

AGE OF CONSENT FOR SEXUAL RELATIONSHIPS IN INDIA: A REFERENCES WITH POCSO ACT

Ritu

Research Scholar

Central University of Haryana.

Email: imsiwach@gmail.com

Abstract: Numerous studies that have gathered information from various Indian States show that the 2012 Protection of Children from Sexual Offences Act prosecutes consenting sexual conduct in a significant portion of cases. The “age of consent” been increased from sixteen to eighteen thanks to the POCSO Act. Consensual sexual behavior with a minor as one of the partners has become illegal as a result of this rise. What purpose does raising the “age of consent” serve? Has raising the “age of consent” accomplished the purpose of preventing sexual predators from preying on children? Has it led to the criminalization of coerced sexual behavior between adults who are of legal sexual consent age? Is pre-trial detention appropriate in a case involving a romantic relationship? Does consenting to sexual activity with a minor under the age of sixteen or seventeen constitute a “moral” violation that calls for a minimum sentence of ten or twenty years in prison? The purpose of this paper is to examine and analyze POCSO Act judgements in great detail. Only the rulings of the Mumbai Special Courts Greater Mumbai and Dindoshi have been analyzed in order to reach a comprehensive perspective and avoid becoming overwhelmed by the volume of cases. The authors were unable to obtain case records like notes of evidence since only the Special Courts’ rulings and orders are available to the public (on the court’s website)

Keywords: Age of Consent, Relationship, POCSO Act 2012, Marriage, Family, Law

1.0 Introduction

The statement from the Chief Justice of India to Parliament regarding the POCSO Act's (Protection of Children from Sexual Offences Act) age of consent is the result of a chain of events. The POCSO has been brought up by the Madras, Delhi, and Meghalaya High Courts in cases involving the criminalization of romantic relationships between or with adolescents.

In *AK v. State Govt of NCT of Delhi* (order by Justice Jasmeet Singh), the Delhi High Court said in November 2022 that the purpose of POCSO was to protect minors under the age of 18 from sexual exploitation, not to criminalise love relationships between consenting young adults.

The government, however, informed Parliament in December 2022 that it had no plans to change the legal age of consent. The definition of “rape” under the Penal Code, 1860 (IPC) was expanded with the passage of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act), and is now known as “penetrative sexual assault.” This includes not only penile-vaginal penetration but also penetration by other parts of the body and objects into specific orifices of the child. In addition to defining sexual offenses more precisely, the legislature decided it was appropriate to increase the “statutory age of rape” or “the age of consent to sexual activity” from sixteen to eighteen years old and eliminate the option for judges to impose a punishment that is less severe than the minimum statutory sentence. Although child rights advocates applauded the broadening of penetrative sexual offense, there was disagreement over raising the age of consent. Some were in favor, while others were opposed. The POCSO Act was revised in 2019 to increase the minimum mandatory sentences for penetrative sexual assault and aggravated penetrative sexual assault to ten years and twenty years, respectively. Additionally, the amendment stated that the punishment for aggravated penetrative sexual assault “may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine, or with death.” Due to this modification and the removal of the court’s discretion in the context of sentence, an offender will be required to serve at least 10 or twenty years in prison following a conviction. The POCSO Act has been in effect for ten years. It is important to investigate the effects of raising the “age of consent,” as well as if the POCSO Act has improved the conviction rate and boosted reporting of sexual offenses against children.

