe, that the consent was given as a result of such fear or misunderstanding.*”<sup>716</sup>

In cases of rape, both section 90 and 375 of IPC must be considered unitedly, with the latter specific provision superseding the former in accordance with the principles of judicial/legal interpretations.

Now consent has been interpreted many times by the supreme court and various high courts. A consensus has been derived through various judgements regarding what can be or cannot be considered as consent. It is apt to look through some of the decisions to crack the crux of consent.

Consent is more than just participating in the act. Mere submission cannot amount to consent. So does neither consent obtained from coercion, fear and misconception. In State of H.P. Vs. Mango Ram, K.G. Balakrishnan, J. while speaking on behalf of court stated that: “*Submission of the body under the fear or terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.*”<sup>717</sup>

Section 90 needs a deeper deliberation as it defines consent from two perspectives. The initial part defines it from the view point of the victim or from the person from whom consent is

<sup>714</sup> THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (ACT NO. 32 OF 2012), s 29

<sup>715</sup> THE INDIAN PENAL CODE (ACT NO. 45 OF 1860), s 375

<sup>716</sup> THE INDIAN PENAL CODE (ACT NO. 45 OF 1860), s 90

<sup>717</sup> State of H.P. Vs. Mango Ram, (2000) 7 SCC 224

being obtained as it says consent given under “fear of injury or under a misconception of fact” is not consent at all and the later part which has view point of accused or the person trying to obtain consent had knowledge reason to believe that that the consent was being obtained through *fear of injury or under a misconception of fact* then such consent is no consent.

A passage from the judgement of Harnarain Singh Vs. State<sup>718</sup> pronounced by Punjab-Haryana High Court which was latter affirmed by supreme court in Uday Vs. State of Karnataka<sup>719</sup> & Deelip Singh @ Dilip Kumar vs State of Bihar<sup>720</sup> by Supreme Court clears the crux of consent:

*“A mere act of helpless resignation in the face of inevitable compulsion, acquiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be ‘consent’ as understood in law. Consent, on the part of a woman as a defence to an allegation of a rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.*

*Submission of her body under the influence of fear or terror is not consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one’s will or pleasure.”<sup>721</sup>*

Similar instance was taken by the Kerala high court in case of High Court of Kerala in Vijayan Pillai @ Babu vs. State of Kerala<sup>722</sup>, the court said in order to established it must be proved that the victim freely submitted herself while in free and unconstrained position of her physical and mental power to act in a manner she wanted. Consent requires deliberate, informed, and voluntary agreement, involving both the mental willingness and the ability to act freely. Passive submission or resignation does not qualify as true consent

In Jowitt’s Dictionary of English Law II Edn. Vol. I explains consent as follows: “An act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side.”

In Deelip Singh @ Dilip Kumar vs State of Bihar<sup>723</sup> the supreme court has explicitly mentioned that a legitimate consent requires three things - a physical power, a mental power and a free and serious use of them.

So, to summarise the above decisions we can say that a consent obtained through fear, misconception and coercion is not consent neither is mere submission rather it is an informed and voluntary agreement of both mental and physical willingness.

#### IV. CONSENT AND POSCO

To say in one sentence consent has no role to play under POSCO Act. The act in its whole uses the word consent only two time which is completely not related to consent of the victim. To put in perspective even though the indulgence in sexual activity was with the consent of victim it cannot be a consent as it is legally accepted that the consent of a person below 18 years is no consent. In the case of State of Madhya Pradesh v. Balu, The Supreme Court held that consent of minors has no value in the eyes of law hence it is not valid.

<sup>718</sup> Harnarain Singh Vs. State, AIR 1958 Punjab 123

<sup>719</sup> Uday Vs. State of Karnataka, AIR 2003 SC 1639

<sup>720</sup> Deelip Singh @ Dilip Kumar vs State of Bihar, AIR 2005 SC 203

<sup>721</sup> Harnarain Singh Vs. State, AIR 1958 Punjab 123

<sup>722</sup> Vijayan Pillai @ Babu vs. State of Kerala, 1989 (2) K.L.J. 234

<sup>723</sup> Deelip Singh @ Dilip Kumar vs State of Bihar, AIR 2005 SC 203

It is based on this stringent law under any circumstances sexual activity was considered as offense under POSCO Act.

