

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

(Navigating the role, duties and functions of Juvenile Justice Board)

WHO IS A JUVENILE?

- According to Rule 4 of *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.
- *United Convention on the Rights of Child* defines “child” as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.
- *Juvenile Justice (Care & Protection) Act, 1986* defines “a juvenile or child, who in case of a boy has not completed age of 16 years and in case of a girl 18 years of age”.
- *Juvenile Justice (Care and Protection of Children) Act, 2000* defines “juvenile” or “Child” as a person who has not completed eighteenth year of age.
- *Juvenile Justice Care and Protection Act, 2015* defines “child” “means a person who has not completed 18 years of age”

“DELINQUENCY”

- **Definition and Nature**

Delinquency is unwelcomed action of a child, which is socially not permitted in the society. A juvenile delinquent is a disorder which is defined as “a child acting like an adult”. The action of the child may seem to be very foolish but actually it’s a matter of serious concern. It is believed that delinquency is considered only when the behaviour of the child is harmful. *Frederick B. Sussmann*, who wrote a book on “Law of Juvenile Delinquency” presented a list of acts or conditions included in delinquency definition as “infringement of any law or ordinance, habitual absence, alliance with thieves, brutal or immoral persons, and beastly beyond authority of parent or guardian”.

- **Causes of Child Delinquency**

Juvenile delinquency takes place at different places and it may vary in degree. The child being the future of the country should be given a good environment in which he/she can nurture himself/herself. Nowadays, juveniles are engaging in various serious offences like rape, murder, dacoity, theft, robbery. There are innumerable causes behind the psychic of a delinquent child which is further defined in two broad categories:

- Biological causes
- Societal and Environmental causes

1. Biological causes

- i. **Ocular Ailments-** It is a disease of retina which can result in the loss of vision. It leads to irritability and discomfort which will further hamper them in leading a moral life.
- ii. **Hearing Problem-** deafness or incapability of hearing leads to the incapability to do any work properly which further leads to antisocial behavior.
- iii. **Excessive Strength-** A child who is possessed with excessive strength and his mental trait being uncultured will lead to the imbalance in the body which will further encourage a child to do a crime.

2. Societal and Environmental Causes

- i. **Family Background-**The family background has greatest influence on the criminal behaviour of offender or Juvenile. The Children divert themselves towards criminal tendencies, if they find their parents or members of the family behaving in the similar manner. A child who is grown up in a hostile aggressive parenting atmosphere becomes an easy prey to criminality.
- ii. **Socio-Economic Condition-** Nowadays, money is a parameter to judge a person's societal status. Everyone around is so busy in earning that the parents are not been able to look after their wards which further leads a child to indulge in illegal activities.
- iii. **Neighbourhood-** One thing leads to another, as the parents/guardians are busy in their own livelihood, the bad influence of neighbours also tend to destroy the genesis of a child.
- iv. **Trend of Alcoholism-**Increasing trends of alcoholism has further triggered children to indulge in criminal activities.
- v. **Peer Pressure-** The behaviour of an individual usually depends upon the peers. Gangs act as a contributory factor towards the commission of a crime. If a child remains with other delinquents then he will be more prone to the criminal activities which he could not think of alone.
- vi. **Cinema and Social Media-** Cinema and Social media plays an important role in the overall development of a person. What they watch on social media and television they try to do in their real life also.
- vii. **Significance of School-** The school plays a significant role in the upbringing of a child, it is the school where the child has the closest relation with other children for such a long time. "School is usually thought as a constructive agency but when it fails to perform its designated functions, it may become by virtue of its negligence, a main contributor to delinquency."

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In December 2012, a 23-year-old student was brutally raped and murdered by a group of men, which included a juvenile. This rape and murder put the spotlight on the juvenile justice system in India. In this case of *Mukesh & ors v. State of Delhi*, popularly known as "Delhi Gang Rape

case” the apex court refused to grant the harsher punishment on the account of the heinousness of the conduct. The Central Government enacted the Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) which has come into effect from 15th January, 2016, repealing the Juvenile Justice (Care and Protection of Children) Act, 2000. Amongst the various provisions of the JJ Act, 2015 there are special provisions to deal with children in the age group of 16-18 years who commit heinous offences. The JJ Act, 2015 provides for strengthened provisions for both children in need of care and protection and children in conflict with law. Some of the key provisions include: change in nomenclature from juvenile ‘to child’ or ‘child in conflict with law’, across the Act to remove the negative connotation associated with the word —juvenile; special provisions for heinous offences committed by children above the age of sixteen year; inclusion of several new definitions such as orphaned, abandoned and surrendered children; and petty, serious and heinous offences committed by children; clarity in powers, function and responsibilities of Juvenile Justice Board (JJB) and Child Welfare Committee (CWC); clear timelines for inquiry by Juvenile Justice Board (JJB); separate new chapter on Adoption to streamline adoption of orphan, abandoned and surrendered children; inclusion of new offences committed against children; penalties for cruelty against a child, offering a narcotic substance to a child, and abduction or selling a child being prescribed etc. and mandatory registration of Child Care Institutions.

