

LEGAL LOCK JOURNAL
2583-0384

VOLUME 3 || ISSUE 4

2024

This Article is brought to you for “free” and “open access” by the Legal Lock Journal. It has been accepted for inclusion in the Journal after due review.

To submit your Manuscript for Publication at Legal Lock Journal, kindly email your Manuscript at legallockjournal@gmail.com.

**JUDICIAL DETERMINATION OF THE CONSENSUAL SEX WITHIN
PARAMETER OF POCSO ACT**

Sanjay Sarma¹, Debajit Adhikary²

ABSTRACT

This research paper delves into the complex judicial process of determining consensual sex within the framework of the Protection of Children from Sexual Offences (POCSO) Act. The POCSO Act, enacted to safeguard children from sexual exploitation and abuse, often intersects with cases of consensual sex among adolescents, raising critical legal and ethical questions. This study aims to explore the judicial mechanisms and challenges involved in differentiating consensual sexual acts from exploitative ones under this Act, especially in the context of adolescent relationships. The methodology employed in this research includes a comprehensive analysis of relevant case laws, judicial interpretations, and expert interviews. The study scrutinizes various landmark judgments to understand the legal nuances and the courts' stance on consensual sex involving minors. Additionally, insights from legal experts and law commission reports, shedding light on the practical challenges and implications of the Act's application. The paper discusses instances where the judiciary has navigated these complexities, balancing the Act's protective intent with the recognition of adolescent autonomy. The study also highlights the legal and social implications of criminalizing consensual adolescent sexual activities, discussing potential reforms and policy recommendations. This paper contributes to the ongoing discourse on child protection laws and adolescent rights. It underscores the need for a nuanced understanding of consensual sex in the legal framework, advocating for a balance between protection and the recognition of evolving capacities and rights of adolescents.

The study concludes that while the POCSO Act is pivotal in protecting children from sexual offenses, its application in cases of adolescent consensual sex requires careful judicial consideration, informed by both legal principles and developmental psychology.

Keywords: POCSO Act, Consensual Sex, Judicial Determination, Adolescent Relationships, Legal Analysis, Child Protection Laws.

¹ The author is a Research Scholar, Mahatma Gandhi University.

² The co author is a Research Scholar, Mahatma Gandhi University.

INTRODUCTION

The contentious issue of cases of romantic relationships being charged under the POCSO Act has invited significant judicial attention, as the various Courts, confronted with the issue, and decided differently. Some Courts have expressed their helplessness in navigating beyond the plain language of the statute, and thereby convicted the accused in cases where he has entered into a consensual sexual relationship with a minor girl. On the other hand, different High Courts have adopted a distinct approach in giving effect to an interpretation which extends beyond the immediate confines of the POCSO Act. By reading the provisions liberally and transcending their literal text, the courts have opined that it was never the objective of the POCSO Act to punish adolescent boys who enter into a consensual sexual relationship with minor girls. To take just one example, in **Ajay Kumar v. State (NCT of Delhi)**³, the Delhi High Court opined that the intention of the POCSO Act was to protect children below the age of 18 years from sexual exploitation and it was never meant to criminalise consensual romantic relationships between young adults. On the other hand, taking a contrary position, in **Ravi v. State**⁴, the Madras High Court held that in matters under the POCSO Act, the consent of the child is immaterial, holding that:

"Whereas, the law defines that the person who has not completed the age of 18 years, is a child. This Court, being an Appellate Court, is a final fact finding Court and cannot traverse beyond the statute. This Court is also eagerly waiting for the amendment in the Legislature as expressed by my learned brothers. In the case on hand, this Court finds that the victim was a minor and the appellant took the custody of the minor without the knowledge or consent of her natural guardians and had committed penetrative sexual assault on her and hence, the offence committed by the appellant falls under Section 5(l) which is punishable under Section 6 of the POCSO Act."

