PRELIMINARY ASSESSMENT-JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT 2015

- **INTRODUCTION**

The Juvenile Justice (Care and Protection of Children) Act 2015 (hereinafter JJ Act, 2015), as passed by Parliament, received the assent of the President of India, on December 13, 2015 and is applicable to the whole of India. The gruesome rape in the *Nirbhaya* case, where one of the offenders was 17 years old, just 3 months short from attaining majority, fueled the concern that the Juvenile Justice Act, 2000 was ill-equipped to deal with this new breed of delinquents, the so-called juvenile super predators. The policy elites, the media, as well as ordinary citizens, from all spectrums resorted to questioning the legitimacy of the juvenile legislation and the need for the adoption of stringent punishment, to act as a deterrent. The Parliament, under unprecedented scrutiny and criticism for its perceived inability to respond to the Juvenile menace, succumbed to the demand of some critics riding on the myth of super predators. Thus, the Parliament brought in the JJ Act, 2015 to make it easier to prosecute juveniles as adults. Under the existing framework, a child between the age of 16-18 years, alleged to have committed a heinous offence, may be transferred to an adult criminal court, known as children's court, to be tried as an adult. Section 15 of the JJ Act, 2015 is the most contentious provision, mandating the Juvenile Justice Board (hereinafter referred to as JJB) to transfer cases involving a child between 16-18 years, alleged to have committed a heinous offence, to a children's court. This decision is to be made by the Board on the basis of a preliminary assessment conducted to examine the child's capacity to commit such an offence. This Section casts an onerous obligation on the JJB to take the assistance of psycho-social workers, psychologists and other experts, in order to come to a conclusion regarding the mental capacity of the said accused. If the Board is satisfied in its preliminary assessment, then it may transfer the child to be dealt by the Children's Court, under Section 18(3).

The 2015 Act justifies the very transfer of juveniles above the age of sixteen year old to adult courts, if the Juvenile Justice Board (JJB) conclusively opines that the level of maturity of the juvenile indicates that he committed the heinous offence as an adult and not as a child. Section 15 of the Act requires the JJB to conduct a preliminary assessment with regard to “his mental and physical capacity to commit such an offence, the ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence”. If the Board finds that the child needs to be tried as an adult, the board may transfer the trial of the case to a children’s court. The children’s court conducts a trial and passes an appropriate order subject to sections 19 and 21 of the Act and considering the special need(s) of the child and other principles of justice to the child. The children’s court does not award any sentence of death or life imprisonment.

This section is therefore based on the premise that now, in the age of increased exposure to all the anti-social elements present in the society, the juvenile court has been transformed from a general rehabilitative social welfare institution into a more scaled down, second class criminal

court for the juveniles. This seems to be because of the increasing crimes committed by our young and because of the perception that there is loss of faith in rehabilitation for that age group. Some children have been come to be labelled as 'predators' or 'super predators', rather than persons in need of treatment, and there has been this shift to treat them more severely than what was earlier being done in the juvenile courts. This is also referred to as the system of *judicial waiver*. This is borrowed from the 'Get-Tough' approach in United States (US). There is unanimity in almost all US States on the point of trying juveniles at par with adults on juvenile attaining the age of fourteen years in certain circumstances barring states like Vermont, Indiana, South Dakota where a child of even ten years can be tried as adult if he has committed a serious offence. There are three legal mechanisms that permit the juvenile to be tried as an adult in the US:

i. **Automatic transfer laws** require the transfer of a child to adult court when statutory criteria, usually involving the charge and the child's age are met.

ii. **Judicial discretionary transfer laws** let the juvenile court judge decide whether a child should be transferred on the finding of probable cause of the child's guilt; and

iii. **Prosecutorial discretionary transfer laws** put the power in the hands of the prosecutor to decide whether to file charges in juvenile or adult court."

- **PROCEDURE OUTLINED-SECTION 15**

i What should be the nature of the offence to fulfil the requirements of this section?

For the application of this section, the juvenile should commit a heinous offence which is defined in section 2 (33) of the Act as, "'Heinous offences' includes the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more."

This category of offences is different from that of petty offences and serious offences. For such heinous offences the Board shall follow the procedure as that of the trial in summons case as under the Code of Criminal Procedure, 1973.

ii What is a JJB? who constitutes it?

The JJB, a multi-disciplinary body, is the one that exercises powers and discharges functions in relation to children in conflict with law under this Act. It consists of metropolitan magistrate or a judicial magistrate of first class not being chief metropolitan magistrate or chief judicial magistrate (hereinafter referred to as principal magistrate) with at least three years of experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman.

The social worker must be the person actively involved in health, education, or welfare activities pertaining to children for at least seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law.

These persons are not eligible if they have a past record of violating human rights or child rights or have been convicted for moral turpitude or have been dismissed from the government service. The members of the JJB are to be sensitised on the care, protection, rehabilitation, legal provisions and justice for children, though clause 5 only provides for a one-time training, but regular training is also strongly recommended.

The proviso to sub-section (1) also provides for assistance to be taken by the board of certain experienced psychologists, psycho-social workers or other relevant experts. A panel of such experts can be provided by the district child protection unit, either on the assistance requested by the Board itself or could be accessed independently.

iii How is the preliminary assessment carried by the JJB?

According to Section 14 of the Act, when a `child in conflict with law' within the meaning of Section 2 (13) of the Act is produced before the Juvenile Justice Board (in Short `the Board') constituted under Section 4 of the Act, the Board is obligated to hold an inquiry as per Chapter XXI of the Code of Criminal Procedure, 1973 (in short `Cr PC') in case of petty offence defined under Section 2(45) of the Act (vide Section 14 (5)(d)); or an inquiry as per Chapter XX of CrPC in case of serious offence defined under Section 2(54) of the Act (vide Section 14(5)(e)), or an inquiry as per Chapter XX of Cr PC in case of heinous offence defined under Section 2(33) of the Act for a child below the age of sixteen years as on the date of commission of the offence (vide Section 14(5)(f)(i)). At the conclusion of such inquiry the Board may pass either an order of exoneration under Section 17 or an order under Section 18 of the Act. In case an Order is passed under Section 18 of the Act, the Board is required to follow the provisions mentioned under Section 18(1) and / or 18(2) of the Act.

However, in case `a child in conflict with law' above the age of sixteen years as on the date of commission of the offence is accused of a `heinous offence', a preliminary assessment inquiry has to be conducted in terms of Section 15 of the Act (vide Section 14(3)/ 14(5)(f)(ii)).

A preliminary assessment conducted in the case of heinous offences under section 15 shall be disposed of by the board within a stipulated time period of three months from the date of first production of the child before the board. The procedure for conducting preliminary assessment is enumerated in Rule 10A of the Rules. The board shall in the first instance see if the child is above the age of 16 years. While making an assessment, the child shall be presumed to be innocent unless proven otherwise. The Board may, for the purpose of conducting this assessment take assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. The word *may* in the proviso is required to be read as *shall* by the Magistrate for it is a pre-requisite that such experts would only help in understanding the true picture related to the child mental psyche which the magistrate himself cannot do in all the cases. The Board then passes an order for trial as an adult, if he deems fit, and assigns reasons for the same.

This preliminary assessment takes into consideration the following kinds of reports/evidences:

i. “Social Investigation Report: A report of a child containing detailed information pertaining to the circumstances of the child, the situation of the child on economic, social, psycho-social and other relevant factors, and the recommendation thereon. Where a child alleged to be in conflict with law is apprehended, the probation officer prepares a report containing information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance to the Board for making the inquiry. It is actually prepared by a Probation Officer or the voluntary or non-governmental organisation, along with the evidence produced by the parties for arriving at a conclusion.”

ii. Social Background Report: A report on a child in conflict with law containing the background of the child prepared by the Child Welfare Police Officer. For gathering the best available information, it is incumbent upon the Special Juvenile Police Unit or the Child Welfare Police Officer to contact the parents or guardians of the child. This report is treated as an important document for the welfare of the children while deciding their case. This has been upheld in the case of *Ramachandran* v. *The Inspector of Police, 1994 CriLJ 3722*

iii. Physical mental drug assessment report

iv. Preliminary assessment report: The report containing circumstances of apprehending the child and the offence alleged to have been committed by him. It also consists of psychological evaluation of the child undertaken by the psychologist himself.

v. Statement of witnesses and other documents prepared during the course of investigation by the child welfare police officer within a period of one month from the date of first production of the child before the board.