The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (JJ Model Rules, 2016) was notified on 21st September, 2016, repealing the Juvenile Justice (Care and Protection of Children) Rules, 2007. The JJ Model Rules, 2016, are based on the philosophy that children need to be reformed and reintegrated into society. The best interest of the child along with child-friendly procedures is incorporated across the provisions and is the primary consideration.

The Indian Constitution envisages a welfare state, where the children would be free from abuse and exploitation. The Act derives its constitutional legitimacy from Article 15(3), Article 39(e) and 39(f), Article 45 and Article 47 of the Constitution of India, 1950. These provisions empower the State to ensure the protection of basic human rights and needs of all children. Further, the Act also aims to achieve the objectives laid down in the United Nations Convention on the Rights of the Child, 1989, which was ratified by India in 1992. The National Policy for Children, 2013 and the National Charter for Children, 2003 take this view of child welfare as well.

Reasons for amending the 2000 Act:

- The government amended the existing law dealing with children in conflict with the law citing implementational issues and procedural delays with adoption, etc.
- The government also cited figures from the National Crime Records Bureau to show that there had been a hike in the number of juveniles committing crimes, particularly in the age bracket of 16 to 18 years.
- In the 2000 Act, there was no distinction between children in conflict with the law and children in need of care and protection. The amended act changed that.

- The 2000 Act also did not have provisions for the reporting of abandoned or lost children to the appropriate authorities, in order to ensure their protection and care.
- The amendment in the 2000 law came about because of public outrage at the infamous Delhi gang-rape case (Nirbhaya Case) in 2012. One of the offenders in the case was a 17-year-old.
- The legislation strives to achieve a balance between child rights and justice by not sentencing juveniles to the death sentence and life imprisonment.

Salient Features of the Act, 2015

The JJA, 2015 introduced many changes to the existing law based on the requirements of the day in terms of reforming the laws and making the juvenile justice system more responsive to the changing circumstances of society. The Act seeks to hold the child accused of crime accountable, not through punishments, but through counselling.

- The Act amended in 2015 changed the nomenclature of ‘juvenile’ to ‘child’ and ‘child in conflict with the law’.
- The Act defines orphaned, surrendered and abandoned children.
- It also gives definitions for petty, serious and heinous crimes by children.
 - A heinous offence is one that attracts a maximum punishment of 7 years’ imprisonment under any existing law.
 - A serious offence is one that attracts imprisonment of 3 to 7 years.
 - A petty offence is one that attracts a maximum of 3 years’ imprisonment.
- The Act gives more clarity on the functions and powers of the Juvenile Justice Board and the Child Welfare Commission.

- **Juvenile Justice Board:**

- This is a judiciary body before which children detained or accused of a crime are brought.
- This acts as a separate court for juveniles since they are not to be taken to a regular criminal court.
- The Board comprises of a judicial magistrate of the first class and two social workers, one of whom at least should be a woman.
- The Board is meant to be a child-friendly place and not intimidating for the child.

- **Child Welfare Committee:**

- The State Governments set up these committees in districts in accordance with the provisions of the Act.
- The Committees have the power to dispose of cases for the care, protection, treatment, development and rehabilitation of the children in need of care and protection, as well as to provide for their basic needs and protection.