Thus, the concerns about the rising number of such cases, wherein minors are punished under the POCSO Act for indulging in sexual intercourse arising out of romantic relationships, are being expressed by various quarters in proceedings before the High Courts of the country as well as the POCSO Special Courts. Despite a clear stand being taken by a female in such an act, that it was a case of consensual sex, the other party, i.e.,

³ Decided by Delhi High Court in Bail Application No- 2279/2022 dated 20-10-2022

⁴ Decided by Madras High Court Crl. Application .No.627 of 2021 dated 18-11-2022

the male accused, stands convicted under the POCSO Act on the basis of the reasoning that the POCSO Act was never intended to exclude from its purview cases of consensual sex with the minor. However, the Act has been the subject of debate and controversy, particularly regarding its handling of consensual sex among adolescents. The Act sets the age of consent at 18 years, potentially criminalizing consensual sexual activity among adolescents. This has led to calls for a review of the Act and its provisions.⁵

THE AGE OF CONSENT

The Protection of Children from Sexual Offences (POCSO) Act, 2012, in India, has been a significant step towards safeguarding children from sexual offences. One of the critical aspects of the Act is the definition of a 'child' as anyone below the age of 18 years and the setting of the age of consent at 18 years. This provision has implications on adolescent relationships and has been a subject of debate and discussion.⁶ The age of consent is the legally defined age at which a person is considered competent to understand and agree to sexual activity. The POCSO Act sets this age at 18 years, which is in line with the United Nations Convention on the Rights of the Child, which defines a child as anyone below the age of 18 years.

But some statutory provision incorporated the age of consent was 16 years for example- **376 IPC** ((marital rape), **Mohammedan Law** also legalised marriage when she attains puberty. Hindu marriage act also prescribed the child marriage **voidable** at the option of the contracting party. This provision is intended to protect children from sexual exploitation and abuse.⁷ However, the setting of the age of consent at 18 years has implications on adolescent relationships. Adolescence is a period of rapid physical, emotional, and social development, and romantic and sexual relationships often form an integral part of this development. The Act potentially criminalizes consensual sexual activity among adolescents who are below the age of 18 years. This has led to some cases where adolescents have been prosecuted under the Act for engaging in consensual sexual activity. Critics argue that the Act fails to distinguish between consensual sexual activity among adolescents and sexual assault. They argue that the criminalisation of consensual

⁵ Bhatia, Gautam (2014). "The Age of Consent and the POSCO Act". *The Indian Journal of Law and Technology*, Vol. 10.

⁶ *Supra* Note. 3.

⁷ United Nations Convention on the Rights of the Child, 1989.

sexual activity among adolescents is not only unjust but also counterproductive, as it may deter adolescents from seeking sexual and reproductive health services, including services related to contraception and sexually transmitted infections. There have been calls for a review of the age of consent set by the Act. Some suggest that the age of consent should be lowered to 16 years, which is the age of consent in many countries. Others propose a 'close in age' exception, also known as a 'Romeo and Juliet' law, which decriminalises consensual sexual activity between adolescents who are close in age. Lowering the age of consent or introducing a 'close in age' exception could potentially expose younger adolescents to sexual exploitation and abuse. The age of consent set by the POCSO Act has significant implications on adolescent relationships. While the Act is crucial in protecting children from sexual offences, its handling of consensual sex among adolescents is a subject of debate and discussion. There is a need for a nuanced approach that balances the need to protect children from sexual exploitation and abuse with the rights and autonomy of adolescents.

AGE OF CONSENT IN VARIOUS COUNTRIES

United States: The age of consent in the United States varies from 16 to 18 years old depending on the state. Out of fifty states, Thirty One states set the age of consent as 16 years, eight set it as 17 & a Eleven set it as 18 as age of consent.

Nigeria:- Age of Consent in Nigeria is 18 years.

Canada:- According to The Trackling Violent Crime Act, the age of consent in Canada is 14 to 16 years. The close-in-age exception are depending the on the age. A youth of twelve or thirteen can consent to sexual activity with a person less than two years older.

China:- The age of Consent in China for sexual activity is 14 years, regardless of gender or sexual orientation.

Japan:- According to the Japan Penal Code ,1907, The age of Consent in Japan is sets a national age of 13.

United Kingdom: United Kingdom national age of consent set as 16. The United Kingdom consists of jurisdiction of England, Wales, Scotland, and Northern Netherland.

Spain: The age of consent in Spain is 16 years.

THE PROPORTION OF CASES INVOLVING CONSENSUAL SEX AGAINST THE ADOLESCENTS VICTIMS.