The purpose of such preliminary assessment test under Section 15 of the Act is to ascertain as to whether `the child in conflict with law' is required to be tried as an adult by a Children's Court (vide Section 18(3)) or not. In the aforesaid eventuality, once `a child in conflict with law' is produced before the Board, it is therefore, imperative for the Board to conduct a preliminary assessment test under Section 15 of the Act with regard to:

a. The mental and;

b. Physical capacity to commit a heinous offence within the meaning of Section 2(33) of the Act;

c. Ability to understand the consequences of the offence and;

d. The circumstances in which he allegedly committed the offence.

In this regard, it may be mentioned that the Board must consist of a Magistrate with at-least 3 years of experience and two social workers (vide Section 4(2)). Rule 10A of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (in short `Central Rules') prescribes the procedure for preliminary assessment into heinous offences by the Board. It provides that the Board shall in the first instance determine whether the child is of 16 years of age or above. According to sub-Rule (2) of the Central Rules, for the purpose of conducting a preliminary assessment in case of heinous offences the Board may take assistance of psychologist or psycho-social workers or other experts who have experience of working with the children in different circumstances. According to sub-rule (3) of the Central Rules, while making the preliminary

assessment, the child shall be presumed to be innocent. According to sub-rule (4) of the Central Rules, where the board, upon a preliminary assessment passes an order that there is a need for trial of the said child as an adult, `it shall assign reasons for the same'.

In order to appreciate the aforesaid provisions; Section 3 of the JJ Act 2015 may be taken into consideration. Section 3 enumerates `General Principles to be followed in administration of the said Act'. According to Clause (i) of Section 3, a child shall be presumed to be innocent of any mala-fide or criminal intent. According to clause (ix) of section 3, no waiver of any right of the child is permissible or valid. According to Clause (xvi), basic procedural safeguards of fairness shall be adhered to, including the right to a fair hearing, rule against bias, etc.

In the aforesaid backdrop, it is therefore evident that the preliminary assessment test is a compulsory step which has to be necessarily followed by a Board once a child is produced before it in the eventualities as mentioned hereinabove. The procedure enumerated in Section 15 read with Rule 10A of Central Rules makes it imperative for the Board to scrupulously and religiously follow the procedure in order to come to an independent decision, of course with aid of expert opinion. The crux is that the formulation of the opinion must, therefore be by the Board and none else. The Board cannot abdicate its essential judicial function. It is trite law that no decision making authority can abdicate its decision making power to another authority *(vide: Gangajali Education Society v. Union of India, (2017) 16 SCC 656).*

An order under Section 15 of the Act not only gives a different legal character to a juvenile aged between 16 to 18 years thereby presuming the said juvenile to be an adult in the contemplation of law, but also takes away the application of the beneficial provisions enumerated under Section 18(1)/(2) of the Act. It eventually determines the forum for trial, procedure for trial and the punishment that can ultimately be imposed in case the said juvenile is found to be guilty. Since the provision under Section 15 of the Act deals with a legal fiction (vide Section 18(3)), it has to be construed strictly.

Once an order is passed under Section 18 (3) of the Act, the case of the said child is transferred to the Children's Court within the meaning of Section 2(20) of the Act. In case the Children's Court is a designated court under Section 25 of the Commissions for Protection of Child Rights Act, 2005 (in short `the Child Rights Act') vis a vis under Section 28 of the Protection of Children from Sexual Offences Act, 2012 (in short `POSCO'), it will follow the procedure for trial of a sessions case under Chapter XVIII of CrPC (vide Section 19 (2) read with Section 33 of POSCO vis a vis Section 25 of the Child Rights Act and Rule 12(8) of the Central Rules). The Children's Court may draw presumptions of guilt and culpable mental state under Sections 29 and 30 of POSCO respectively, in appropriate cases. It may pass any order of sentence except death sentence and life imprisonment without remission (vide Section 21) unlike the Board under Section 18 of the Act. The protection against disqualification under Section 24 of the Act will also not operate qua a child in conflict with law who was tried as an adult by the Children's Court.

The decision passed by the Board must necessarily be supported by reasons inasmuch as assigning reason is the best way out to demonstrate the application of mind. In case the reasoning fails, as a consequence thereof, the conclusion fails equally. An order under Section 15 of the said Act need to demonstrate satisfaction regarding the mental and/or physical capacity of the child to commit a heinous offence; the ability of the child to understand the consequences of the offences, and the circumstances in which the alleged offence had occurred.

After an inquiry under Section 15 of the Act, one `a child in conflict with law' is forwarded to the Children's Court in terms of Section 18(3) of the Act, the Children's Court is obligated to decide the issue as to the need for trial of the said child by the Children's Court a-fresh (vide Section 19(1)). In case the Children's Court finds that there is a need for trial of the child as an adult as per ordinary procedure of Cr PC (read with Section 4(2) of Cr PC), the Children's Court may proceed in terms of Section 19(1)(i) of the Act. However, if is it found by the Children's Court that there is no need for trial of the child as an adult, the Children's Court may conduct an inquiry under Section 14(5)(e) of the Act. Hence, it is evident that in order to commence trial of a child aged between 16 to 18 years in case of heinous offences the Children's Court has to conduct an additional inquiry. In this regard attention may be drawn to the provision of Rule 13 of the Central Rules. As per Rule 13(1) Children's Court is obliged to decide whether there is need for trial of the child as an adult or not and thereafter it will pass appropriate orders to this effect. As per Rule 13(6), the Children's Court shall record its reasons while arriving at a conclusion in passing an order under Section 19(1) of the Act.

- **PRELIMINARY ARGUMENTS QUESTIONING CONSTITUTIONALITY OF THE ACT**

Violation of the Right to Equality under Article 14

Section 15 of the Act violates the Right to Equality enshrined under Article 14 of the Constitution in two aspects : First, the treatment of juveniles or children in the age group of 16-18 is different from juveniles or children below 16 years of age. On examination of the impugned Section, it is clear that there is no reasonable basis to differentiate juveniles or children in the age group of 16-18 from the other ages of juveniles thereby resulting in a blatant form of inequality for the juveniles and children above the age of 16. Second, the rampant power is given to the Juvenile Justice Board. As per the provision of Section 15 read with Section 18(3) of Act , the Juvenile Justice Board will determine whether they will decide upon the matter or transfer it to the Children's Court based on a preliminary assessment which takes into regard the mental and physical capacity of the child to commit an offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence.

The Standing Committee which was constituted prior to the passing of the the Juvenile Justice (Care and Protection of Children) Bill, 2014 in the Rajya Sabha stated that the various stakeholders who were consulted by the Committee were in agreement that then proposed legislation seeking to bring major changes in juvenile justice system were in contravention of the Constitutional Provisions of Article 14 and 15. The Committee Report concluded at that time that the existing juvenile system is not only reformative and rehabilitative in nature but also

recognises the fact that 16 -18 years is an extremely sensitive and critical age requiring greater protection.

Prima facie there seems no need to subject this age group to different or adult judicial system as it will go against Articles 14 and 15(3) of the Constitution." The Justice Verma Committee which was assigned to look into the possible amendments in the criminal laws related to sexual violence against women looked at available statistics, scientific evidence on recidivism and also took into account India's international commitment on protecting the Rights of Children; reached to a conclusion that the present cut-off of 18 years should be retained and that the age of a juvenile need not be reduced to 16 years.