- The Act provides for an efficient and organized system for the adoption of orphaned, surrendered and abandoned children.
- It also makes it compulsory for all child care institutions to be registered.
- An important provision of the amended Act is that it provides for minors in the age group 16 – 18 years to be treated as adults in the case of heinous crimes.
- The Act also gives the Central Adoption Resource Authority (CARA) statutory status.
- The Act distinguishes between children in conflict with the law and children in need of care and protection.
- Under the previous Act, any minor, regardless of the crime committed, could be convicted only to a maximum of 3 years. Under no circumstances could the minor be tried in an adult court or sent to an adult jail, or given a penalty longer than 3 years. However, this changed with the 2015 amendment. All children below the age of 18 would be treated equally except for one departure from the norm. That is, in the case of heinous crimes. Any minor of the age group 16 – 18 and who has been accused of committing a heinous crime can be tried like an adult. For this, the Juvenile Justice Board would assess the child's physical and mental capacities, his/her ability to comprehend the consequences of the crime, etc. and determine whether the child can be treated as an adult.
- The Central Adoption Resource Agency will frame rules and regulations for adoption of orphaned children. Inter-country adoption is allowed when no Indian adoptive parents are available within 30 days of child being declared free for adoption.
- Adoptive parents should be financially and physically sound. A single or divorced person may adopt a child. A single male may not adopt a girl child. Disabled children will be given priority for adoption.
- Children in need of care and protection can allowed to be placed in foster care based on the orders of the CWC. The selection of the foster family is based on the family's ability, intent, capacity and prior experience of taking care of children.
- Buying and selling of a child attracts imprisonment up to five years. Giving an intoxicating or narcotic substance to a child attracts imprisonment up to seven years.
- Institutions for child-care must be registered. Corporal punishment of children in child-care institutions is also punishable.
- Non-disclosure of identity of juvenile offenders by media

Positive and Negative Aspects of Act

➤ Positive

There are many positives in the 2015 JJA. It was enacted to correct the deficiencies in the previous legislation. Some of the important benefits of this Act are:

1. There is a clear distinction between children in conflict with the law and children in need of protection and care.

2. It makes the registration of all children's homes mandatory, bringing in more transparency and efficiency in the system.
3. It seeks to reduce crimes committed by children between the ages of 16 and 18.
4. By including the provision for 16 to 18 year-olds to be tried like adults in case of heinous crimes, it provides justice to the victims of such crimes.

➤ Negative

The amended JJA also has certain negatives associated with it. Some of the problems in the law are discussed below.

1. Many psychological studies point out the vulnerability of the 16 – 18 age group children because of hormonal and physical changes. Considering offences committed in this age as crimes and putting them in adult jails can cause further damage. In such environs, the minor will come into close contact with professional criminals, which can hamper their rehabilitation.
2. Some opine that the treating of minors between 16 and 18 years differently is a violation of Article 14 of the Constitution, which guarantees every citizen the right to equality.
3. India ratified the UN Convention on the Rights of the Child in 1992. According to this Convention, any individual below the age of 18 is to be treated like a child. This is in contravention to the amended law that gives provisions for treating 16 – 18 year-olds like adults.
4. Psychological assessment is to be made to assess whether the minor can be treated as an adult or not. However, this can be subjective and not entirely scientific.
5. The argument to include 16 – 18-year-old minors in a special bracket was based on the data from the National Crime Records Bureau (NCRB). This data is itself questioned by many, and also, many of the cases were in the FIR stage and under preliminary proceedings only.
6. Most children who commit crimes are from the economically weaker sections of society. In order to reduce crime among children, there is a need to provide a better environment for the nurture of children who grow up in slum areas. Also, there is a need to foster a culture of open communication between parents and children among all classes.

Prevention is better than cure. There is a need to ensure that children do not turn to crime at all, in the first place. Also, minors who do get into crime should be held accountable depending on the circumstances. Rehabilitation is of utmost importance to avoid children in conflict with the law from becoming future liabilities for society.

GENERAL PRINCIPLES OF CARE AND PROTECTION OF CHILDREN

Section 3 of the JJ Act, 2015 prescribes that the Central Government, the State Governments, the Board and other agencies, as the case may be, while implementing the provisions of JJ Act, 2015, shall be guided by the following fundamental principles, namely:-

- Principle of presumption of innocence
- Principle of dignity and worth

- Principle of participation
- Principle of best interest
- Principle of family responsibility
- Principle of safety
- Positive measures
- Principle of non-stigmatizing semantics
- Principle of non-waiver of rights
- Principle of equality and non-discrimination
- Principle of right to privacy and confidentiality
- Principle of institutionalization as a measure of last resort
- Principle of repatriation and restoration
- Principle of fresh start
- Principle of diversion
- Principles of natural justice

JUVENILE JUSTICE BOARD

Under the Juvenile Justice Act, 2015 a board shall consist of Metropolitan Magistrate or a Chief Judicial Magistrate with at least three years experience and two social workers selected in such a manner as they may be prescribed, of whom at least one shall be a woman. The Act provides that under no circumstances the Board can regulate and operate from regular court premises. The decision taken by the Principal Magistrate shall be final.

