

## **JUDICIAL VIEW ON AGE AND QUANTUM OF PUNISHMENT IN CASE OF JUVENILE OFFENDERS**

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### **INTRODUCTION**

The Juvenile Justice Act<sup>1</sup> was passed in 2000 with the purpose of incorporating into domestic law India's obligations under international law as a signatory of the UN Convention on the Rights of the Child of 1989, the UN Standard Minimum Rules for Administration of Juvenile Justice 1985 also known as the Beijing Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990. Underlying these international texts is the legal philosophy that juveniles lack the physical and mental maturity to take responsibility for their crimes, and because their character is not fully developed, they still have the possibility of being rehabilitated. This basic principle underlies the juvenile justice systems in many countries, including the United States and the UK.

The JJA creates a juvenile justice system in which persons up to the age of 18 who commit an offence punishable under any law are not subject to imprisonment in the adult justice system but instead will be subject to advice or admonition, counselling, community service, payment of a fine or, at the most, be sent to a remand home for three years.

As the data suggests, between 2011 and 2012 alone, there was a massive increase in instances of rape by juveniles by nearly 300, which is almost as much as the increase in such cases over the entire previous decade. This increase alone makes amendment of the JJA imperative.

The incident of gang rape cases, inter alia, has brought to limelight the issue of involvement of a juvenile in a crime as heinous as rape. The accused taking up the plea of being a minor has allegedly committed the maximum damage to the deceased victim.

This brings to the forefront the questions relating to the legal provisions followed in cases like this and the methods implied by forensic experts to determine the age of the accused to

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<sup>1</sup> Hereinafter referred as JJA

enable court in taking a decision, whether the accused is fit as per law to be treated as a juvenile.

This papers aims to peruse the Juvenile Justice Act, 2000 and the Indian Evidence Act, 1872 and the forensic methods involved, to reach a conclusion pertaining to the legal position of the age of juvenile offender.

The Following Issues are discussed herein:

1. Position of juveniles under Indian legislations- JJA
2. Determination of age by the court or competent authority
  - i. Forensic methods- Forensic odontology, radiology etc. (brief)
  - ii. Reliability and evidentiary value of forensic procedures - In reference to the Indian Evidence Act and related case laws.
3. Legal principles on determining the quantum of sentence and related procedures.

### **JUVENILE JUSTICE ACT, 2000 - RISING CONTROVERSY AFTER AMENDMENT OF 2006**

- India has had interventions on justice for children first through the National Children's Act, 1960. This was followed by the Juvenile Justice Act, 1986 and presently the Juvenile Justice (Care and Protection of Children) Act 2000, as amended in 2006. The Juvenile Justice Law in India deals with children in need of care and protection as well as children in conflict with law.
- Section 2 (1) (k) & (l) defines the following as:
  - 'juvenile' or 'child' means a person who has not completed eighteenth year of age;
  - 'juvenile in conflict with law' means a juvenile who is alleged to have committed an offence;
- Determination of age of a delinquent, particularly in borderline cases, is rather a complex exercise. The Act as such does not lay down any fixed norms, which could be applied for determining the age of a person.
- However, Section 49 of the Act provides for Presumption and determination of age that when it appears to the competent authority viz., the Board, that the person

brought before it is a juvenile, The Board is obliged to make an enquiry as to the age of that person; for that purpose it shall take evidence as may be necessary and then record a finding whether the person in question is a juvenile or not.

- Also in terms of the provisions of Section 68 of the Juvenile Justice (Care & Protection of Children) Act, 2000, the Central Government has framed Juvenile Justice (Care & Protection of Children) Rules, 2001. Rule 22 of the said Rules provides for the procedure to be followed in respect of determination of the age of a person. It indicates that the opinion of the Medical Board is to be preferred only when a date of birth certificate from the school first attended is not available.
- One issue in the Delhi gang rape case that has provoked a lot of outrage is the claim that the most brutal rapist of the lot is allegedly a minor (he says he is 17 years plus) and hence may not get punished for the crime.
- There is debate over whether the legal age of a 'minor' needs to be lowered to 16 from the current 18, and also over whether or not the 17-year-old should be allowed to go scot-free just because he falls under the legal definition of a 'minor'. While those debates rage on, the first task is to establish if he is indeed 17 years old as he claims to be.
- The most commonly used age determination test - is a bone or an ossification test. As ossification test is a medical procedure that detects a person's age based on a biological process known as ossification.
- The law itself says very little about age determination tests. The Indian Penal Code, for example, doesn't mention age determination tests at all. Section 49 of the law states that a competent authority can be asked to provide evidence of a person's age to determine whether he or she is a juvenile. It does not, however, state who or what the competent authority could be, nor does it lay down any procedures to determine a person's age.