On dissecting the provisions of the Act, an in-depth analysis of how the Act contravenes the Right to Equality is elucidated as follows:

i. The Lack of any Reasonable Classification to treat juveniles and children above the age of 16 differently

In any scenario where similarly situated persons are treated differently, the question of violation of equality and discrimination arises. Article 14 envisages equality before law and equal protection of laws. The Supreme Court has aptly observed that "Equal Protection of Laws is corollary to Equality before Law and in substance both the expressions mean the same". The principle of equal protection does not take away from the state the power of classifying persons for the legitimate purpose. "But the doctrine of Reasonable Classification must not be over emphasized as it is only a subsidiary rule involved to give practical content to the doctrine of Equality and therefore the doctrine of equality should remain superior to doctrine of classification" .

As per law, classification should be based upon two things firstly, it should be based upon the Intelligible Differentia and secondly, the Intelligible Differentia should have a "rational nexus with the object sought to be achieved". Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question. The classification under Section 15 of the Act is not reasonable and it has no rational nexus to the object sought to be achieved. As per its preamble, the Act was enacted to 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 in the adjudication and disposal of matters in the best interest of children and for their rehabilitation through processes provided, and institutions and bodies established, herein under and for matters connected therewith or incidental thereto.

The Act has defined juveniles and children as persons who are below the age of 18 . However Section 15 of the Act brings in a separate classification of the age group of 16-18 without any Intelligible Differentia. Thus Section 15 makes the Classification of this age group unreasonable,

resulting in the violation of the Right to Equality. In *Subramanian Swamy v. Raju* , the Supreme Court elucidated that categorization need not be the outcome of a mathematical or arithmetical precision in the similarities of the persons included in a class and there may be differences amongst the members included within a particular class. The court observed that so long as the broad features of the categorization are identifiable and distinguishable and the categorization made is reasonably connected with the object targeted, Article 14 will not forbid such a course of action. The Supreme Court in *State of W.B. v. Anwar Ali Sarkar* , declared Section 5(1) of WB Special Courts Act, 1950 unconstitutional as it gave arbitrary power to the executive and the legislature to decide which cases are to go a special Court and which ones are to be decided by a normal Court without making any classification in the law itself. Therefore if the inclusion of all persons under 18 into a class called 'juveniles' is understood in the above manner, differences inter se and within the 'under 18' category may exist. Article 14 will, however, tolerate the said position. "Precision and arithmetical accuracy will not exist in any categorization. But such precision and accuracy is not what Article 14 contemplates" . The separate classification of 16 — 18 year old juveniles does not adhere to or does not have any nexus with the objective sought to be achieved. The Juvenile Justice Board under section 15 of the Act therefore has an arbitrary power to conduct a preliminary inquiry to determine whether a juvenile offender is to be sent for rehabilitation or be tried as an adult. The jurisdiction of Article 14 extends to the prevention of arbitrary and unreasonable actions of the State, which are "antithetical" to the rule of equality. Therefore the unreasonable classification of juveniles of the age group of 16-18 as per Section 15 of the Act, being of such an arbitrary nature is in grave violation of the Right to Equality.

ii. Arbitrary power of the Board under Section 15 of the Juvenile Justice Act, 2015.

In addition to the classification of 16-18 year olds itself being arbitrary, the manner in which the Juvenile Board makes this classification is also of the same degree of arbitrariness, if not more. A detailed elucidation of this is stated in the three aspects described below.

a. Absence of the compulsory presence of a psychologist in the preliminary assessment of the juvenile.

The proviso under Section 15 of the Act, 2015 states that in the preliminary assessment by the Board in the case of heinous crimes, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts. This implies that the Board may also not take the said assistance. Thus this imparts a power on the Board which is completely arbitrary in nature as the board may choose to take assistance at its own will. A common man or lay person is not qualified to assess the mental capacity of a juvenile and therefore the assistance of experienced psychologists or psycho-social workers or other experts is extremely crucial in assessing the mental capacity of a juvenile. The term 'may' in Section 15 results in a vague and ambiguous understanding of the statute. The Supreme Court has so far not struck down this arbitrary provision of the Juvenile Justice Act. Such a law affecting a Fundamental Right may be held bad for sheer vagueness and uncertainty and therefore should be held as unconstitutional at the earliest.

b. The Lack of appropriate qualified persons in the Board for preliminary assessment of the juvenile.

The Composition of the Juvenile Board has been provided in Section 4 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The Section states that:

> "(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years' experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.
>
> (3) No social worker shall be appointed as a member of the Board unless such person has been actively involved in health, education, or welfare activities pertaining to children for at least seven years or a practicing professional with a degree in child psychology, psychiatry, sociology or law."

The operative word used in subsection (3) of section 4 is 'or'. This means that the social workers in the board need not compulsorily be a practicing professional with a degree in child psychology or psychiatry. In order to assess whether a juvenile has the required mental capacity of an adult while committing the crime, it is vital and of crucial importance that at least one member of the board is a practicing professional with a degree in child psychology or psychiatry in order to appropriately assess the juvenile. The basis for determining whether trial of the juvenile is to be conducted as is for an adult, is a preliminary assessment with regard to the juvenile's mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which the juvenile allegedly committed the offence. If there is no mandatory requirement that a psychologist or psychiatrist assess the mental capacity of the juvenile, then there is a high possibility that the assessment by the Board is not credible. This lack of qualified persons in the Board for assessment is an abuse of power and of arbitrary nature thereby violating Article 14.

c. The Lack of a reasonable time for preliminary assessment of the juvenile by the Board. Section 14(3) of the Act states that the preliminary assessment in case of heinous offences under Section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board. The Juvenile Justice Boards have just three months to take a call if the child is to be tried as an adult based on the circumstances, his understanding of the consequences of his actions and his maturity levels. This assessment will have to be done based only on the FIR made by the police. This preliminary investigation of only three months to decide whether someone in the age group 16-18 can be tried as an adult, has stripped such children in conflict with law of the basic safeguards provided to all accused under the criminal law. The juvenile will have an opportunity to give his version only when the police file the charge sheet, which generally takes more than three months. In the meantime, the Board would have already passed him over to the adult criminal justice system without giving him an

opportunity to defend himself. Thus the procedure which is currently in place to assess the heinous offence is of a completely arbitrary nature being a bar to fairness and justice.

DOLI INCAPAX AND JUVENILE

It is a fundamental principle of criminal law that both actus reus and mens rea must be established before an individual may be convicted of a criminal offense. Actus reus refers to the conduct or act by the individual which consists of a voluntary body movement. In addition to the physical element of a crime, actus reus, the law also requires that mens rea, the mental element of the crime, be established. Mens rea can be simply defined as the intention to do the act which society has made penal, or the intent to do the act with knowledge of the circumstances that make the act a criminal offense. Only when both actus reus and mens rea are present can an individual be held criminally responsible. The principle which resulted was expressed in 'the phrase *"actus non facit reum nisi mens sit rea."* (An act does not make a person guilty unless his intention be guilty also.)The law, however, has always dealt with children in a somewhat different manner than their adult counterparts.

The crimes committed by children are mitigatingly treated under the Indian Penal Code as it specifically declares that' "nothing is an offence which is done by a child under seven years of age.” Further section 83 of the Code reads:

> “Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion”.

Thus, the Indian law takes note of the familiar concept of doli incapax which absolves a child of complete liability if the child happens to be below the age of seven years at the time of committing the crime. The absolute exemption from liability to children of this age group is based on sound experience and wisdom, and no change is warranted to extend the privilege to a higher age group.

The law also takes note of the interest of children above the age group of absolute exemption, i.e., seven years, as stated above in section 83 of the Indian Penal Code. Under this provision exemption from liability is granted to children ranging between the age group of seven to twelve years. The basis for limited exemption rests on the fact that these children have not attained annum pubertitis and they lack sufficient maturity and understanding to judge the nature and consequences of their conduct on the occasion. The limited liability fastened on children beyond the age of seven years is somewhat an intricate issue. On policy matters the criminal Jaw should take a discriminating view of the matter because the tenderness of age is a reckoning factor to attribute the lack of sufficient understanding of the nature and consequences of the act. In case where the privilege under section 83 of the Indian Penal Code is invoked, it becomes necessary to look into the antecedents and circumstances of each case to disprove that requisite intention to commit the offence was absent due to the incapacity of the wrongdoer because of his age.