1. Special Procedure of Juvenile Justice Board: The Act has provided the procedure against the juvenile offender. Following are the main special procedure.
2. The hearing must be informal and should be strictly confidential.
3. The offenders should be kept under Observation Home.
4. A child in conflict with law may be produced before an individual member of the Board, when Board is not sitting.

A primary responsibility of JJB is to cater developmental needs, care, protection, and treatment, case procedure, inquiry and final order for ultimate rehabilitation of children conflict with law in the best interest of child.

The powers and functions of the Board are;

1. Ensuring the informed participation of the child and the parent or guardian in every step of the process.
2. Ensuring that the child's rights are protected throughout the process of apprehending the child, inquiry, aftercare and rehabilitation.
3. Ensuring availability of legal aid for the child through the legal services institutions.
4. Wherever necessary the Board shall provide an interpreter or translator, having such qualifications, experience, and on payment of such fees may be prescribed, to the child if he fails to understand the language used in proceedings.

5. Directing the probation officer, or in case probation officer is not available to the Child Welfare Officer or a social worker, to undertake a social investigation into the case and submit social investigation report within a period of fifteen days from the date of first production before the Board to ascertain the circumstances in which the alleged offence was committed.
6. Adjudicate and dispose of case of children in conflict with law in accordance with the process of inquiry.
7. Transferring to the committee, matters concerning child alleged to be conflict with law, stated to be in need of care and production at any stage, thereby recognizing that a child in conflict with law can also be child in need of care simultaneously and there is need for the committee and the Board to be both involved.
8. Disposing of the matter and passing a final order that includes an individual care plan for the child's rehabilitation including follow up by the probation officer or the District Child Protection Unit.
9. Conducting inquiry for declaring fit persons regarding care of children in conflict with law
10. Conducting at least one inspection visit every month of residential facilities for children in conflict with law and recommend action for improvement in quality of services to the District Child Protection unit and the state Government.
11. Order the police for registration first information report for offences committed against any child conflict with law, under this act or any other law for the time being in force, on a complaint made in this regard.
12. Order the police for registration first information report for offences committed against any child need of care and protection, under this act or any other law time being in force, on a written complaint by a committee in this regard.
13. Conducting regular inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer such child to the observation home.

CHILDREN IN CONFLICT WITH LAW

The new Act strengthens the protective approach provided by the juvenile justice system towards children in conflict with law as well as children in need of care and protection. The 'Juvenile' in conflict with law has been redefined in the Juvenile Justice Act 2015 as a 'child in conflict with law'. Offences have been categorized as petty/ serious/ heinous offences. Children in the age group of 16-18 years may be tried as adults in cases of heinous offences after preliminary assessment by the Juvenile Justice Board.

A child in conflict with law will be sent to an Observation Home temporarily during pendency of inquiry. The child will be segregated according to age, gender, physical and mental status and nature of offence. A child who is found to have committed an offence by the Juvenile Justice Board will be placed in a Special Home. A Place of Safety will be setup for children above the age of 18 years or children of the age group of 16-18 years who are accused or convicted for committing a heinous offence. The Place of Safety will have separate arrangement and facilities for under trial children and convicted children. The Juvenile Justice Board will conduct regular

inspection of jails meant for adults to check if any child is lodged in such jails and take immediate measures for transfer of such a child to the Observation Home [Section 8 (3) (m)].

The preliminary assessment by the Juvenile Justice Board is to be conducted within three months before transferring the case to the Children's Court. The Act mandates that in case the child is tried as an adult by the Children's Court, it shall ensure that the final order includes an individual care plan for the rehabilitation of child, including follow up by the probation officer or the District Child Protection Unit or a social worker. The Children's Court shall ensure that the child is kept in place of safety till he attains the age of twenty-one years. When he attains the age and the term is still pending, the Children's court shall evaluate whether he need to be transferred to jail or if he has undergone reformatory changes and could be spared incarceration. The Act puts a complete embargo on capital punishment or life imprisonment without the possibility of release for the child offenders who come to be treated as adults by the juvenile justice administration. The decision whether the child is to be released or sent to jail after attaining the age of 21 years will be taken by the Children's Court.