However, in spite of all these strict and stringent provisions there had been an increasing consensus regarding consent and age under POSCO which goes against the act or its strict application. This has been termed by many as grey zone. The courts have found creativity to meet the justice. There are four basic grounds for such catena of decision by various high courts:

- Aim of act
- Lack of awareness
- Consensual adolescence sexual activity
- Romantic relationship
- The age of consent

Everyone wants to enjoy their youth and everyone has right to explore their sexuality. The law of the land which is based on accepted morality of land can prohibit certain choices in

Before going to the cases lets again revise the aim of the act which was to stop sexual abuse of the children. The object was to punish such culprits who harass and sexually exploit the children below 18 years and to create a deterrence for the same but the aim was never to punish adolescents engaging in sexual activity due to some emotional or physical bond. This point has been capitalised by courts in various of its decision.

One of the earliest judgements was given by Madras High Court in case of Vijayalakshmi v. State rep. by the Inspector of Police, All Women Police Station, Erode<sup>724</sup>. The facts of the case were as follows the petitioner was facing trial before the sessions court Erode for offences under Section 366 of the Indian Penal Code, 1806, Section 6 of the Prevention of Child from Sexual Offences, 2012 and Section 9 of the Prohibition of the Child Marriage Act, 2006. The petition was filed quashing these proceeding and the peculiar point was that petition was

filed jointly by the accused and the victim or defacto complainant.

According to the records, the victim girl, who was the co-petitioner, had a known association with the accused and both were engaged in a romantic relationship. Eventually, they decided to marry and eloped from their respective homes. Subsequently, a police complaint was lodged, leading to the initiation of criminal proceedings against the accused. The parents of the victim also did not want to continue the criminal proceedings and had been declared hostile. The main issue raised by state in this case was that *"taking into account the seriousness of the offence has to consider the issue as to whether an offence of this nature can be quashed on the ground of compromise between parties."*

The court while allowing the petition held that

The seriousness of offenses under the POCSSO Act is cannot be questioned, as it aims to protect victims of child abuse. However, the Court must be careful to distinguish acts that should not fall within the scope of the Act to avoid unjustly punishing or penalizing youth for innocuous actions. The Act was meant to safeguard children from sexual assault, harassment, and pornography, but many cases seem to involve complaints from families regarding romantic relationships between adolescents and teenagers. Such cases may not align with the Act's intended purpose. Understanding the science and psychology of adolescence and young adulthood is vital in handling such cases. The court emphasised on the "biosocial approach," it said that considering both biological and social factors and drawing from biomedical and social sciences, can provide valuable insights into human development, health, and behaviour. This approach helps to recognize the complexities involved and avoid misusing the Act as a tool to unfairly target young individuals in romantic relationships.

<sup>724</sup> Vijayalakshmi v. State rep. by the Inspector of Police, All Women Police Station, Erode, 2021 SCC OnLine Mad 317.

The court further held that the victim, who was in a relationship with the accused, explicitly stated that she urged him to take her away from her home and marry her due to parental pressure. In a difficult position, the accused acquiesced to her request, and they eloped, got married, and consummated their union. Such incidents are not uncommon in villages, towns, and cities. However, when parents or families file complaints, FIRs are registered for kidnapping and various offenses under the stringent POCSO Act. Unfortunately, this leads to the boy's arrest, abruptly halting his youthful life. The current provisions of the POCSO Act may classify the boy's actions as an offense, leaving him defenceless if the case reaches its conclusion. It is essential to recognize that the objective of the POCSO Act was never to punish an adolescent boy in such situations. Rather, adolescents experiencing hormonal and biological changes should be supported and guided by their parents and society. It is crucial not to perceive these incidents from an adult's perspective, as understanding and empathy are needed to handle such cases effectively.

The court also held that *"These incidents should never be perceived from an adult's point of view and such an understanding will in fact lead to lack of empathy. An adolescent boy who is sent to prison in a case of this nature will be persecuted throughout his life. It is high time that the legislature takes into consideration cases of this nature involving adolescents involved in relationships and swiftly bring in necessary amendments under the Act. The legislature has to keep pace with the changing societal needs and bring about necessary changes in law and more particularly in a stringent law such as the POCSO Act."*<sup>725</sup>

Another judgement from the same court has given an excellent insight on the topic. In the case of Sabari v. Inspector of Police<sup>726</sup>, the Court expressed concern over the increasing number of offenses under the stringent POCSO Act,

especially when applied to teenagers who may not fully grasp the severity of the law. The court gave several suggestions to make the act more effective and such case of adolescent consensual sex is not punished vehemently.