In *Hiralal Mallick vs. the State of Bihar* AIR 1977 SC 2236, the Supreme Court upheld the conviction and sentence of a 12-year-old boy, who along with his two elder brothers had been initially convicted for murder; which was later converted by the High Court to one for voluntarily causing grievous hurt by dangerous weapons or means. The Supreme Court noted that Section 83 had not been invoked at any stage of the criminal process implying that the onus is on the defense to establish the child's immaturity.

In *Kakoo vs. the State of Himachal Pradesh,*AIR 1976 SC 1991 a 13-year-old boy was convicted for raping a two-year-old girl. To bring down the sentence of the punishment, the counsel on behalf of the accused urged the Court to take into consideration Sections 83 and 84 of the Indian Penal Code that children and adults are not to be treated in a similar manner while hearing a criminal matter. The Court though convicted the child for the offense of rape, it reduced the sentence of punishment by accepting the aforementioned argument of the counsel on behalf of the accused child. Hence, it can be concluded from the judgment that Section 82 and 83 do not only provide for 'doli incapax' but they also act as a signal to the courts while deciding a case that children are not to be treated as equal to adults in criminal cases. It has indeed become a settled principle of law that when courts are dealing with children, it must take a humanitarian view and should ensure reformation of the child rather than making him a hardcore criminal.

Whether the principles of criminal responsibility which are embodied in the term mens rea should apply to the juvenile justice board is a question which does not lend itself to a simple solution. A remarkable feature of the entire system of juvenile justice is that, unlike the criminal law, the juvenile system goes about its business with an avowed single-mindedness. A single principle has charted the direction of the board; almost all disputes which have arisen in this area have been resolved by resort to the philosophy of doing what is in the best interests of the child. When a juvenile' is charged with a criminal offense, it is the prosecutor's and the defender's goals to prove and disprove, respectively, the *mens rea* element of the alleged crime. The lowest level of criminal culpability-negligence—typically establishes the "reasonable person" as the reference point for the prosecutor and the defender to use as to whether the child is to be held criminally responsible. Overall substantive criminal law continues to rely on adult standards of *mens rea* as the appropriate calibration of adolescent guilt. Without express guidance to do otherwise, fact-finders anchor their judgment of a juvenile's culpability in their own adult decision making processes.

Inappropriate prosecution of children for any reason, including reliance on an improper reasonable person standard, is perilous to the individuals and to society. First, juvenile system processing of any kind can have lifelong consequences. In the short term, when we label certain acts as "deviant" and treat kids who commit them as "outsiders," we may actually perpetuate the delinquent behaviour. In the long term, records of juvenile adjudications can negatively affect educational, employment, housing, and military opportunities, and be used in adult criminal sentencing. Second, it perverts the criminal and juvenile law systems when we hold anyone criminally responsible and, subsequently, punish them in error. Delinquency is generally committed by almost every youth at some point in time and, after a period of occasional

offending, most youth discontinue their delinquent behaviour. Third, the way we define criminal culpability has an enormous impacts.

The Indian Penal Code aims to protect the acts of infants from criminal liability. The reasoning behind conferring the protection is that the law never intends to punish those who lack the requisite *mens rea* for the commission of a crime. The Juvenile Justice Act, 2015 being in contravention with certain basic & fundamental principles of Constitution defeats the sole purpose of providing defence for the infancy under section 82 & section 83 to the juveniles.

JUDICIAL PRONOUNCEMENTS

1. Durga v/s. State of Rajasthan- 2019 CriLJ 2720

This indeed is a very interesting case to understand the quality of the assessments carried out upon children. Section 15 mentions that a committee consisting of experienced psychologists, psycho-social workers, who have ample experience in dealing with troubled children, should be appointed to conduct the preliminary assessment. However, it is really interesting to see that in the present case, the Honourable Rajasthan High Court observed that the child in conflict with the law, i.e., a girl named Durga, was not provided 'any effective opportunity of hearing or legal representation' Moreover, the Court also found out that as required, appropriate psychologists, having ample experience of dealing with troubled children were not consulted and the Juvenile Justice Board didn't adhere to the principles of natural justice and without any justification, the child was admitted to the psychiatry department of the MBH Hospital. From this case, the standards of the professionals available to conduct the assessment and the atrocities that children have to face due to the loopholes of the system, just in the name of Section 15, are clearly exposed.

The court stressed upon complying the mandatory requirement of Section 15 of JJ Act 2015 and Rule 10A of the Model Rules, 2016. The court set aside the preliminary assessment order. Further it was directed that the observation herein mentioned below ought to be treated as guidelines while considering cases of juvenile and shall be followed in letter and spirit.

> "In view of the above discussion made herein above, we conclude as below:
> (i) that the entire investigation is vitiated for the reason that no female police officer was associated in the investigation against female child offender. Furthermore, the investigation was not conducted by the Special Juvenile Police Unit as warranted by Section 107(2) of the Juvenile Justice Act;
> (ii) that the appellant did not murder her husband in furtherance of any preconceived design or in a cold calculated manner, and thus there was no justification for her trial as an adult by a Sessions Court by virtue of Section 15 of the Juvenile Justice Act;
> (iii) that the Principal Magistrate failed to adhere to the mandatory requirements of Section 15 of the Act while holding the enquiry and making the assessment;

(iv) that no legal assistance/effective opportunity of hearing was provided to the appellant child during the preliminary assessment made by the Juvenile Justice Board under Section 15 of the Act and thus also, these proceedings are vitiated;

(v) that the preliminary assessment order is also vitiated for the reason that the appellant was unjustly kept confined in the psychiatry ward of the Hospital and because no psychologist or psycho-social worker having experience of working with children in difficult circumstances (as mandated by Section 15(3) of the Juvenile Justice Act), was associated during the enquiry conducted under Section 15 of the Juvenile Justice Act;

(vi) While holding the inquiry, the Juvenile Justice Board, failed to adhere to the principle that the child shall be presumed to be innocent unless proved otherwise as mandated by Section 3 of the Juvenile Justice Act read with Rule 10A(3) of the Model Rules, 2016. No consideration of this principle is reflected in the order and thus, the illegality is incurable and goes to the root of the matter;

(vii) copy of the order passed under Section 15 of the Act was not provided to the juvenile of thus breaching the mandate of Rule 10A of the Model Rules of 2016;

(viii) that the under-trial child was sent to the District Jail, Pratapgarh vide order dated 19.08.2017 and thus, was treated in gross contravention of the mandate of Section 19(3) read with Section 46 of the Act of 2015 thereby vitiating the entire proceedings before the Sessions Court.

(ix) The child suffered incarceration from 16.05.2016 to 11.02.2019 on which date this Court suspended the sentences awarded to her and thus, she has undergone a custodial period of nearly two years and seven months in a prison which course of action is totally prohibited by law."

2. *Shilpa Mittal v. State of NCT of Delhi and Another, AIR 2020 SC 405*

The Apex Court has underlined the importance of this provision and held,

"18. The Children's Court constituted under the Act of 2015 has to determine whether there is actually any need for trial of the child as an adult under the provisions of Cr.PC and pass appropriate orders in this regard. The Children's Court should also take into consideration the special needs of the child, tenets of fair trial and maintaining child- friendly atmosphere. The Court can also hold that there is no need to try the child as an adult. Even if the Children's Court holds that the child has to be tried as an adult, it must ensure that the final order includes an individual care plan for rehabilitation of the child as specified in Sub-section (2) of Section 19. Furthermore, under Sub-section(3) such a child must be kept in a place of safety and cannot be sent to jail till the child attains the age of 21 years, even if such a child has to be tried as an adult. It is also provided that though the child may be tried as an adult, reformative services, educational services, skill development, alternative therapy, counselling, behaviour modification, and psychiatric support is provided to the child during the period the child is kept in the place of safety."