- **History of Legislation concerning Children in Conflict with the Law**

- The Apprentices Act, 1850, was the first law enacted in India dealing with children in conflict with the law. This law allowed the courts to treat children who had committed petty crimes as apprentices instead of sending them to prisons.
- The second law that dealt with juvenile offenders was the Reformatory Schools Act, 1876.
- The Indian Jails Committee (1919-20) also made some recommendations with regard to children in conflict with the law.
- In 1960, the Children Act was passed to provide for the care, maintenance, protection, welfare, education, training, trial and rehabilitation of neglected and delinquent children.
- The Juvenile Justice Act, 1986: This was the first central law on juvenile justice that provided a uniform law for the whole country in this respect.
- In 1992, the government of India ratified the United Nations Convention on the Rights of the Child which made it expedient to have a law that conformed to the standards of the Convention.
- Hence, the JJA, 1986 was repealed and the Juvenile Justice (Care and Protection of Children) Act, 2000 was enacted.

- **Anticipatory Bail and Children in Conflict with Law**

A constitutional bench of the Supreme Court in *Gurubakash Singh Sibbia v. State of Panjab* 1980 AIR 1632 while distinguishing normal bail from anticipatory bail held that while the former is granted after an arrest, releasing a person from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. The Court laid down certain guidelines in light of the conditions under Section 438 of the Code of Criminal Procedure, 1973 ('the Code').

Although the position of law with regard to anticipatory bail, in general, is a settled one, the position regarding its applicability in case of juveniles or children in conflict with law is in a state of flux. Due to the absence of an authoritative pronouncement by the Supreme Court on the issue, different benches of various High Courts have taken conflicting views and supported them with their own reasoning. As a result, there is an inconsistency in the interpretation of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 ('the Act' or 'the JJ Act' alternatively) vis-à-vis section 438 of the Code. The issue has not drawn much attention and even the Law Commission of India has failed to mention it in its comprehensive report on anticipatory bail.

➤ Literal Approach

The foremost argument against the maintainability of an anticipatory bail petition in case of juveniles is that as Section 12 of the JJ Act provides for a non-obstante clause which excludes the application of the provisions of the Code, Section 438 would not be applicable in case of juveniles. This argument was accepted by the division bench of the Calcutta High Court in *In Re: Krishna Garai* 2016(5)CHN(CAL)157. The court, while rejecting the application for anticipatory bail, held that the Juvenile Justice (Care and Protection of Children) Act, 2000 ('the 2000 Act') (now repealed) is a special Act which would prevail over the Code. While dealing with the applicability of sections 437 and 439 of the Code in case of a juvenile, a division bench of the Chhattisgarh High Court in *Tejram Nagrachi v. State of Chhattisgarh* 2019 (3) CGLJ 295 held that the grant of *bail* to a juvenile is required to be dealt with under section 12 of the JJ Act and not under sections 437 or 439 of the Code. It was held that the jurisdiction under Section 439 of the Code is excluded by the use of the non-obstante clause in Section 12(1) of the JJ Act. The Court opined that under the statutory scheme of the JJ Act, a comprehensive provision has been made as to how a child in conflict with the law has to be dealt with when he is apprehended and not released on bail.

With regard to the jurisdiction of the Juvenile Justice Board ('the JJ Board'), a single judge bench of the Madhya Pradesh High Court in the case of *Kapil Durgawani vs. State of Madhya Pradesh* 2010 (IV) MPJR 155 held that as Section 12 of the 2000 Act does not provide power to the JJ Board which is equivalent to Section 438 of the Code, the Board has no jurisdiction to entertain the application of anticipatory bail filed by a juvenile. The position was reiterated by another single judge bench of the Court in *Sandeep Singh Tomar v. State of M.P.* (2019).

➤ Purposive Approach

With regard to the interpretation of the provisions of the JJ Act generally and Section 12 of the Act particularly, it is an established principle in law that in case of *conflict or inconsistency* between general legislation and special legislation, the provisions of special law prevail to the *extent of that inconsistency*. However, where there is no inconsistency and the general legislation provides something which is not prescribed by the special legislation, the provisions of general legislation would prevail. This argument was accepted by Justice Yashwant Verma of the High Court of Allahabad in a recent judgment in *Shahaab Ali and Ors. v. State of*