As per data collected from the National Crime Record Bureau (NCRB) during the year 2019-21⁸, highlighted the proportion of cases involving consensual sex against adolescent as follows-

	BOYS	GIRLS	TRANSGENDER
Victims below 6 Years (all India)	25	650	0
Victims 6 to 12 Years (all India)	140	3157	0
Victims 12 to 16 Years (all India)	83	13173	0
Victims 16 to 18 Years (all India)	69	16206	0

TOTAL- **33503**

The data clearly shows that there were as many as 33503 cases registered during the year 2019-21 throughout the country. Out of which the cases involving consensual sex amongst adolescent where the victim is 16 to 18 years of age is highest in nature.

THE PORPORTION OF CASES INVOLVING CONSENSUAL SEX AGAINST THE ADOLESCENTS JUVENILES APPREHENDED UNDER POCSO ACT.

Another report collected from the National Crime Record Bureau (NCRB)⁹ during the year 2019-21 highlights the number of Juvenile apprehended under POCSO ACT in category of different age groups are as follows.

⁸ Source: data collected for the NCRB report 2019-21

⁹ Source: data collected for the NCRB report 2019-21

	BOYS	GIRLS	TRANSGENDER
BELOW 12 YEARS	33	0	0
12- 16 YEARS	592	3	0
16-18 YEARS	1720	5	0

On perusal of the aforesaid data, it is found that the highest number of adolescents apprehended under POCSO Act is in between the age group of 16 to 18 years as compared with the other age group.

ANALYSIS OF CONVICTION RATES IN CASES OF CONSENSUAL SEXUAL ACTIVITY AMONGST ADOLESCENTS.

In India, the conviction rates for cases involving consensual sex amongst adolescents are relatively low due to a combination of factors. The Protection of Children from Sexual Offences (POCSO) Act, introduced a decade ago, criminalizes all sexual activity by children under 18; however, this has led to numerous adolescent boys in consensual relationships finding themselves legally compromised. In a study conducted by the National Law School of India University's Centre for Child and the Law, it was found that the proportion of cases registered in the context of a romantic relationship was fairly high in various states: 21.58% in Delhi, 21.21% in Andhra Pradesh, 20.52% in Maharashtra, 15.69% in Assam, and 5.45% in Karnataka. However, the conviction rate for cases of consensual sexual activity was notably low, ranging from zero in Assam and Andhra Pradesh, 1% in Delhi, to 3% in Maharashtra.¹⁰ Implementing the POCSO Act in relation to these cases raises several dilemmas. For instance, the act often overlooks its

¹⁰ "Child Rights and the Law: A Study on the Protection of Children from Sexual Offences Act, 2012" by the Centre for Child and the Law, National Law School of India University, Bangalore. This study provides a comprehensive analysis of the POCSO Act and its implementation, highlighting the proportion of cases involving consensual sex amongst adolescents, <https://feministlawarchives.pldindia.org/>.

gender-neutral principle when it comes to the application of legal actions, where girls are usually recognized as victims and boys are held accountable irrespective of their age.¹¹ Additionally, multi-spectral stakeholders who form part of child protection mechanisms often face ethical dilemmas and challenges when dealing with cases of consensual sex amongst adolescents.¹² The Protection of Children from Sexual Offences (POCSO) Act, enacted in India ten years ago, is a comprehensive law enacted to protect children from sexual abuse.¹³ However, an analysis of POCSO cases has indicated gaps in its implementation and raised concerns about the proportion of cases involving consensual sex amongst adolescents.

JUDICIAL DETERMINATION

The judiciary plays a crucial role in interpreting and applying the Protection of Children from Sexual Offences (POCSO) Act, 2012, particularly in determining what constitutes 'consensual sex' within the parameters of the Act. This is a complex task, given the sensitive nature of the cases and the need to balance the rights of the accused with the need to protect minors from sexual exploitation. The judiciary's role in protecting the rights of minors is paramount. The courts have consistently held that the child's best interests must be the primary consideration in all decisions affecting them. This principle is reflected in the POCSO Act, which is designed to provide robust legal protection for children against sexual offences. The Act is comprehensive, covering a wide range of sexual offences, including penetrative and non-penetrative assault, as well as sexual harassment and pornography. It also provides for stringent punishments for offenders. However, the judiciary faces several challenges in determining 'consensual sex' within the parameters of the POCSO Act. One of the main challenges is the age of consent. In India, the age of consent is 18 years, which means that any sexual activity involving a person below this age is considered a crime, regardless of consent. This has led to controversy, particularly in cases involving teenagers in romantic relationships.