This case also exposed the lacunae present in the enactment. In this the extremely important and interesting issue arises as to "Whether an offence prescribing a maximum sentence of more than 7 years imprisonment but not providing any minimum sentence, or providing a minimum sentence of less than 7 years, can be considered to be a 'heinous offence' within the meaning of Section 2(33) of The Juvenile Justice (Care and Protection of Children) Act, 2015?

To this the Apex Court holds that an offence which does not provide a minimum sentence of 7 years cannot be treated to be an heinous offence. However, the Act does not deal with the 4th category of offences viz., offence where the maximum sentence is more than 7 years imprisonment, but no minimum sentence or minimum sentence of less than 7 years is provided, in such circumstances they shall be treated as 'serious offences' within the meaning of the Act and dealt with accordingly till the Parliament takes the call on the matter.

3. Mumtaz Ahmed Nasir Khan v/s. The State of Maharashtra– 2019(4)BomCR(Cri) 261

The present case points out the most hilarious aspect of Section 15. In the present case, two juveniles were involved in the murder of a three and a half years old child. The elder one was seventeen and a half years old and the younger was sixteen and a half years old. The Juvenile Justice Board ("the Board") assesses the older juvenile's physical health, mental maturity, and other collateral factors, and decides to try him, under Section 15 of the Juvenile Justice Act, 2015, as if he were an adult. After applying the same standards, it, however, decides to try the younger one as a juvenile. The Board's decision engendered before the Sessions Court two appeals: One by the Government against the Board's decision to try the younger boy as a juvenile; the other by the older boy against its decision to try him as an adult. The criteria adopted by the Board were vague in nature to this the High Court observed as follows:

> "In this context, if the Board's criteria of evaluation, as affirmed by the Appellate Court, are followed, then every case becomes an open and shut case. If the child is 16 or above and is capable of committing the offence and understanding the consequences, that will suffice. I am afraid it ought to be more than that. The whole endeavour of the JJ Act is to save the child in conflict with the law from the path of self-destruction and being a menace to the society. It is reformative, not retributive. Section 15, I believe, must be read and understood keeping in view the objective that permeates the whole Act and the spirit it is imbued with."

Further the court carried out the threadbare analysis of the Preliminary Assessment carried out by the Juvenile Justice Board and observed as follows:

> "33. As Section 15 permits the Board may, during the preliminary assessment, take the assistance of experienced psychologists or psychosocial workers or other experts. First, the preliminary assessment is "not a trial." Second, it is, instead, an inquiry to assess the child's capacity to commit the alleged offence and to understand its consequences. On inquiry, the Board must satisfy itself in its preliminary assessment about the juvenile's mental and physical capacity, his ability to understand the consequences of the offence, and so on. Then, if the Board is "satisfied on preliminary assessment that the matter should be disposed of", it will follow "the procedure, as far as may be, for trial in summons case under Cr PC." The Board's order is appealable under sub-section (2) of Section 101.
>
> 38. A universally accepted ideal is that children are dependent and deficient in the mental and physical capacities, and are in need of guidance. Perhaps, initially, a multi-visual medium like TV; later, a globe devouring internet (appropriately, ominously worded as "world wide web"), and finally-and fatally-the post-truth social media have let the children, especially the adolescents, leapfrog into the adult world. Mostly it is a crash-landing, with disastrous consequences. So the childhood innocence is the casualty. These devices may have made a child

bypass his or her childhood, sadly. Then, naturally, the theory of reduced culpability for juveniles relative to adults has taken a statutory dent. The good-old-days icon of a truant child seems to get replaced by the modern-day mascot of a violent predator.

87. So we need to revisit Section 15 of the Act to determine what circumstances compel a juvenile to face the trial as if he were an adult. (1) It must be a heinous offence; here it is. (2) The child must have completed sixteen years; here he has. (3) The Board must have conducted a preliminary assessment; here it has. (4) That preliminary assessment concerns four aspects: (a) the child's mental and (b) physical capacity to commit such offence; (c) his ability to understand the consequences of the offence; (d) and the circumstances in which he allegedly committed the offence. The preliminary assessment, indeed, has been on all these aspects. Agreed. But has the Board found the child fitting into the scheme on all four counts?

88. I reckon of the four aspects-physical capacity, mental ability, understanding, and the circumstances-none is dispensable. They all must be present, for they are not in the alternative. Let us remind ourselves, just because the statute permits a child of 16 years and beyond can stand trial in a heinous offence as an adult, it does not mean that the statute intends that all those children should be subject to adult punishment. It is not a default choice; a conscious, calibrated one. And for that, all the statutory criteria must be fulfilled.

89. Here, the Social Investigation Report records many factors uniformly in the older juvenile's favor. It misses out on one very vital aspect: the neighborhood perception of the juvenile. It records an improbable circumstance: that in a residential apartment, none was present to provide information on that count. On every other parameter, the Report favors the juvenile. In fact, the juvenile makes a clean breast of the incident or crime and expresses remorse for the accident, as he calls it. It is, true, an extra-judicial confession. So is what the police have extracted from him about the child's death. The older juvenile did report to the Probation Officer about the police brutality and the Report responds to it. It has informed the Board about the juvenile's allegation.

90. Despite the older juvenile's "confession" to crime, the Report records that he has been manipulative and evasive-even contradictory. But the very Report belies it. Perhaps, the gravity of the offence and the public outcry must have heavily weighed on the Report. Let us take, for want of better evaluative norms, Kent's criteria and assess the Board's justification to try the older juvenile as an adult:

(1) The seriousness of the alleged offense to the community and whether protecting the community requires a waiver:

The offence serious-even grave-and the community needs protection. But the Social Investigation Report misses out on gathering the community's opinion whether it needs protection from this juvenile. Is he a predator on the prowl and out to repeat the offence with or without provocation? The older juvenile, in fact, is an ordinary, unremarkable neighborhood boy.

(2) Was the alleged offence committed in an aggressive, violent, premeditated, or willed manner?

No. Even the extra-judicial confession does not spell out that it was.

(3) Was the alleged offense committed against persons or against property, with a greater weight attached to offenses against persons, especially if personal injury resulted.

The alleged offence answers this claim here.

(4) The prosecutive merit of the complaint; that is, is there evidence upon which the court may be expected to return a guilty verdict?

Very likely (only for the evaluative purpose, though)

(5) The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults.

It does not apply here.

(6) The sophistication and maturity of the juvenile by consideration of his home, environmental situation, emotional attitude, and pattern of living:

Post the alleged offence, the juvenile seems to have displayed some sophistication in making calls of ransom only to deflect the police attention. But the juvenile's home, environmental situation, emotional attitude and pattern of living are normal or unremarkable. Especially, his family and pattern of living are almost ideal, as per the Report.

(7) The record and previous history of the juvenile, including previous contacts with the law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions.

To this criterion, the answer is a clear no. The juvenile had been pursuing his education, had been under strict parental care, and has no criminal track record.

(8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by using the procedures, services, and facilities currently available to the juvenile court.

On this count, we may note that post the incident, the parents faced social opprobrium and shunning. They were forced to shift to some other place. They preferred the juvenile to be kept in the Observation Home.

91. In the Observation Home, the older juvenile's conduct is reported as good. He studiously pursued his studies and even cleared the Board examination. Both the Social Investigation Report and the MH Report reveal that the juvenile has been remorseful about the event and displayed a calm, unagitated mind.

92. The explanation to Section 15 of the Act clarifies that the preliminary assessment is not a trial; it is an exercise to assess the child's capacity to commit and understand the consequences of the alleged offence.

93. In this context, if the Board's criteria of evaluation, as affirmed by the Appellate Court, are followed, then every case becomes an open and shut case. If the child is 16 or above and is capable of committing the offence and understanding the consequences, that will suffice. I am afraid it ought to be more than that. The whole endeavor of the JJ Act is to save the child in conflict with the law from the path of self-destruction and being a menace to the society. It is reformative, not retributive. Section 15, I believe, must be read and understood keeping in view the objective that permeates the whole Act and the spirit it is imbued with.