### **HIGHLIGHTS OF JUVENILE JUSTICE ACT, 2015**

The bill was introduced in Parliament after public outrage because one of the offenders in the 2012 Delhi gang rape case was a few months short of 18 years of age. After getting assent from President on December 31, 2015, the Ministry of Woman and Child Development has passed orders enforceable from January 15, 2016.

The Act allows for juveniles 16 years or older to be tried as adults for heinous offences like rape and murder. Heinous offences are those which are punishable with imprisonment of seven years or more. Act consolidate and amend the law relating to children alleged and found to be in conflict with law and children in need of care and protection by catering to their basic needs through proper care, protection, development, treatment, social re-integration, by adopting a child-friendly approach. It mandates:

- Setting up Juvenile Justice Boards and Child Welfare Committees in every district. Both must have at least one woman member each.
- The decision to try a juvenile 16 years or older as an adult will be taken by the Juvenile Justice Board, which will have a judicial magistrate and two social workers as members. If the board decides against it, the juvenile will be sent for rehabilitation.
- The Child Welfare Committees will look at institutional care for children in their respective districts. Each committee will have a chairperson and four other members, all specialists in matters relating to children.
- Act also deals with adoption of children and lays down the eligibility criteria for adoptive parents. A central adoptive resource agency will frame the rules for adoption, which will be implemented by state and district level agencies.

Since India is a signatory to the UN Convention on the Rights of the Child which mandates that all children under the age of 18 years be treated equal. There is argument that the law was in contradiction with international standards and that most children who break the law come from poor and illiterate families. Instead of punishment they should be educated. It is one of the post December 2012 Delhi Gang Rape responses as creation of media sensationalization of the issue, and cautioned against any regressive move to disturb the momentum of Juvenile Justice Legislation in the Country.

However, some sections in the society felt that in view of terrorism and other serious offences, Juvenile Justice Act of 2000 needed to be amended to include punitive approaches in the existing Juvenile Justice Law, which so far is purely rehabilitative and reformatory. Some argued that there is no need of tampering with Juvenile Justice Act for putting up effective deterrent against terrorism.

*“We are a civilized nation and if we become barbaric by twisting our own laws, then the enemy will succeed in destroying our social structure. We should not allow that but we must condemn this move of sending children to fight their war”.*<sup>2</sup>

There is division into two groups one below 16 and another above 16, goes against the core principle that all children should be treated as such till the age of 18. This age has been fixed based on studies in child behaviour and the UN Convention of the Rights of the Child. A parliamentary Standing Committee opposed the change, noting that subjecting juveniles to the adult judicial system would go against the objective of protecting all children from the rigours of adult justice. It noted that the Supreme Court had not agreed with the view that children involved in certain offences should be tried as adults.

## VERDICTS OF SUPREME COURT ON THE ISSUES

**Babloo Parsi & Other v. State of Jharkhand**<sup>3</sup> - Relevancy/Evidentiary Value of Bone Ossification Test:

- The Supreme Court ruled in this case held that no fixed norm had been laid down by the Act for the age determination of a person and the plea of the juvenile must be judged strictly on its own merit. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.
- At Para 16: It is no more than an opinion. More so, when even the Medico-Legal opinion is that owing to the variation in climatic, diet, hereditary and other factors, affecting the people of different States in the country, it would be imprudent to formulate a uniform standard for the determination of the age. True, that a Medical Board's opinion based on the radiological examination is a useful guiding factor for determining the age of a person but is not incontrovertible. Commenting on the evidentiary value of the opinion of a doctor, based on x-ray tests, as to the age of a person, in **Ramdeo Chauhan v. State of Assam**<sup>4</sup>, R.P. Sethi, J., speaking for the majority in a three-Judge Bench, had observed that an X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate

<sup>2</sup> Justice R.S. Sodhi, Retired Judge of Delhi High Court, Hindustan Times, 08 August 2015

<sup>3</sup> 2009 (1) JCR 73 (SC)

<sup>4</sup> (2001) 5 SCC 714

the exact date of birth of the person concerned. Too much of reliance cannot be placed upon textbooks, on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform.

- At Para 17: It is well settled that it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. The date of birth is to be determined on the basis of material on record and on appreciation of evidence adduced by the parties. The Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence.