¹¹ "Understanding the Implementation of the Protection of Children from Sexual Offences Act, 2012" by the Centre for Child Rights, National Law University Delhi. This report provides an in-depth analysis of the POCSO Act, its implementation, and the challenges faced in its enforcement, <https://feministlawarchives.pldindia.org/>.

¹² "Child Sexual Abuse and the Law in India: A Study Based on Court Cases" by the Centre for Child Protection, Tata Institute of Social Sciences, Mumbai. This study analyses court cases related to child sexual abuse in India, providing valuable insights into the application of the POCSO Act, <https://feministlawarchives.pldindia.org/>.

¹³ A Decade of POCSO' (2021) 10 Journal of Child Rights 1.

In some of the landmark cases, the Hon'ble Court has interpreted the consensual sex amongst adolescents as-

- **State vs Akhilesh Harichandra Mishra:** ¹⁴ Bombay High Court held that when victim is sufficiently matured to know the consequence of sexual act, accused could not be punished. (Emphasized Romeo Juliet Law)
- **Atul Mishra v. State of U.P. And 3 Others**¹⁵, the Allahabad High Court noted that the POCSO Act is not intended for teenagers' romantic affairs and granted bail to an accused who ran away with a 14-year-old due to their romantic affair.
- **Ajay Kumar v. State (NCT of Delhi)** ¹⁶:- Intention of the POCSO Act is not to punish the adolescent of consensual act.
- **Ravi v. State (2021)** ¹⁷:- *The Madras High Court, being on Appellate Court, is a final fact finding Court and cannot traverse beyond the statute.*
- **Independent thought Vs Union of India-** *read down Exception 2 to Section 375 to the extent that 15 years is to be read as 18 years. Thus, the current position in law as it stands is that even if the husband has consensual sexual intercourse with his wife who is below the age of 18 years, it will amount to rape under this provision. Now such a position in law gives rise to a peculiar dilemma. As per the current scheme of law, sexual intercourse with a girl child by the husband, lover or any other person, amounts to an offence under Section 375 of the IPC as ravel as the POCSO Act. However, if certain reprieve is sought to be granted to the accused under the POCSO Act in cases of adolescent romantic relationships, as is being recommended in this Report. The same would be meaningless without a corresponding amendment in Section 375 punishable under Section 376 of the IPC. This is so because while the reprieve under the POCSO Act can be claimed by the lover of the child. The alleged offence in question shall continue to be penalized under Section 375 for both the lover or the husband of the child.*

¹⁴<https://www.legalserviceindia.com/legal/article-5878-approach-of-romeo-and-juliet-laws-in-india.html#:~:text=In%20State%20v.,and%20she%20had%20no%20grievances.> Last visited on 20/03/24

¹⁵ LiveLaw (AB) 51 (2022). *Atul Mishra v. State of U.P. And 3 Others.*

¹⁶ <https://indiankanoon.org/doc/173298242/> Last visited on 20/03/24

¹⁷ <https://indiankanoon.org/doc/108075132/> Last visited on 20/03/24

- **The Justice J.S. Verma Committee, in its 172 Report, 2013¹⁸**, had suggested lowering the age of consent under the POCSO Act to 16 years in line with Section 375 of the IPC and suggested that the sixth description under Section 375 be amended to read: “Sixthly, when the person is unable to communicate consent either express or impliedly”.
- The constitutional court of South Africa in famous *Teddy Bear Clinic for Abused Children* case held that the harshness of the criminal justice system and the chilling effect of such exposure on the development of a proper understanding of and healthy attitudes towards sexual behaviour as well as the infringement of constitutional rights of children were highlighted.

Further there was two references was made Karnataka High Court and Madhya Pradesh High Court pertaining to the consensual sexual relation within the parameter of POCSO Act.

REFERENCE BY KARNATAKA HIGH COURT TO LAW COMMISSION:

The first reference made by the Karnataka H.C Vide its letter No- 19th April, 2023 to the Law Commission of India in **State of Karnataka Vs Basavraj, (2023)¹⁹**, wherein the honorable court draws the attention of Law Commission on how the POCSO ACT causes gross injustice to accused where defacto consent of victim is present and suggested Law Commission to amend POCSO Act in respect of age of consent.

