

# CHILD, LAW, AND CONSENSUAL SEX

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July 26, 2023 12:15 am | Updated 01:54 am IST

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In the last one month, at least three different High Courts have either quashed First Information Reports (FIRs) and pending criminal proceedings or acquitted accused persons under the Protection of Children from Sexual Offences (POCSO) Act, 2012. One High Court released the accused on bail on the grounds that the accused and victim had consensual sex.

On July 12, the Delhi High Court released a 25-year-old accused on bail on the premise that the 15-year-old girl had eloped with him on her own and did not support the prosecution's story of sexual assault. On July 10, the Bombay High Court quashed the conviction of a 25-year-old man under POCSO on the grounds that he had consensual sex with the 17-year-old girl. The girl had terminated her pregnancy after the arrest of the accused. On July 7, the Madras High Court not only quashed an FIR registered under POCSO and consequential criminal proceedings, but also directed the Director General of Police to produce the reports of all such pending cases before the Court. On June 27, the Madhya Pradesh High Court quashed an FIR registered under POCSO and all criminal proceedings on the basis that the sexual relationship was consensual. The judgment did not mention the age of the accused (who used to be her coach). The Court recommended that the Indian government consider reducing the age of consent of the prosecutrix from 18 to 16 years. The relevant sections of the Indian Penal Code (IPC) were also applied in these cases.

A 'child' under POCSO is defined as any person below the age of 18 years. Acts of penetrative sexual assault committed on children are criminal offences under POCSO. The purpose of defining 'child' under POCSO, and of the provision under Section 375 of the IPC (sexual intercourse, whether with or without her consent, is rape if she is under 18 years of age), is to safeguard children against penetrative sexual assault irrespective of their consent, which could even be unequivocal and voluntary. Otherwise, the third part of Section 90 of the IPC, which provides that consent is not consent "unless the contrary appears from the context, if it is given by a person who is under 12 years", was sufficient to interpret consent for a child of any age.

An analogy can be drawn with the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, where, if certain prohibited acts are committed with the knowledge of the caste of the victim, intention does not have to be proved separately. The provision was made specifically to safeguard vulnerable groups. Similarly, if children are to be treated as a separate and vulnerable category, consent should be of no avail if the accused had knowledge of the

victim being a child.

However, in the cases cited above, the High Courts neither honoured the age of consent nor took any cognisance of the mandatory legal presumption in favour of the prosecutrices. Even the difference between the age of the prosecutrix and the age of the accused, which ranged up to 10 years, was not taken into account. Though there are recommendations from various sources to reduce the age of consent from 18 to 16 years, the case where the victim was 15 years was also not paid heed to.

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If all 'consensual sex' cases are to be quashed by the judiciary, what will be the bottom-line age of consent and who will set that boundary? Can the objective of POCSO be softened and allowed to boil down to Section 90 of the IPC (which is general in nature) where consent of a child who is even less than 12 years of age be admitted? Can such interpretations be said to be in the 'best interests of the child'? In two of the above four cases, minor girls had become pregnant and terminated their pregnancy. Did the courts examine whether these girls really understood the consequences of early pregnancies?

The High Courts have not declared any provision of the IPC or POCSO unconstitutional. Therefore, quashing the cases of consensual sex may not lead to any less work for the police; they will still have to register FIRs whenever a child goes missing or a cognisable offence is reported either by parents or any other third party and proceed with their investigation.

One of the reasons, inter alia, for the reluctance of courts to convict accused persons in consensual sex cases could be the harsh minimum imprisonment, which is 10 years and 20 years for penetrative sexual assault and aggravated penetrative sexual assault, respectively. Instead of proving to be a deterrent, this appears to be benefiting the accused. The Bureau of Police Research and Development could analyse the cases of consensual sex (as has been directed by the Madras High Court), age-wise, across States and help the Central government in taking a decision of reducing the age of consent based on that study. One solution could be to reduce the age of consent with some leverage allowed to the judiciary to interpret consent in cases of the victim being of lower age based on the child's understanding of consequences. The caveat of the 'best interest of the child' would be necessary.

While reducing the age of consent is within the jurisdiction of Parliament, the Supreme Court must step in to quickly resolve the gap between the laid down law (as understood by the investigating agencies) and the different interpretations by the High Courts. This acquires importance in light of the Supreme Court judgment in *Independent Thought v. Union of India* (2017) wherein it held that even sexual intercourse with a minor wife is rape.

***R.K. Vij is a retired Indian Police Service officer. Views are personal***

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