To raise awareness about the act the court suggested that a warning sign mentioning the consequence of POSCO Act to be displayed before screening any film that involves teenage characters in relationships.

The Court noted that a significant number of cases involve relationships between adolescent boys and girls. While the Act defines a "child" as someone below 18 years, the Court observed that relationships between young individuals, even if consensual and innocent, may inadvertently come under the Act's purview if the girl is below 18 years old. This could lead to severe penalties of 7 to 10 years of imprisonment for the boy involved.

To address this issue, the Court proposed redefining the term "child" under the Act to be 16 years instead of 18. It suggested excluding consensual relationships or bodily contact involving individuals aged 16 and above from the rigorous provisions of the POCSO Act. Instead, a more liberal provision could be introduced to distinguish cases of teenage relationships from cases of sexual assault on children below 16 years. The Act could be amended to ensure that the age difference between the offender and the consensual victim girl should not exceed five years or so, thus preventing older individuals from taking advantage of impressionable young girls.

In case of Ranjit Rajbanshi v. state of Bengal & Ors<sup>727</sup>, the Calcutta High Court had made very important remarks regarding romantic sexual relationship and put forward some serious question. The court held that *"The POCSO Act was, rightly, introduced to offer protection to innocent children from several offences. However, a Draconian interpretation of the provisions thereof would merely convert it into*

<sup>725</sup> Vijayalakshmi v. State rep. by the Inspector of Police, All Women Police Station, Erode, 2021 SCC OnLine Mad 317.

<sup>726</sup> Sabari v. Inspector of Police, (2019) 3 Mad LJ (Cri) 110

<sup>727</sup> Ranjit Rajbanshi v. state of Bengal & Ors, 2021 SCC OnLine Cal 2470



*a tool of abuse of the process of law, instead being a protective shield against defenceless minors. Keeping in view the definition of 'child' in Section 2(d) of the said Act, even a person who is aged 17 years and 364 days would qualify as a child, but her maturity would not be much different from another person, who was just one day older than her, that is, 18 years old.*<sup>728</sup>

Taking into account the facts of the case the court said that the courts in its interpretation of statues cannot ignore the reality and must take into account the objects and reason of the act. The Act aims to safeguard children from sexual assault, harassment, and pornography by establishing Special Courts to handle related cases. Therefore, in determining the definition of a 'child,' factors such as age, maturity, and relevant circumstances play a crucial role, especially in cases involving penetrative sexual assault.

The court said that that in the present circumstances where the girl is 16½ years old and studied in Class XII at the time of alleged offence. The girl was not naïve or was aware of implication of sexual relations and the victim had a sexual relationship several times with accused who was also of young age.

While the consent of a minor is not considered valid under the law and cannot be considered as 'consent,' the term 'penetration' in the POCSO Act should be understood as a deliberate, one-sided action by the accused. Engaging in consensual, participatory intercourse, driven by passion, does not always mean that penetration, in itself, is a unilateral and positive act by the accused. It could also be a mutual union between two individuals acting of their own accord. In such cases, the term 'penetrates' in Section 3(a) of the POCSO Act might not solely imply the voluntary alignment of sexual organs between individuals of different genders. If the union is participatory in nature, there is no justification for singling out only the male based

on the peculiar nature of the anatomy of different genders' sexual organs. The mental state of the parties involved and the maturity level of the victim are also crucial factors to be taken into account to determine whether the penetration was indeed a unilateral and positive act by the male.

Therefore, considering the situation from a proper perspective, even if the alleged act is proven, it may not qualify as sufficient penetration to attract Section 3 of the POCSO Act. This is particularly relevant when taking into account the admitted instances of prior physical union between the accused and the victim, as well as the maturity of the victim.

Therefore, it would be incorrect to assert that the accused is guilty of penetrative sexual assault. In this case, if penetration did occur, it should be viewed not as a unilateral act by the accused but as a participatory moment of passion involving both the victim and the accused.