U.P. 2020(1) ACR 1146 where it was observed that the provisions of the Code may apply and operate in areas where the JJ Act is *either silent or constructs no special or distinct measure*. It was held that the non-obstante clause in Section 12 is only indicative of the JJ Board being conferred the power to grant bail notwithstanding any restraint or fetter that may be found in that regard in the Code. A special fast track court at Tis Hazari, Delhi also followed this approach in the case of *X (Minor) through his mother v. The State (2020)*. The Court held that there is no exclusion of granting the benefit of anticipatory bail to a child in conflict with the law as the said benefit under section 438 of the Code is available to “any person”. The same reasoning was given by a single-judge bench of the Kerala High Court in *Gopakumar v. State of Kerala (MANU/KE/1314/2020)*. The Court while appreciating the objectives and the purpose of the JJ Act emphasised that a court has a duty to see that the rights of a child in conflict with law are not in any way impaired. It was held that a juvenile apprehending arrest will be entitled to seek the discretionary relief of pre-arrest bail envisaged under section 438 of the Code as the provision takes within its ambit “any person” to seek such relief. Also, while interpreting the scope of Section 12 of the JJ Act, two benches of the Chhattisgarh High Court in *Mohan (In Jail) v. State of Chhattisgarh (2005)* and in *Subhash Kumar @ Sonu v. State of Chhattisgarh (2014)* held that despite the provisions contained in Section 12 of the Act, the bail application under Section 439 of the Code is maintainable before the Sessions Court and the High Court.

The Allahabad High Court in *Shahaab Ali* also clarified that the words “arrest” and “apprehend” can possibly be used as substitutes of each other and convey an identical meaning. It was held that Section 438 of the Code will apply at the stage before the registration of First Information Report (‘FIR’) and it is within this narrow confine that the right to invoke the jurisdiction of the Court of Sessions or the High Court to grant anticipatory bail to juvenile must be recognised to exist and preserved. After the registration of an FIR, Section 438 stands impliedly excluded and only Section 10 (which provides for the apprehension of juvenile) and Section 12 of the JJ Act would operate.

CHILDREN IN NEED OF CARE AND PROTECTION

A child in need of care and protection is to be produced before the Child Welfare Committee within 24 hours. The Act provides for mandatory reporting of a child found separated from his/her guardian. Non reporting has been treated as a punishable offence. The Child Welfare Committee is to send the child in need of care and protection to the appropriate Child Care Institution and direct a Social Worker, Case Worker or the Child Welfare Officer to conduct the social investigation within 15 days. The Child Welfare Committees shall meet atleast 20 days in a month and the District Magistrate shall conduct a quarterly review of the functioning of the Child Welfare Committee.

A child in need of care and protection will be placed in a Children’s Home for care, treatment, education, training, development and rehabilitation. The Act provides for Open Shelters for Children in need of community support on short term basis for protecting them from abuse or keeping them away from a life on the streets. The Child Welfare Committee could recognize a facility to be a Fit Facility to temporarily take the responsibility of a child. The Specialized

Adoption Agency is to take care of the rehabilitation of orphans, abandoned or surrendered children.

PRELIMINARY ASSESSMENT BY JUVENILE JUSTICE BOARD

The most crucial change brought about by the JJ Act, 2015 is that, under Section 15 of the JJ Act, 2015, a child who has completed or is above the age of 16 years can potentially be tried as an adult. Under the Act, a child has been defined as a person who has not attained the age of 18 years of age. Section 15 of the JJ Act, 2015 mandates the JJB ('Juvenile Justice Board') to conduct a preliminary assessment of children to understand their mental status. The JJB may take the help of psycho-social workers, psychologists and other experts to ascertain their mental capacity. If the Board is satisfied that the child possesses the mental capacity to commit such a crime on the basis of the preliminary assessment conducted therein, it may send the child to be tried as an adult by Children's Court under Section 18(3). This change is relevant, as such a transfer entails a protracted process, characterized by an extremely adversarial hearing. The process envisaged in the Act rebuts the presumption of Doli Incapax.

In *Durga Vs. State of Rajasthan* 2019 ALLMR(Cri)361 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.”

AGE DETERMINATION UNDER JUVENILE JUSTICE ACT

A ‘child’ under the JJ Act means a person who has not completed eighteen years of age [Section 2 (12)]. Hence, all children below 18 years of age are to be brought under the protection of the juvenile justice system. It is not only for applicability of the JJ Act 2015, determination of age is important for all child-related legislations. Section 94 of the JJ Act provides the procedure for determination of age – this procedure is to be followed for children in conflict with law, and children in need of care and protection. This procedure should be also followed to ascertain age under other child-related legislations. Section 94 (1) states that there is no need to conduct the process of age determination process where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it...that the said person is a child. Thus, only in case of doubt regarding age should a process of age determination be undertaken. The process of age determination entails seeking of evidence regarding age – (a) documentary evidence, and (b) medical examination. Documentary evidence are of two types : (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat. If the child does not have any of the documentary proof mentioned above, ‘age shall be determined by an ossification test or any other latest medical age determination test’. As applying of juvenile legislation is dependent on age, age determination should be expeditiously conducted, i.e., ‘within fifteen days from the date’ of such order passed by the Board or the Committee.