94. That to contain crime, the State must be strict and the punishment must be harsh is an intuitive assertion; but sometimes the solution to the crime are counterintuitive. Steven D. Levitt and Stephen J. Dubner, in their popular book Freakonomics[16] , have hypothesized that the juvenile crime in a few of states of the US has come down thanks to **Roe v. Wade**, a judgment of the American Supreme Court that legalized abortion. Critics apart, there can be ideas that are worth exploring. It is equally worthwhile, first, to explore for ideas, instead getting stuck in a predictable, plebian approach to societal problems.

98. Merely on the premise that the offence is heinous and that it lends to the societal volatility of indignation, we are bracing for juvenile recidivism. Retributive approach vis-a-vis juveniles needs to be shunned unless there are exceptional circumstances, involving gross moral turpitude and irredeemable proclivity for the crime. Condemned, any juvenile is going to be a mere

numeral in prison for a lifetime; reformed, he may redeem himself and may become a value addition to the Society. Let no child be condemned unless his fate is foreordained by his own destructive conduct. For this, a single incident not revealing wickedness, human depravity, mental perversity, or moral degeneration may not be enough. Just deserts are more than mere retribution.

99. The Society, or restrictively the aggrieved person, views any problem ex post; it wants a wrong to be righted or remedied to the extent possible. The courts, especially the Courts of Record, view the same problem ex ante. "It involves looking forward and asking what effects the decision about this case will have in the future"[19]. To be more accurate, the courts balance both perspectives. I reckon Section 15 of the Act requires us to balance both the competing perspectives: ex post and ex ante.

[19] [The Legal Analyst, Ward Farnsworth, The University of Chicago Press, Ed. 2007. P. 5]

100. So I conclude that the Board, in the first place, has mechanically relied on the Social Investigation Report and MH Report, without analyzing the older adult's case on its own. Similarly, the Appellate Court has also endorsed the order in appeal, without exercising the powers it has under Section 101. So both fail the legal scrutiny; they have failed to exercise the jurisdiction vested in them."

4. ***CCL LK @LKP vs. State, 262(2019)DLT 319***

The question that arises for consideration is as to whether the provisions of Section 19 are mandatory or is the Children Court merely to follow the recommendations of the Board, made under Section 15 of the Act read with Section 18(3) of the Act?

The Court interpreted Section 19(1) of the Act read with Rule 13 of the Central Rules and held as follows:

"19. Though, once again the expression used in Rule 13(1) is that the Children's Court may decide, however, Rule (6) uses the expression 'shall' and mandates the Children's Court to record its reasons while arriving at a conclusion whether the child is to be treated as an adult or as a child.

20. Rule 13(7) stipulates that in case the Children's Court decides that there is no need for trial of the child as an adult, then it shall decide the matter itself. It is thereafter to conduct an inquiry as if it was functioning as a Board and follow the procedure for trial in summon cases under Cr. P.C.

21. Rule 13(8) stipulates that in case the Children's Court decides that there is need for trial of the child as an adult, it is to follow the procedure prescribed by Cr. P.C. or trial by Sessions.

22. Reading of Rule 13 in conjunction with Section 19 of JJ Act clearly shows that it is obligatory on the part of the Children's Court to take a decision after receipt of the preliminary assessment report from the Board as to whether there is need for trial of the child as an adult or as a child. Appropriate speaking order recording reasons for arriving at the conclusion is to be passed by the Children's Court.

23. In the present case, once the preliminary assessment report was received from the Board opining that the child should be treated as an adult, record does not reveal any application of mind or an independent decision taken by the Children's Court in terms of Section 19 read with Rule 13(1) and 13(6). The Children's Court has thereafter proceeded on to frame charges by the impugned order.

24. Perusal of the record further shows that the testimony of the child victim has already been partly recorded before the trial court.

25. No doubt, the Children's Court has not passed an order under Section 19, independently taking a decision as to whether the petitioner is to be tried as an adult or as a child, the same in my opinion would not vitiate the proceedings, thereafter undertaken but, would be an irregularity which would be curable.

26. The reason for holding so, is that in both eventualities, i.e. trial as an adult and trial as a child, the proceedings have to continue before the Children's Court.

27. In terms of Rule 13 (7) in case the Children's Court decides that there is no need for trial of the child as an adult, then, it (Children's Court) has to conduct an inquiry as if it were functioning as a Board and following the procedure for trial of the summon cases.
28. In case the Children's Court decides to try the child as an adult, then, it (Children's Court) has to conduct the trial following the procedure of trial by Sessions Court.
29. In either eventuality, charge/notice which is to be framed on the same set of facts, would not be altered in so far as the offence is concerned. The only difference is as to the procedure to be followed by the Children's Court for trial.
35. However, since the Children's Court has not passed any order in terms of Section 19 of the JJ Act read with Rule 13(1) and Rule 13(6) of the Rules, the Children's Court is directed to pass an order in terms thereof.
36. In case the Children's Court opines that there is no need for trial of the child as an adult; it shall follow the procedure as prescribed under Rule 13(7) and in case it holds that there is need for trial of the child as an adult it shall follow the procedure as prescribed under Rule 13(8).”

The two-tier inquiry as conceptualized under the Act cannot be diluted under any circumstances either by the Board or by the Children's Court even though no objection was raised from the defence. It is trite law, nevertheless fundamental that a Legislative wisdom decision cannot be abjured by resorting to the equitable doctrine of waiver [Vide: ***The Deputy Legal Remembrancer on behalf of the Government of Bengal v. Upendra Kumar Ghosh, (1907-1908) XII Cal WN 140 at Page 143***].

Apart from that under Section 3 of the Act no waiver of right of the child is permissible or valid (vide (ix)).

From the facts and circumstances as narrated hereinabove, it is evident that under the Act and the Central Rules there are two tier inquiry contemplated before forwarding a child in conflict with law aged between 16 to 18 years for alleged commission of heinous offence to the Children's Court and the procedure of such inquiry as contemplated are to be strictly construed by the Board and the Children's Court respectively.

5. ***Rajiv Kumar vs. The State of Bihar 2020(1)PLJR 662***

The court herein clarified that the Preliminary Assessment cannot be made by the Board into offences which are not covered within the definition of 'heinous offences’. The court held that since the appellant had not been alleged to have committed any 'heinous offence', the Board could not have conducted preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence, physical capacity to commit such offence etc., as provided under Section 15 of the Act of 2015. It could not have even transferred the case of the appellant under Section 18(3) of the Act of 2015 to the Children's Court for trial as an adult.

6. ***Dheeraj Badoni vs. State of Uttarakhand and Ors. (18.06.2019 - UCHC) , 2020CriLJ681***

Preliminary Assessment cannot be carried out by Juvenile Justice Board where the child is not minor rather major.

"The procedure provided under Section 15 of the Act will not be applicable nor it was required to be resorted to by the Juvenile Justice Board by issuing any observation with regard to the direction to the Investigating Officer, for proceedings against the major, who otherwise does not fall to be within the ambit of juvenile as defined under the Act and, hence, Section 15 will not at all govern the directives which has been given by the Juvenile Justice Board"

7. Sachin Vs. State of U.P. and Another MANU/UP/0554/2020

Merely the seriousness of the offence is not the sole factor which would control the decision whether the child in conflict with law is to be enlarged on bail or not. This aspect of the matter has been considered by this Court in this case.

" 10. Section 15 of the Amending Act only provides for transfer of a juvenile to the Children Court for trial as an adult. Where the child has attained the age of 16 years and has been alleged to have committed heinous offence, the JJ. Board is required to conduct a preliminary inquiry with regard to his mental and physical capacity to commit offence, ability to understand the consequence of the offence and the circumstances in which the offence was committed considering their physical, psychological and mental status in commission of crime. Section 18(3) of the Act provides that after making the assessment under section 15, JJ Board comes to a conclusion that there is a need for trial of the child as an adult, the Board may pass an order for the transfer of the trial of the case to the Children Court.