**Ram Suresh Singh v. Prabhat Singh & Others**<sup>5</sup> - Section 35 of Evidence Act cited in light of evidentiary value of school records for the purpose of determining age of a person:

- It was held that in cases “where determination of age is in question with regard to Act of 2000 the date of birth as entered in school admission register, such evidence has to be taken in account and when such entry in register is been proved as per Sec. 35 of Evidence Act there lies no reason as to why the same should not be given effect to.”
- At Para 15: The condition laid down in Section 35 of the Evidence Act for proving an entry pertaining to the age of a student in a school admission register is to be considered for the purpose of determining the relevance thereof. But in this case, the said condition must be held to have been satisfied.
- At Para 16: An entry in a school register may not be a public document and, thus, must be proved in accordance with law, as has been held by this Court in the case of **Birad Mal Singhvi v. Anand Purohit**<sup>6</sup>, but, in this case the said entry has been proved.
- At Para 17: Even if we had to consider the medical report, it is now well known that an error of two years in determining the age is possible. In the case of *Jaya Mala v. Home Secretary, Government of J&K & Others*<sup>7</sup>: This Court held: However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

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<sup>5</sup> (2009) 6 SCC 684

<sup>6</sup> 1988 SCR Supplementary (2) 1

<sup>7</sup> [1982] 3 SCR 583

- A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard.

**Mahadeo v. State of Maharashtra & Others<sup>8</sup>** - Rule 12(3) is to be followed while determination of age:

- It was held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:

*Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining – (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a playschool) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.*

- At Para 12: Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be

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<sup>8</sup> (2013) 14 SCC 637

rightly followed by the courts for the purpose of the ascertaining the age of a victim as well. (Emphasis supplied)

**Vimal Chadha v. Vikas Chowdhary**<sup>9</sup>: Determination of age by the court on the date on which the offence is said to have been committed by the accused it was held:

- That the determination of age of a ‘juvenile in delinquency’ must be determined as and when an application is filed. In view of the decision of the Constitution Bench in **Pratap Singh v. State of Jharkhand**<sup>10</sup>, it is no longer res integra that the relevant date for determination of the age of the accused would be the date on which the occurrence took place. What would be the date on which offence has been committed in a given case has to be decided having regard to the fact situation obtaining therein. If an offence has been a continuing offence, then the age of the juvenile in delinquency should be determined with reference to the date on which the offence is said to have been committed by the accused.
- Further it also held that if an offence has been a continuing offence, then the age of the juvenile in delinquency should be determined with reference to the date on which the offence is said to have been committed by the accused.

**Gurpreet Singh v. State of Punjab**<sup>11</sup>: Method of Computing Sentence when the accused was juvenile on the date of occurrence:

- It was held at Para 18 in this case that first SC should consider the legality or otherwise of conviction and in case conviction is upheld a report should be called from trial court on the said issue and there upon receiving report, if it is found that the accused was juvenile on the date of occurrence and continues to be so, he shall be sent to juvenile home but if in case where he was juvenile on the date of occurrence but not so on the date when Supreme Court is passing the final order, the sentence imposed against him would be liable to be set aside.

**State of Madhya Pradesh v. Anoop Singh**<sup>12</sup> : Answering with the central question as to the criteria to be adopted and applied to resolve the controversy over the age of a rape victim in the event of a discrepancy in the birth certificate and the school certificate SC held:

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<sup>9</sup> (2008) 15 SCC 216

<sup>10</sup> (2005) 3 SCC 551

<sup>11</sup> (2005) 12 SCC 615



- Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape, and that medial opinion can be relied on only in the absence of the documents prescribed in Rule 12(3) of the Juvenile Justice Rules.
- Further it was found on facts that there was a difference of only two days in the dates mentioned in the abovementioned Exhibits, and further endorsed the finding of the Trial Court that the birth certificate Ext. P/5 clearly shows that the registration regarding the birth was made on 30.10.1987 and keeping in view the fact that registration was made within 2 months of the birth, it could not be guessed that the prosecutrix was shown as under-aged in view of the possibility of the incident in question.
- That the discrepancy of two days in the two documents adduced by the prosecution is immaterial and the High Court was wrong in presuming that the documents could not be relied upon in determining the age of the prosecutrix said the Court.

## CONCLUSION

Child rights activists have condemned the 2015 Act as regressive and not in sync with international standards. They argue that children cannot be made to fight their own wars. Further, they vociferously argue that laws especially those meant for children should be reformatory and not retributory in nature. Children are the wealth of a nation. Provisions like the 'transfer system' in the new Act must be given a reassessment. A carefully thought of juvenile justice system is the need of the hour.

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<sup>12</sup> (2015) 3 MLJ (Crl) 358 (SC)