In case of Kwantar Khongsit and Others Vs State of Meghalaya and Ors,<sup>729</sup> the Meghalaya High Court while dealing with similar circumstances has said : *"Coming to the case in hand, this Court dealing with cases under similar or even identical facts and circumstances has maintained that in the event it is apparent that a young couple are in a relationship where love is the deciding factor even to the extent that it has culminated into a marriage relationship, it may be the case that in such a relationship even if the girl involved is legally a minor, if she has the capacity to procreate and her age is perhaps ranging from about 16 to 17 years and more but below 18 years, it would not shock the conscience of this Court if hypothetically speaking such a girl enters into a marriage relationship on her own free will, as oppose to a child of about 12 or 13 years voluntarily entering into a marriage relationship.*<sup>730</sup>

<sup>728</sup> Ranjit Rajbanshi v. state of Bengal & Ors, 2021 SCC OnLine Cal 2470

<sup>729</sup> Kwantar Khongsit and Others Vs State of Meghalaya and Ors, 2022 Cri LJ 4732

<sup>730</sup> Kwantar Khongsit and Others Vs State of Meghalaya and Ors 2022 Cri LJ 4732

The Meghalaya High Court had another take on romantic relationship in the case of *Silvestar Khonglah and Anr Vs State of Meghalaya and Anr*<sup>731</sup>. In this case it was held that in cases of rape or sexual assault, the impact goes beyond just physical harm and leaves deep emotional scars, especially when the victim is a child. To address such heinous acts and discourage potential offenders, the lawmakers enacted stringent provisions in the Protection of Children from Sexual Offences (POCSO) Act. The law even considers the concept of 'good touch' and 'bad touch,' where any inappropriate sexual conduct towards a child can lead to prosecution. However, there is a potential pitfall in this approach. In situations where there exists mutual love and affection between a child and another person, which may even lead to a physical relationship, the law does not consider the child's consent in prosecuting sexual assault. In cases involving young couples, like boyfriend and girlfriend, if both are still very young, it may not be appropriate to label their consensual actions as 'sexual assault' under the POCSO Act, considering the context of mutual love and affection.

The Karnataka High Court, in the case of *State of Karnataka v. Basavraj s/o Yellappa Madar*,<sup>732</sup> made insightful observations regarding the Protection of Children from Sexual Offences (POCSO) Act. The Act aims to safeguard minors from sexual exploitation, and it rightly recognizes that a person below the age of 18 years cannot provide legal consent. The court, having encountered cases where minor girls above 16 years fell in love, eloped, and engaged in sexual intercourse with their partners, suggests that the Law Commission of India should reevaluate the age criteria, considering the practical realities.

The aspect of consent becomes a crucial factor when examining whether an offense under the IPC and/or POCSO Act has occurred, especially

when the victim, who is now a major, provides testimony about an act committed while still a minor. Many of these offenses are committed due to a lack of awareness on the part of the involved minors. Often, the boy and girl are closely related or well-acquainted classmates, and their actions may stem from their impressionable age, leading them to engage in activities unknowingly breaching provisions of the POCSO Act and IPC. While ignorance of the law is not an excuse, the court raises an important question about whether minors can be presumed to have knowledge of applicable laws in such circumstances.

One of the latest judgements of the Bombay high court clears the intent of this judicial trend. The Bombay high court in the case of *Ashik Ramjaini Ansari Vs State of Maharashtra and Another*,<sup>733</sup> has laid down the reasons for consent being relevant under POSCO Act, disadvantages of criminalising romantic sexual relationship and how court has to balance between criminalisation of sexual activity and freedom of sexual health and intimacy.

Undoubtedly, this provision of POSCO was introduced with the clear objective of addressing the sexual exploitation of children, irrespective of gender. However, it has inadvertently given rise to a grey area, as it now criminalizes consensual relationships between adolescents and teenagers. The recent amendment to the POCSO Act, raising the age of consent from 16 to 18 years, has further complicated matters. In cases where consensual sexual activity occurs between an adolescent and an adult, the adult's actions are now subject to criminal prosecution.

In the case at hand, the prosecutrix is 17 years and 5 months old when the FIR is lodged, and she willingly and consensually engaged in sexual activity with the accused, indicating a clear romantic relationship between them. The crucial question is whether, merely because she is a few months away from turning 18 and

<sup>731</sup> *Silvestar Khonglah and Anr Vs State of Meghalaya and Anr* 2022 SCC OnLine Megh 575

<sup>732</sup> *State of Karnataka v. Basavraj s/o Yellappa Madar*, 2022 SCC OnLine Kar 1608

<sup>733</sup> *Ashik Ramjaini Ansari Vs State of Maharashtra and Another*, 2023 SCC OnLine Bom 1390

attaining legal adulthood, the act of sexual intercourse would be deemed an offense under the POCSO Act and considered rape under Section 375, even if it occurred with her consent. The concept of sexual autonomy encompasses both the right to engage in desired sexual activity and the right to be protected from any form of unwanted sexual aggression. To fully respect human sexual dignity, it is imperative to acknowledge and uphold both aspects of adolescents' rights.