2.0 Data Pertaining to the POCSO Act

Data from Crime in India 2011 shows that at the national level, 7112 incidences of rape against minors (Section 376 IPC) were reported, but data from Crime in India 2019 reveals that at the national level, 4977 instances of rape against children were reported. The separate Table for sexual offenses under the POCSO Act in Crime in India 2019 is responsible for the decline in figures. Penetrative sexual assault (Section 4 of the POCSO Act) and aggravated penetrative sexual assault (Section 6 of the POCSO Act) incidents totaled 26,192 in India in 2019, according to Crime in India 2019. For incidents reported under Sections 4 and 6 of the POCSO Act, the rate of rape against children in 2011 was 0.6, and it grew to 5.9 in 2019. A comparison of these numbers suggests that there has been a significant increase in the reporting of penetrative sexual offenses against children, but these numbers may also reflect the gender neutrality of the POCSO Act's offenses, the expansion of the term "rape," or the increase in the legal age of consent to 18. It might also suggest that the POCSO Act has improved victim and caregiver confidence in the criminal justice system. The POCSO Act's requirements for child-friendly structures and trained employees would lead one to believe that doing so will increase the conviction rate for juvenile offenders. However, this is not the case. According to Sections 4 and 6 of the POCSO Act, the conviction rate for child rape was 31.8% in 2011 and barely rose to 34.7% in 2019. When compared to the legislative changes brought about by the POCSO Act, this small increase becomes meaningless. Is an increase in the legal age of consent contributing to the rise in reported cases? Has this increase in the legal minimum age for consent led to the criminalization of consenting sexual conduct between individuals who are either underage or underage together? Does the low conviction rate reflect the prosecution witnesses' "hostility" in front of the trial courts? Is the prosecution of cases involving love connections the cause of such turning "hostile"? The National Crime Records Bureau (NCRB) statistics does not provide any information on the proportion of instances reported to the police that involve consensual sexual behavior with at least one party under the age of eighteen. Examining the record and proceedings of the Special Courts, established to hold trials under the POCSO Act, is crucial for this purpose.

3.0 Analysis of Sexual Relationship Judgements in India

According to a review of the Mumbai Sessions Court's website's judgments for cases resolved under the POCSO Act in 2019 at Greater Mumbai and Dindoshi, 33 of the 59 cases with finalized trials (or 56%) involved "romantic relationships." Out of 44 instances resolved in Greater Mumbai, 24 (54.5%) involved romantic relationships. Trials in 15 cases at the Special Court in Dindoshi were concluded⁴, and nine of those cases (or 60%) involved romantic relationships. All 24 of these prosecutions in Greater Mumbai and 9 of these prosecutions in Dindoshi, which involved romantic ties, resulted in acquittals for the defendants. The "victim" did not support the prosecution's case in any of the Greater Mumbai cases involving romantic relationships. Before the Dindoshi court, the "victim" did not support the prosecution's case in 6 of the instances involving romantic relationships (67%)⁵. The information shows that the "victims" had not started the criminal activity. Her family members were mostly those who reported their underage daughter's kidnapping to the authorities. Eleven (45.8%) of the informants in Greater Mumbai were dads, ten (41.6%) were mothers, and one each was a sibling, a police officer, and the victim. In Dindoshi, two fathers and the victim were among the five (56%) informants who were moms. The fact that the informants were primarily the "victim's" parents demonstrates that the girls had no beef with the accused. Furthermore, the prevalence of girls who became "hostile" to the prosecution's penetrative sexual assault accusation shows that the girls were involved in a romantic connection. The first informant became hostile or stated that they did not want to prosecute the case against the accused in 50% of the romantic relationship cases in Greater Mumbai, and other first informants did the same during the Dindoshi trials. By the time the parents' testimony was recorded, they had come to terms with the reality that their daughters were happily married, according to the data, which shows that the parents' initial opposition to their daughter's choice of partner was the reason they had contacted the police. The "victim" and the "accused," in 75% and 67% of the cases before the courts in Greater Mumbai and Dindoshi, respectively, had wed, and in 28% and 22% of the cases, the pair had given birth to a child. The three "victims" who voluntarily filed the FIR did so because they thought their partners would not consent to a marriage; nevertheless, by the time the trials started, the "victims" had wed the "accused," and they were living happily together. The Special Courts are currently hearing a significant number of cases involving romantic relationships because police are required to prepare charge sheets and register FIRs.