Age determination is essential to find out whether or not the person claiming to be a child is below the cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate. As juvenile in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.

Apex Court in *Arnit Das v. State of Bihar* (2000) 5 SCC 488, clarified that the review of judicial opinion shows that the Court should not take a hyper-technical approach while appreciating evidence for determination of age of the accused. If two views are possible, the Court should lean in favour of holding the accused to be a juvenile in borderline cases. This approach was further reiterated by this Court in *Rajindra Chandra v. State of Chhatisgarh and Another* (2002) 2 SCC 287, in which it laid down that the standard of proof for age determination is the degree of probability and not proof beyond reasonable doubt.

In *Hari Ram v. State of Rajasthan*: (2009) 13 SCC 211 the court took note of the various provisions of the Juvenile Justice Act and opined that in case of any ambiguity with regard to the age, Rule 12 framed under the Act had to be taken recourse to in order to arrive at the age. In *Jarnail Singh v. State of Haryana*: (2013) 7 SCC 263 the court for the first time took a view that although Rule 12 deals with a child in conflict with law but by using the judicial tool of reading is held that the same could be extended to determine the age of the victim also.

In *Rajak Mohammad v. State of Himachal Pradesh*: 2018 (3) SCC (Cri.) 753 three judges bench of Supreme Court in case where school certificate regarding age of prosecutrix was found unreliable, considering the medical evidence regarding her age has held as under:

“7. While it is correct that the age determined on the basis of a radiological examination may not an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.”

In *Sri Ganesh v. State of T.N.*: (2017) 3 SCC 32 the court held that in the face of relevant documentary evidence there could be no medical examination to ascertain the age and any such direction passed by any court would be unwarranted. The court while taking such a view discouraged because from directing any medical examination if there was credible worthy documentary evidence on record given the scheme of the Juvenile Justice Act after its amendment.

In *Mukarrab v. State of U.P.*: (2017) 2 SCC 210 the court observed that in the absence of a birth certificate issued by the authority concerned the determination of age becomes a very difficult task providing a lot of discretion to the judges to pick and choose evidence. It was held that if two views were possible, the court should lean in favour of taking a beneficial approach.

LATEST JUDGMENTS

Supreme Court

- *Satya Deo vs. State of Uttar Pradesh MANU/SC/0740/2020*

In light of Section 6 of the General Clauses Act read with Section 25 of the 2015 Act, an Accused cannot be denied his right to be treated as a juvenile when he was less than eighteen years of age at the time of commission of the offence, a right which he acquired and has fructified under the 2000 Act, even if the offence was committed prior to enforcement of the 2000 Act on 01.04.2001. In terms of Section 25 of the 2015 Act, 2000 Act would continue to apply and govern the proceedings which were pending when the 2015 Act was enforced.

- *In Re: Contagion of COVID 19 Virus in Children Protection Homes: MANU /SC /03 58/2020*

In this the Apex Court issued various directions to the Juvenile Justice Board ,Children's Court and Child Care Institutions. In addition to this measures to be taken by CCI, Government were also dealt with by the Court. The directions so issued are mentioned below:

“Juvenile Justice Boards (JJB) and Children's Courts are directed to proactively consider steps that are to be taken in the light of COVID - 19, while conducting their inquiries/inspections. Online or video sessions can be organized.

- The Juvenile Justice Boards/Children's Courts may consider measures to prevent children residing in Observation Homes, Special Homes and Places of Safety from risk of harm arising out of COVID- 19.

- In this regard, JJBs and Children's Courts are directed to proactively consider whether a child or children should be kept in the CCI considering the best interest, health and safety concerns. These may include:

- Children alleged to be in conflict with law, residing in Observation Homes, JJB shall consider taking steps to release all children on bail, unless there are clear and valid reasons for the application of the proviso to Section 12, JJ Act, 2015.

- Video conferencing or online sittings can be held to prevent contact for speedy disposal of cases.

- Ensure that counselling services are provided for all children in Observation homes.

It is important to consider that violence, including sexual violence may be exacerbated in contexts of anxiety and stress produced by lockdown and fear of the disease. JJBs would need to monitor the situation in the Observation Homes on a regular basis.”