11. It is pertinent to mention here that Section 12 of the Juvenile Justice (Care and Protection of Children) Act has not been amended so far as the parameters and yardstick for granting bail to the juvenile-accused is concerned. Therefore, while rejecting the bail application of such juvenile, it cannot be the criteria that the alleged offence is of serious and heinous nature. The order must show that the grant of bail to the juvenile-accused is against his interest as there is possibility of his being associated with known criminals, or there is some short of moral, physical or psychological danger to him or there is likelihood of end of justice being defeated. All these conditions have been incorporated in law in order to ensure justice to the juvenile."

The aforestated observation was also reiterated in Uddin Vs. State of U.P. and Another decided on 25.02.2020 and Home Singh vs. Addl. Distt. and Sessions Judge 8/Special Judge Pocso Act and Ors., MANU/UP/1574/2020

8. State of H.P. vs. Satish Chauhan and Ors. (10.07.2019 - HPHC) : MANU/HP/1220/2019

The Court herein stressed upon the mandatory compliance of Section 15 by the Juvenile Justice Board. The observation so made is hereby narrated:

"3. Even though, the afore mandate, borne in sub-clause(ii) of sub-Section (1) of Section 19, of the Act, (a) hence may be construable to be a bestowal upon, the Children's Court, to pass/render all orders, alike the one, which are renderable, under Section 12 of the Act, (b) yet, the afore powers, are, exercisable by the Children's Court, only after strictest adherence being meted, vis-a-vis, the mandate, enshrined in Section 15 of the Act, (c) and, when adherence, vis-a-vis, the mandates, borne in Section 15 of the Act, enjoins mandatory, and, strictest compliance, vis-a-vis, the apt statutory contemplation (s), appertaining to, holding, of, preliminary assessment(s), vis-a-

vis, the afore facets, (d) and, even though, sub-section (2) of Section 15 of the Act, bestows also upon the Board, upon the latter, receiving hence the preliminary assessment(s), vis-a-vis, the afore facets, rather, also the apt empowerment hence to inquire into the offences, allegedly committed, by the juveniles in conflict with law, (e) and, when hence, thereafter the exercise of jurisdiction, under, Section 12 of the Act, either by the Children Court, or by the Juvenile Justice Board, rather would be valid, (f) nonetheless, when the afore mandatory hence precursory(s), for there through the Board rather validly exercising, the apt jurisdiction, bestowed upon it, under Section 12 of the Act, and, mandatory precursory(ies) whereof enjoin(s) it, to, given the child, evidently, at the relevant stage, of, his committing the offence(s), being aged 16 years, (g) rather to ensure the conducting, of, a preliminary assessment, vis-a-vis, the afore facets, and, whereas the afore statutory precursory(ies), rather remaining un-recoursed, by the Juvenile Justice Board, (h) thereupon, when hence the apt statutory satisfactions, within, the ambit of Section 15 of the Act, remaining not recorded, by the Juvenile Justice Board, nor thereafter, vis-a-vis, upon the Juvenile Justice Board, hence applying its judicial mind, vis-a-vis, the preliminary assessment of the child, rather deeming it fit, to make a reference to the Children's Court, for enabling the latter, to mete adherence, vis-a-vis, the mandate of Section 19 of the Act, for thereafter, hence ensuring qua the Children's Court, upon its making a conclusion, within, the ambit, of sub-clause (ii) of sub-Section (I) of Section 19, vis-a-vis, it rather inquiring, into, the allegedly committed offences, (h) whereupon, it, may be capacitated to make an order, hence within the ambit of Section 12 of the Act. Consequently, for all the afore statutory omissions, and, when only upon the apt statutory recoursing(s), hence being made, would rather render validated the, exercise of jurisdiction, under, Section 12 of the Act, by the Board, (I) whereas, non-recoursing(s) thereof, render, the impugned order, to be made hence at an inchoate stage. Consequently, the impugned order is quashed and set aside. However, liberty, is reserved, to, after conclusion, of, the preliminary assessment, of, the juvenile in conflict with law, hence his/their moving, the appropriate application, either before the Juvenile Justice Board, or the case may, before the Children's Court, and upon the afore motion being made either therefore(s), hence the afores, are directed to, in accordance with law, render an appropriate order thereon."

9. <u>Manas Kumar Khuntia vs. State of Orissa (18.08.2016 - ORIHC) : 2016(II)OLR 935</u>

The Hon'ble Odisha High Court has insisted on mandatory compliance of Section 15 of the Act. It was held

"11. In view of the purpose of amendment for which the Juvenile Justice (Care and Protection of Children) Act, 2015 was enacted after repealing the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) by virtue of section 111 of 2015 Act, it is the requirement of law that in case of a child who has completed or above the age of sixteen years as on the date of commission of "heinous offence", the Juvenile Justice Board constituted under section 4 of 2015 Act has to make a preliminary assessment in terms of section 15 of 2015 Act. Though in the proviso to subsection (1) of section 15 of 2015 Act, the word "may" has been used, but in the context of the provision, when the power is coupled with an obligation and duty, the word "may" which denotes discretion should be construed to mean a "command" and it becomes mandatory otherwise it would defeat the very purpose of the amended Act."

10. <u>Bholu vs. C.B.I. 2019(1)RCR(Criminal)603</u>

The Hon'ble Punjab and Haryana High has inter alia held that the parameters led down under Section 15 of the Act are required to be followed strictly.

"18. The case, in hand, falls within the category of heinous offence and the petitioner, being more than 16 years of age on the date of commission of offence, is required to be dealt with as per provisions of Section 15 of the Act for the purpose of making preliminary assessment. As per arguments of learned counsel for the petitioner, the Board has not conducted the preliminary assessment as per provisions of the Act and Rules framed thereunder. A conjoint reading of both Rules 10, 10A inconsonance with Section 14, 15 and 18(3) would reveal that the path to be tread upon by the Board, post the production of the Juvenile has been clearly spelt-out where heinous offence has been alleged to be committed by a child, who has completed 16 years of age. Rule 10(5) clearly reflects that the Child Welfare Police Officer is to produce the statements of witnesses 13 of 19 and other documents prepared during the course of investigation within a period of one month from the date of first production of a child before the Board. It is also required that a copy thereof is to be given to the child or parent or guardian of the child. The legislature in its wisdom has prescribed the period of one month to produce the statements of the witnesses and other documents with a copy to the child, subsequent to which, the Preliminary Assessment in case of heinous offences under Section 15 of the Act has to be completed. Meaning thereby, the copy of list of witnesses and other documents along with copy of final report is to be supplied to the child or his parents or to the guardian before making the Preliminary Assessment as per provisions of Section 15 of the Act. It is also stipulated in Section 15 read with Rules 10 and 10-A along with other provisions of the Act that three basic parameters are necessary to be followed in case of a heinous offence before passing the order under Section 18(3) for determining the need for trial of a child as an adult. The Board had to follow three parameters for making Preliminary Assessment as to whether there is a need for the trial of said child as an adult or not. It is to be seen as to how the Board as well as the Appellate Court has appreciated the circumstances of the commission of alleged offence, without the list of witnesses, documents relevant to the matter as well as the final report, which in any case the investigating authority is to file before the Board in less than two months of the production of the child before it.

18. In the present case, no list of witnesses and documents were supplied to the petitioner or his parents or guardian, which itself shows that the Board as well as the Appellate Court have decided the case without any application of mind and contrary to the provisions of the Act and the Rules 14 of 19 framed thereunder.