3.0 Reaction of Special Courts to Cases Relating to Sexual Relationships

As stated above, the Special Courts have exonerated the "accused" in every case involving a romantic relationship. A perusal of the judgments reveals that the acquittals have been based on the "victim's" inability to recall her age at the time of sexual activity, the fact that a legal marriage had already been consummated and the prosecution was unable to establish that the sexual activity occurred before the age of 18, the prosecution's inability to establish that the sexual activity was performed under duress, the "victim's" failure to identify the accused, or the fact that the

“victim Although it would seem that the “victim” and “accused”’s romance would be viewed as a mitigating circumstance, Section 5(l) of the POCSO Act states that cases of romantic relationships are handled as aggravated penetrative sexual assault. Section 6 of the POCSO Act had been applied in 13 (54%) and 5 (56%) of the romantic relationship cases decided by the courts in Greater Mumbai and Dindoshi, respectively. Such cases were treated as “aggravated” and punishable “with rigorous imprisonment for a term which shall not be less than twenty years.” Although the “accused” was released on bond in 87.5% of cases in Greater Mumbai and 56% of cases in Dindoshi, respectively, there were situations of romantic relationships where the “accused” was kept in custody until the end of the trial. In one instance, despite the fact that the “victim” and the “accused” had been married, the “accused” was held in detention for two years and eighteen days before being found not guilty.

Even though the sexual activity is consensual in nature and the offense is gender-neutral, criminalizing “romantic relationships” between 16 and 18-year-olds perpetuates gender discrimination in its application. Since none of the “accused” in the Mumbai instances were female in situations involving romantic relationships, this gender discrimination is evident in those cases. It is also significant to note that, in 2019, only 0.4% of the 77% of children detained for violating the POCSO Act who were between the ages of 16 and 18 were female. Due to the overwhelming volume of POCSO cases filed, the Special Courts are unable to quickly record the child’s statement and complete the trials in accordance with the POCSO Act’s deadlines. At the end of 2019, there were 88.8% of cases still pending in all of India under Sections 4 and 6 of the POCSO Act, and 93.5% of those cases were in Maharashtra. The establishment of Special Courts was intended to expedite case resolution, yet in 2011, when “child rape” cases were heard by regular criminal courts, the pendency in Maharashtra and all of India was lower, at 48% and 25%, respectively. The POCSO Act has not achieved its goal of “speedy disposal” because the rate of disposal was significantly greater in 2011, when the age of consent was sixteen years old and there were no Special Courts. The high percentage of cases still pending raises the question of whether sexual assault cases against children are receiving the attention they require or whether they are being postponed because Special Courts are overburdened with cases involving romantic relationships involving people between the ages of sixteen and eighteen. According to the data from Mumbai’s Special Courts, the legislature abruptly and without considering the consequences raised the legal age of consent to sexual conduct.

4.0 Need to Reconsider the Age of Consent in India

Many authorities and professional organizations have considered the issue of “age of consent.” The Justice Verma Committee Report on interpreting Article 34 of the UN Convention on the Rights of the Child recommended lowering the POCSO Act’s age of consent to sixteen years, noting that the act’s primary goals were to protect children from sexual assault and abuse and not to criminalize consensual sex between two people even if they are under the age of eighteen. The National Family and Health Survey (NFHS) data from 2015–16 shows that 11% of girls had their first sex before the age of 15, and 39% before the age of 18. This data matches the reality on the ground. 6.3% of married women who were at least 18 years old at the time of the survey’s administration admitted to having their first sex before the age of 15.¹⁸ Legislators should reevaluate the “age of consent” under the POCSO Act in light of the current situation and professional opinion. There should be a revision of the “age of consent,” according to the High Courts as well. The Madras High Court, while clearing the accused in the case of a seventeen-year-old girl who disagreed with the prosecution’s case, stated that such a “relationship invariably assumes the penal character by subjecting the boy to the rigors of the POCSO Act” and that “the boy involved in the relationship is sure to be sentenced to 7 years or 10 years as minimum imprisonment, as the case may be,” and suggests to the legislature, “on a profound consideration.” Similar to this, the Allahabad High Court noted the following when giving bail to the accused in an elopement case where the couple had a kid from their marriage: (Atul Mishra case²⁰, SCC Online All para 6)