- *Re Exploitation of Children in Orphanages in The State of Tamil Nadu vs. Union of India (UOI) and Ors. 2020(1)RCR(Criminal)1022*

In this the court blow down heavenly over no implementation of Section 12 of the Act pertaining to Bail to Child in conflict with law. The Court observed as follows:

“All JJBs in the country must follow the letter and spirit of the provisions of the Act. We make it clear that the JJBs are not meant to be silent spectators and pass orders only when

a matter comes before them. They can take note of the factual situation if it comes to the knowledge of the JJBs that a child has been detailed in prison or police lock up: It is the duty of the JJBs to ensure that the child is immediately granted bail or sent to an observation home or a place of safety. The Act cannot be flouted by anybody, least of all the police.”

- ***Pawan Kumar Gupta vs. State of NCT of Delhi AIR 2020 SC 590, Ram Narain v. State of Uttar Pradesh (2015) 17 SCC 699.***

Claim of juvenility may be raised at any stage even after final disposal of the case. It may also be raised for the first time even after final disposal of the matter. However, once the Accused has chosen to take the plea of juvenility before the trial court, before the High Court and also before the Supreme Court and the said plea has been rejected, it is not open to the accused to reargue the plea of juvenility by filing the fresh application Under Section 7A of the JJ Act.

- ***Shilpa Mittal vs. State of NCT of Delhi and Ors. AIR 2020 SC 405***

In this the extremely important and interesting issue arises in the case.

"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 hold 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.

Rajasthan High Court

- ***Tulachha Ram vs. State of Rajasthan 2019(2) WLN 371 (Raj.)***

In this case although the school certificate shows her date of birth to be 20.09.2000 but in the statements of the victim (PW 1), her father Mal Singh (PW 2) and mother Santosh Kanwar (PW 4), it has come on record that the victim was 20 years of age in the year 2017, therefore, on the date of the incident, she was well above the age of 18 years. The court in such circumstances after taking into account Section 94 of the JJ Act 2015 observed as follows:

“As per clause 2 (i) of the Act of 2015, the date of birth certificate issued from the school is a governing factor for deciding the age of juvenile. However, considering in light of various pronouncements of Hon'ble Supreme Court including the observations made in the case of Birad Mal Singhvi V/s Anand Purohit: AIR 1988 SC, 1796, it is manifest that for satisfying the court regarding genuineness of the school certificate (Ex. P.14) (in view

of the fact that the father of the victim has himself gave evasive reply regarding the exact date of birth of the girl as recorded in the school certificate), the prosecution was required to produce on record and prove the date of birth of the prosecutrix as recorded in the concerned school at the time of her initial admission in the school.”

Therefore, in the facts and circumstances of the case, we have no reason to disbelieve the statements of the victim (PW 1), her father Mal Singh (PW 2) and mother Santosh Kanwar (PW 4) that the age of the victim was more than 18 years at the time of the incident. Therefore, it is a clear case of consensual relations and since the victim was above the age of 18 years on the date of the incident, the provisions of Protection of Children from Sexual Offences Act were wrongly applied in the present case as observed by us in the detailed discussion made above.”

- ***Sattu Ram vs. State of Rajasthan 2016(2) WLN 170(Raj.)***

The court after relying upon the judgment of *Bhoop Ram v. State of U.P.* AIR 1989 SC 1329(1) and *Rashid @ Rasshid @ Rashidiya v. State of Rajasthan 2012 (4) Cr.L.R (Raj.) 1786* held that the petitioners, having crossed the age of 18 years cannot be confined in a special home/fit institution. The orders passed by the Juvenile Justice Board and the Appellate Court in this regard are in total conflict with the specific provisions of the Juvenile Justice Act and the interpretation thereof as done by the Courts in the above referred judgments and thus, cannot be sustained.

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT BILL, 2018

The Juvenile Justice (Care and Protection of Children) Amendment Bill, 2018 was introduced in Lok Sabha on August 6, 2018 to empower district magistrates to issue adoption orders in order to expedite adoption proceedings. The Statement of Objects and Reasons of the Bill states that 629 cases related to adoption orders are pending in various courts across the country. This raises a question whether the level of pendency of adoption cases is significant enough to warrant a shift in the power to issue adoption orders from the court to the district magistrate. It may be argued that empowering district magistrates to issue adoption orders may lead to further delay as they are already burdened with several responsibilities such as maintenance of law and order, land and revenue administration, disaster management, general administration, and implementation of several government schemes and programmes in a district.