REFERENCE BY MADHYA PRADESH HIGH COURT TO LAW COMMISSION:

The subsequent reference made by the Madhya Pradesh High Court to the Law Commission in **Veekesh Kalawat v. State of Madhya Pradesh & Ors²⁰**, vide its letter dated 9th Nov, 2023 asking the commission to rethink the age of consent to 16 years considering the rising number of cases.

¹⁸ <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>. Last visited on 11/03/24

¹⁹ <https://indiankanoon.org/doc/105300317/> Last visited on 11/03/24

²⁰

<https://www.sconline.com/blog/post/2023/09/30/law-commission-recommends-to-amend-pocso-act-legal-news/> Last visited on 11/03/24

LAW COMMISSION'S 283rd REPORT, dated 27-09-2023

Recently the Law Commission of India in its 283rd report²¹ on the “Age of Consent under POCSO ACT” has said that blanket criminalization of sexual activity among teenagers as per the POCSO Act is a cause of concern recommended amendments to POCSO Act & JJ Act to avoid imprisonment for adolescents involved in sexual activity and thereby ruled out reducing the age of consent to 16 years or giving limited exception in cases involving a child.

SUGGESTIONS & RECOMMENDATIONS

On microscopic analysis of various reported datas, judicial decisions and Law Commissions report it is found that various courts acknowledged the relationships among minors or with young adults are a result of natural biological attraction. Many argue that the law is out of sync with reality as criminalizing regular adolescent sexual activity is shown to ruin lives and burden the overcrowded justice system. Recent calls to lower the age of consent from 18 to 16, similar to many other countries, have been gaining momentum, backed by judiciary figures and organizations like UNICEF. A balance between child protection and respect for evolving adolescence autonomy is seen as necessary, recognizing that adolescent sexuality is a normal facet of human development. Considering the high rate of romantic cases falls under POCSO Act, the researcher has opined for the following suggestions-

1. Need for an amendment in POCSO act decriminalizing consensual acts involving adolescents above 16 years.
2. The amendment should also ensure their protection by criminalizing non-consensual acts, against their will, or where consent obtained through fear of death or hurt, intoxication or accused in a position authority.
3. Comprehensive sexual education needed to fulfill knowledge gap.
4. Efforts are also needed in direction towards imparting knowledge, skill and attitude to vulnerable groups like children with disabilities or those out of groups
5. One solution could be the close- in age exemption or age- span provision. These are used in Canada & USA. So this concept tells us what should be done where there is a consensual sexual relationship between adolescence who are below the age of consent. So

²¹ <https://lawcommissionofindia.nic.in/> Last visited on 11/03/24

in such cases if the age gap between both is less, then there should be no criminalization. The rationale behind this is that if the age gap is less, then there is very less chance of sexual exploitation and most probably it could be romantic relationship. However, if the age gap is more than there are chances of sexual exploitation because there is less likelihood of a relationship so here the court should take action.

CONCLUSION:

The Protection of Children from Sexual Offences (POCSO) Act, 2012, has been instrumental in safeguarding children from sexual offences in India. However, its relevance in the context of adolescent relationships has been a subject of debate. The Act, in its current form, criminalizes all sexual activity involving children under 18, which has led to legal complications for adolescents engaged in consensual relationships. One perspective argues that the Act, while well-intentioned, does not adequately differentiate between exploitative sexual conduct and consensual relationships among adolescents. This viewpoint suggests that the law should be amended to decriminalize consensual sexual activity between adolescents, thereby reducing the burden on the justice system and preventing the unnecessary criminalization of young individuals. Another perspective maintains that the POCSO Act is necessary in its current form to protect children and adolescents from sexual exploitation. This viewpoint argues that lowering the age of consent could potentially expose younger adolescents to sexual exploitation and abuse. A third perspective suggests a more nuanced approach, proposing that the Act could be amended to include a "close-in-age" exemption, often referred to as a "Romeo and Juliet" law. This would decriminalize consensual sexual activity between adolescents close in age, while still protecting younger children from sexual exploitation.

The POCSO Act, in its current form, criminalizes all sexual activity involving children under 18, which has led to legal complications for adolescents engaged in consensual relationships. As such, it is the need of hour to amend the POCSO Act to include a "close-in-age" exemption or "Romeo and Juliet" law to decriminalize consensual sexual activity between adolescents or discretionary power may be vested upon court to take lenient view while imposing punishment on its satisfaction that the case involves a consensual activity.