A mathematical explication or its theorem are not relevant to the applicability of statutory requirements in the specific facts and circumstances of the case. We should be cautious about the outcome when the law courts use these regulations. It is the responsibility of the courts of law to ease up on their rigors in order to produce a lot more meaningful and swallowable application of that provision in a given set of facts and circumstances of the case if implementing any provisions in a given set of facts results in a disastrous and catastrophic outcome. Atul Mishra case, SCC OnLine All para. 18, continuing. The requirements of the POCSO Act would undoubtedly not stand in the way of these teenagers being married and having a child as a result of their relationship. In accordance with the intent of the POCSO Act, the girl has not experienced sexual abuse, sexual assault, or harassment from the applicant. The Allahabad High Court also ordered the husband/father to present a bank draft worth INR 5,00,000 in the wife’s/child’s favor in order to protect the girl and the child’s future. Globally, domestic laws include a clause defining the “age of consent” (the minimum age for engaging in sexual behavior). The justification for setting a

minimum consent age is that it “preserves the particular nature of childhood; protects children from sexual exploitation and corruption by adults”²¹ and is based on the notion that sex is physically and mentally damaging before that age. Consider the idea of a child’s developing capacities when determining the “age of consent.” The Committee on the Rights of the Child’s General Comment No. 20 (2016) on the implementation of children’s rights during adolescence defines the term “evolving capacities” and specifically states that states “should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent.” States ought to refrain from punishing young people of comparable ages for factually consensual and non-exploitative sexual behavior.

5.0 What does the Court’s Intervention in this Case Entail?

Defining the Nature of Acts: The judiciary has made an effort to right any wrongs that the legislative has created. In *Vijayalakshmi v. State* (2021), the Madras High Court deemed it essential to create a distinction between the kinds of conduct that should and shouldn’t be subject to this onerous rule.

Other courts have concurred with the court’s obiter that POCSO has turned into a tool in the hands of some social groups to subvert the legal system.

In cases where the outcome of the love affair is marriage, the judiciary has reportedly been sympathetic and has readily granted bail.

In *Dharmendra Singh v. State Govt of NCT* (2020), the Delhi High Court made an effort to improve the prospects of bail for an accused in situations involving “innocent yet unholy physical alliances” or situations in which the girl has given her “tacit approval-in-fact” and there is a “little age difference between the victim and the offender.”

In dismissing a lawsuit brought under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), the Karnataka High Court recently stated that the Law Commission of India will need to reconsider the age of consent for Adolescents.

According to the court, if it is actually a crime under the Indian Penal Code and/or the POCSO Act, the court must take into account the girl’s permission at the age of 16, even though she is under the legal drinking age of 18.

6.0 Conclusion

The POCSO Act’s “age of consent” has to be reviewed by the legislature in order to prevent unnecessarily inserting teenagers into the criminal justice system as “accused” or victims. It is important to understand that teenagers frequently explore and play about with their sexuality, a trait for which they shouldn’t be punished. The Kerala High Court recently issued the following comment regarding the POCSO Act: (Case of Anoop, SCC OnLine Ker, paragraph 2.... Sadly, the law does not differentiate between “sexual relations” brought on by genuine attachment and physiological changes and the traditional sense of the word “rape.” For a particular age group of victims, the laws treat all “intrusions” on physical autonomy, whether done with or without agreement, as rape since they do not take into account the biological inquisitiveness of adolescents. According to the Kerala High Court, partnerships “that went beyond platonic love” were to blame for the sexual behaviour of “students or persons young in age.” The proportionality concept should be taken into account when enacting substantive criminal legislation as well as when punishing offenders. This principle is violated when someone is prosecuted and given a minimum term of 10 years or twenty years after being found guilty of having sex with a 16- or 17-year-old. Legislators must understand that for criminal laws to be successfully enforced, society must accept them; otherwise, people who were supposed to be protected by the law will use them as an excuse to disobey them. One can wonder what the appropriate “age of consent” should be since the POCSO Act’s definition is arbitrary. This is a challenging task. There are two things that must be considered. First, “to safeguard young, psychologically immature persons from danger and exploitation; and to offer sexual freedom to young, physically developed people.” Second, the “age of consent” should be determined based on evidence and in a scientifically sound manner after thorough discussion among the appropriate professionals; emotions should not be allowed to rule this process. A law that criminalizes everyday behavior and activity makes the public feel sorry for the “accused” rather than denouncing his behavior. The provisions of the legislation should be such that they deal with extraordinary situations, not everyday ones. By raising the age of consent, which has been the norm in India for more than 80 years, the POCSO Act has achieved this. It is hoped that the courts will defend teenagers in consensual romantic relationships and shield them from the harsh repercussions of the POCSO Act until the “age of consent” is adequately examined.