Therefore, in such cases involving consensual relationships between adolescents close to the age of majority, it is essential for the legal system to carefully consider the principles of sexual autonomy, the evolving nature of adolescent sexuality, and the complexities of consensual relationships. Balancing the need to safeguard minors from harm while respecting their autonomy is paramount in ensuring fair and just outcomes.

*"Whilst all children are entitled to be protected from sexual violence, such protection should also enable young people to extend their boundaries, exercise choices and engage in necessary risk taking though not exposing them to inappropriate response, harm and danger. The penal approach towards adolescents' sexuality has impacted their life to a barrier free access to sexual and reproductive health services"*<sup>734</sup>

The criminalization of romantic relationships has placed an overwhelming burden on the criminal justice system, requiring extensive involvement of the judiciary, police, and child protection agencies. However, when the victim becomes uncooperative and does not support the charges against the accused due to the romantic relationship they shared, it often leads to an inevitable acquittal. While the POCSO Act cannot suppress the natural feelings that arise towards the opposite sex, especially during the phase of biological and psychological changes, it would be against the best interest of the child

to punish a minor boy involved in a romantic relationship with a minor girl. Both adolescents may find themselves in the grip of hormonal and biological transformations, and safeguarding their ability to make decisions and protecting their autonomy is the State's responsibility. Mere apprehensions about impulsive and misguided decisions should not categorize all adolescents in the same way, and their wishes and will must not be disregarded. It is crucial to differentiate the age of consent from the age of marriage, acknowledging that sexual acts occur beyond the boundaries of marriage. This important aspect should not only be recognized by society but also by the judicial system.

## V. CONCLUSION

The criminalization of romantic relationships under the Protection of Children from Sexual Offences Act (POCSO Act) has created a complex and challenging situation within India's criminal justice system. While the Act was originally enacted with a noble intention of safeguarding children from sexual exploitation and abuse, its stringent provisions have unintentionally resulted in the prosecution of adolescents involved in consensual relationships. This predicament raises significant questions about the delicate balance between protecting minors and respecting their rights and autonomy.

Various high court judgments have brought to light the necessity for a more nuanced approach when handling cases of consensual sexual activity involving adolescents. The courts have acknowledged the importance of considering the psychological and emotional aspects of teenage relationships and the evolving nature of adolescent sexuality. They have underscored that the primary objective of the Act is not to penalize adolescents in romantic relationships but to address and combat sexual offenses against children.

To address the challenges arising from the criminalization of consensual relationships, a

<sup>734</sup> Ashik Ramjaii Ansari Vs State of Maharashtra and Another 2023 SCC OnLine Bom 1390

careful re-evaluation and amendment of certain provisions in the POCSO Act by the legislature are imperative. One potential amendment could be the revision of the term "child" to include individuals aged sixteen and above, instead of the current eighteen, to distinguish cases of teenage relationships from those involving younger children.

Additionally, there should be a heightened focus on raising awareness about the Act, targeting both adolescents and parents. Educational programs can be conducted in schools and communities to enlighten young individuals about the legal implications of their actions and to foster healthy relationships.

Furthermore, the Act should be amended to consider the mental and emotional maturity of adolescents engaged in consensual relationships. The law should take into account the mutual understanding and willingness of both parties rather than solely fixating on the age of the individuals involved.

Moreover, the Act should prioritize diversionary and rehabilitative measures for adolescents engaged in consensual relationships. The implementation of juvenile justice mechanisms would ensure that minors receive appropriate guidance and support, rather than facing harsh penalties that might adversely affect their future.

In conclusion, achieving a delicate balance between protecting minors from sexual exploitation and upholding their rights and autonomy is essential in addressing the criminalization of romantic relationships under the POCSO Act. Through thoughtful legislative amendments and extensive awareness-raising efforts, India can ensure that the Act achieves its original purpose of safeguarding children while avoiding unjust punishment of adolescents in consensual relationships.

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