19. The proviso to Section 15 enables the Board to take the assistance of any experienced psychologist or other experts to make the Preliminary Assessment. It is clearly mentioned in para No. 17 of order dated 20.12.2017 passed by the Board that in case, the opinion/assistance of any expert is required, the same be taken. It is necessary to assess the mental capacity of the juvenile. It was mandatory for the Board to assess the mental capacity of the alleged offender to commit such an offence and also the ability to understand the consequences of the same. It is also clear from the order that the clinical psychologist has himself suggested that if any further assessment is required, the juvenile may be sent to the Institute of Mental Health at Rohtak. However, it has completely been ignored by the Board and the assessment is based on inappropriate tests, namely, coloured Progressive Matrices (CPM) and Malin's Intelligence Scale for India Children (MISIC) meant for children between the ages of 5-11½ and 5-15 has been taken as the basis for the

determination of the mental capacity of a child of 16½ years. Both the Board as well as the Appellate Authority have completely ignored this fact. The petitioner wanted to cross examine the psychologist regarding the same but his request was declined and no permission was granted to him. The social investigation report is also self contradictory and the same is not worth considering. The copies of the tests, in question, were not provided to the petitioner/parents/guardian but were shown just prior to the hearing of arguments. It was not practically possible to understand 35 pages of the report by any layman in a time period of less than 30 minutes. However, in a time period of 30 minutes, the petitioner got to have a look at the record of Dr. Joginder Singh Kairo, Clinic 15 of 19 Psychologist. It came out that he had carried the assessment on the basis of two tests i.e., (i) Coloured Progressive Matrices (CPM) and (ii) Malin's Intelligence Scale for Indian Children (MISIC). The petitioner (represented by his father) and his counsel were having no idea about these tests. Subsequently, they tried to find out and came to know that those tests were absolutely irrelevant to the case of the petitioner and could not be used for making the mental assessment of the petitioner. The basic book on Clinical Child Psychology written by Radhey Sham and Azizuddin Khan categorically states that Malin's test of Intelligence for children is made for 5 to 15 years of children. Since the petitioner was 16.75 years old, when these tests were conducted on him, which were not correct tests and have resulted in wrong results. Said expert himself stated in his report that it would be appropriate that further assessment be made by a higher authority. This resulted in the petitioner doubting the credentials of the so called experts. Only because of this reason, the petitioner not only sought copies of the reports but also wanted to cross examine them so as to check the veracity and the credentials of the experts and their reports. However, he was not allowed in spite of specific request and averments made to that effect, leading to travesty of justice. The IQ test of the petitioner was conducted when he was more than 16 years and 9 months of age. An IQ of 95 at the age 16.75 would necessarily translate to 15.67 years, going by the formula for determining the mental age of any child, which is mental age/Biological Age x 100. This means that the petitioner-child has been determined to have a mental age of less than 16 years as per the report of so- called expert. Even as per said report, the petitioner had to be necessarily treated to be below 16 years. As the tests in question, in any case, are for 16 of 19 children below the age of 15 years, the IQ of 95, determined by these tests, would obviously translate to a mental age of much less than 15 years in any case."

11. ***Achawal and Ors. vs. State of Assam and Ors. (20.05.2019 - GUHC) : MANU/GH/0400/2019***

Preliminary Assessment is not a trial

"17. In view of the orders to be passed under Section 18(3) that may provide for a need of trial of the child in conflict, we also have to clarify that the preliminary assessment that may be made under Section 14(3) and further under Section 15(1) is not a trial but is an assessment only for the purpose of assessing the capacity of such child to commit and understand the consequences of the alleged offence"

12. ***Bhanwarlal vs. State of Rajasthan and Ors. (16.11.2018 - RAJHC) : 2019(1)RLW586(Raj.)***

The Act has prospective effect and preliminary assessment as mandated by Section 15 of the Act is not required to be conducted in respect of a child who is involved in an offence committed prior to commencement of the Act.

13. Pradeep Kumar v. State of NCT of Delhi, (2019) 260 DLT 641 (Delhi)

The Hon'ble Delhi High Court has inter alia held:

> "9. The proviso attached to Section 15 of the Act, provides that the JJ Board may take the assistance of experienced psychologist or psycho-social worker or other experts. Further, the explanation to the Section provides that preliminary assessment is not a trial but is to assess the capacity of such CCL to commit and understand the consequences of the alleged offence.
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> 10. The JJB-II as well as the Appellate Court has taken into consideration, all the parameters and factors mentioned in Section 15 of the Act while passing the impugned order and judgment, respectively. Further, the JJB-II has given a careful thought and consideration to the submissions of both the parties as well as the legal position in this regard. Similarly, the Appellate Court has also given careful thought and consideration to the submissions of the learned counsel for the petitioner. There is no doubt that the JJ Board may seek the opinion of an expert regarding the mental and physical capacity of a CCL to commit an offence and it is not necessary that if an expert opined that the mental and physical capacity of a CCL and his ability to understand the consequence of the offence are positive, then the JJ Board is bound by the expert opinion. It is well within the jurisdiction of the JJ Board to agree or disagree with the preliminary assessment report of the CCL submitted by such a psychologist to the JJ Board. But the circumstances, in which the alleged offence was committed has to be considered by the JJ Board independently, in which the alleged offence was committed and the JJ Board has to apply a judicial mind."

14. Puneet S. v. State of Karnataka, 2019 (4) AKR 662

The Hon'ble Karnataka High Court with respect to compliance of Section 15 observed as follows:

> "9. Section 15 of the JJ Act is a procedure to conduct a Preliminary assessment to consider this type of heinous offence. The said provision specifically says that if the offence is heinous in nature and the accused person has completed the age of 16 years and if he is below the age of 18 years, the Board shall conduct a preliminary assessment with regard to the mental and physical capacity to commit such offence, and also the ability to understand the consequences of the offence and the circumstances in which, he allegedly committed the offence and thereafter, the Board can pass appropriate orders under sub section (2) of section 15 or under sub section (3) of Section 18 of the JJ Act.
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> 10. For the purpose of analysing and coming to a conclusion to pass order u/s.15 of the JJ Act, the Board has got ample power to take the assistance of an experienced psychologists or Psycho-social workers or other experts. It is also made clear that, if the Board is satisfied on the preliminary assessment and arrived at a conclusion that the Board itself can dispose of the case by following the procedure to try the accused before the Board itself as contemplated under the provisions of the Cr P C and the JJ Act. In such on eventuality, the Board shall not send the Juvenile to the Sessions Court for trial. Therefore, it is crystal clear that such power is exclusively

vested with the Board to pass such an order. The main object of Section 15 is to ascertain and assess the total capacity of the accused on the basis of the facts and on the basis of the expert's opinion if necessary as contemplated under the said provisions. It is not a mechanical power entrusted to the Board. It should also be borne in mind that mere using of the words that "the accused is mentally and physically capable of committing such an offence and ability to understand the consequences and also the circumstances existed to establish the above said factors", but, the Board has to in detail examine with reference to the surrounding circumstances and if necessary after taking expert's opinion has to reason out, why the Board is coming to such a conclusion. But, this has not been taken care of by the learned Sessions Judge while passing the impugned order.

11. Be that as it may, as could be seen from the above said provision, the learned Sessions Judge or the Special Judge or the Child Friendly Court, presided over by the learned Sessions Judge have absolutely no power to pass any order u/s.15 of the Act. It is the statutory power vested with the Board. This has completely lost the sight of the Sessions Judge as could be seen from the order itself.

12. Once the Board comes to the conclusion that the Board has got jurisdiction then the Board shall follow the procedure as contemplated u/s.15 of the JJ Act and to proceed with the trial against the accused. If the Board come to the conclusion otherwise than the above, and after inquiry, the Board is of the opinion that the accused after the preliminary inquiry as contemplated u/s.15, feels that there is a need for trial of the child as an adult, then by giving reasons to the effect that the accused/juvenile is between the age of 16 and 18 years, and he was mentally and physically competent to commit such an offence and he was able to understand the consequences of the offence and also the circumstances in which he has committed the offence, then only the Board shall pass order of transfer of the case to the Children's' Court/Sessions Court having jurisdiction to try such offence, as specified under section 18(3) of the said JJ Act.

13. Looking from the above said angle, considering the provisions of Sections 15 and 18 of the JJ Act, the II Addl. Sessions Judge, Kolar, had absolutely no jurisdiction to pass order u/s.15 of the JJ Act. The Sessions Court has not even cared to look into the provisions of the Act, but in an over enthusiasm appears to have passed the above said order. Under the above said circumstances, the order is not sustainable either in law or on facts."