7.0 References

- i. Swagata R, Anuroopa G, Geeta S, et al. Frequently asked questions on the Protection of Children from Sexual Offences Act, 2012, and the Criminal Law (Amendment) Act, 2013. Bengaluru: National Printing Press, 2015, 132.
- ii. Centre for Child and Law and National Law School of India University Implementation of the POCSO act, 2012 by special courts: challenges and issues. Bengaluru: Centre for Child and Law (CCL) and National law school of India university (NLSIU), 2018.
- iii. Basavaraju M, and Navaneetham J. Beyond infatuation and love: review of adolescent mental health manuals in India. Arch Mental Health, 2019; 20: 3.
- iv. Misra A, and Bronitt S. Reforming sexual offences in India: lessons in human rights and comparative law. Griffith Asia Q, 2014; 2 37–56.
- v. International Institute of Population Sciences, National Family Health Survey 4, India.pdf. 2015.
- vi. Sabari v. State of T.N., 2019 SCC Online Mad 18850.
- vii. Atul Mishra v. State of U.P., 2022 SCC Online All 420.
- viii. Elizabeth Yarrow, Kirsten Anderson, Kara Apland & Katherine Watson, “Can a restrictive law serve a protective purpose? The impact of age-restrictive laws on young people’s excess to sexual and reproductive health services”, Reproductive Health Matters, November 2014, Vol. 22, No. 44, Using the law and the courts (Taylor & Francis Ltd., November 2014), pp. 148-156.
- ix. National Crime Records Bureau, Ministry of Home Affairs, Government of India.
- x. Chapter 4-A, Crime Against Children (States/UTs), Table 4-A.2(ii).
- xi. Age of consent to sexual intercourse was increased from 14 years to 16 years in 1940.
- xii. Article 34(a) of UNCRC.
- xiii. Ministry of Women and Child Development, GoI Draft Model Rules, 2016 under the Juvenile Justice (Care and Protection of Children) Act, 2015. New Delhi: Ministry of Women and Child Development, 2016.
- xiv. S. Varadarajan v. State of Madras, (1965) 1 SCR 243 : AIR 1965 SC 942
- xv. Crime in India 2019, Table 4-A.9.
- xvi. Graupner, H.J.D., & Bullough, V.L., Adolescence, sexuality, and the criminal law : Multidisciplinary perspectives (Haworth Press Inc., London, 2004).
- xvii. Crime in India 2019, Table 5-A.3.
- xviii. Section 35 of the POCSO Act.
- xix. Crime in India 2019, Table 4-A.5.
- xx. Crime in India 2019, Table 4-A.6.
- xxi. Anoop v. State of Kerala, 2022 SCC OnLine Ker 2982.
- xxii. Jacob Barrett & Gerald F. Gaus, Laws, Norms and Public Justification : The Limits of Law as an Instrument of Reform, (Cambridge University Press, 2020).
- xxiii. <https://www.sconline.com/blog/post/2023/03/12/age-of-consent-under-the-pocso-act/>
- xxiv. Janardhana N, and Manjula B. Adolescents romantic relationship: dynamics of parent-child relationship from India. In: Mohammadnezhad M (ed) Maternal and child health matters around the world. London: IntechOpen, 2018.
- xxv. Sujay R. Premarital sexual behaviour among unmarried college students of Gujarat, India. Health and Population, Innovation (HPI) Fellowship Program Working Paper no. 9. New Delhi: Population Council, 2009.