

RAPE OF MINORS BY MINORS; AN ANALYSIS OF INDIAN LAW-SCAPE

Suhani Gupta***ABSTRACT**

This legal article delves into the legal landscape of India to give insights into the empirical facts in relation to rapes in India. It includes a brief analysis of various statutes that are currently in action for the purpose of delivering justice to the victims of sexual violence, especially minors. This article tries to draw the attention of readers towards the deteriorating state of society due to the indulgence of youth in crimes. There is a mention of a recent incident which is taken into consideration to portray the sub-minimal, society is onto. The article aims to shed light on the ongoing scenario which absolves the liability of children belonging to the age group below 7 years. The nature of crimes undertaken by what I as an author would like to refer them as 'unnoticed evils', is not something that should be left unattended. The crimes involving a violation of sexual integrity are considered heinous in nature. This article tends to pose a question: just because the offender is below 7 years of age, should he be allowed to undertake horrendous acts like rape? The article uses the empirical method of research to draw favorable results. It uses a focus group perspective to narrow down the research to a particular age group i.e. below 7 years of age and the laws and legislations in relation to rape applicable to them, which technically when looked at is none. The article also takes into consideration not only what is happening but also why it is happening. The research contributes to the development of catechism for the prevailing distribution of age groups for awarding punishments along with providing a basic knowledge of the prevailing laws.

Keywords: Minors, Child, Rape, Doli Incapex.

INTRODUCTION

The recent news of rape in the city of Kanpur has posed many questions for the justice system of India to look into. The news of an approximate 7-year-old boy raping a girl of 5 years of age¹ has shaken the nation making it difficult to absorb not just in terms of what prompted the boy to do so, but also how it needs to be dealt with. Rape according to Section 375 of the Indian

*BA LLB, SECOND YEAR, MARATHWADA MITRAMADAL'S SHANKARRAO CHAVAN LAW COLLEGE, PUNE.

¹ Faiz Rahman Siddiqui, '7-year-old boy accused of raping 5-year-old in Kanpur' The Times of India (Kanpur, 20 September 2023)

Penal Code refers to when a man penetrates his penis, to any extent, into the vagina, mouth, urethra, or anus of a woman or makes her do so with him or any other person against her will, without her consent or when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt, due to unsoundness of mind or due to intoxication.² The increasing number of crimes committed by children i.e. below 7 years of age is a great matter of concern. India being the most populated country in the world, with almost 253 million people being referred to as youth amongst whom approximately 13.10% percentage of people belonging to the age group of below 7 years is barely a bullet that could be dodged³. Section 82⁴ of the Indian Penal Code maintains that- “Nothing is an offence which is done by a child under seven years of age” which means that there lies no criminal liability if the offender is below 7 years of age irrespective of the crime she or he commits. The Bombay High Court on Dec 9, 2020: enhanced the punishment of rape in a case observing that rape is a heinous crime that cannot be viewed with any leniency.⁵ But when it comes to an accused of rape below the age of 7, the matter stands still like water which needs to be disturbed with the turbulence of: What now? The matter is deeper than what it seems at the surface. Here in this scenario, it is not only the minor victim who is at stake but also the minor offender who is at stake making the situation even worse.

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

Journal of Legal Research and Juridical Sciences

The Juvenile Justice Act⁶ is an act to consolidate and amend the law relating to children alleged and found to be in conflict with the law and children in need of care and protection by catering to their basic needs. This act basically stands in place to provide protection, care, treatment, etc to reform them into better individual for society, rather than punishing them. The act has been designed taking into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for Administration of Juvenile Justice, 1985 (The Beijing Rules), the United Nations Rules for Protection of Juveniles Deprived of their Liberty (1990), The Hague Convention on Protection of Children and Co-operation in

² Indian Penal Code 1860, s 375

³ ‘Census 2011 All Details’ (Government Adda, 3 September 2020) < [Census 2011 All Details Free PDF – Download Now - GovernmentAdda](#)> accessed 16 October 2023

⁴ Indian Penal Code 1860, s 82

⁵ Kanchan Chaudhari, ‘Rape a heinous crime, there can be no leniency in conviction: Bombay HC’ Hindustan Times (New Delhi, 9 December 2020)

⁶ The Juvenile Justice (Care and Protection of Children) Act 2015

respect of Inter-Country Adoption (1993) and other international instruments for helping children alleged and found to be in conflict with law.

SECTIONS OF RELEVANCE

Section 2(12) - “child” means a person who has not completed eighteen years of age;⁷

Section 2(13) - “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence⁸;

Section 2(54) - “serious offences” includes the offences for which the punishment under the Indian Penal Code or any other law for the time being in force, is imprisonment between three to seven years⁹;

Section 2(33)- “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 more¹⁰;

Section 15(1) - In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence;¹¹

Section 2(45) - “petty offences” includes the offences for which the maximum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment up to three years¹²;

Section 18 - Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of the offence, specific need for supervision or

⁷ The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(12)

⁸ The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(13)

⁹ The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(54)

¹⁰ The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(33)

¹¹ The Juvenile Justice (Care and Protection of Children) Act 2015, s 15(1)

¹² The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(45)

intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit can allow the child to go home, direct the child to participate in group counselling and similar activities, order the child to perform community service under the supervision of an organisation, order the child or parents or the guardian of the child to pay the fine so on and so forth¹³.

Section 21 - No child in conflict with the law shall be sentenced to death or life imprisonment without the possibility of release, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code (45 of 1860) or any other law for the time being in force¹⁴. The act suggests that even for heinous offences being committed by juveniles the punishment may not extend more than 3 years and also cannot be given death or life imprisonment as in the cases of the Indian Penal Code. The act also suggests sending for remand homes portraying its direct intent to protect the juvenile offenders as the name of the act suggests itself.

POCSO: YOU THOUGHT SO?

The Protection of Children from Sexual Offences Act, 2012¹⁵ is an act that stands in place to protect children from offences of sexual assault, sexual harassment, and pornography and provide for the establishment of special courts for the trial of such offences and matters connected therewith or incidental thereto. It was developed in relevance with the Convention on the Rights of the Child, adopted by the General Assembly in the United Nations on the 11th of December 1992. The act also aims to protect the right to privacy and confidentiality to be protected and respected by all means and through all stages. The convention prevents the engagement of children in any unlawful sexual activity, exploitative use of children in prostitution, and pornographic use of children, which acts as the base for POCSO.

Sections of Relevance:

Section 2 (d) - "child" means any person below the age of eighteen years¹⁶;

Section 3 - A person is said to commit "penetrative sexual assault" if— he penetrates his penis, to any extent, into the vagina, mouth, urethra, or anus of a child or makes the child do so with

¹³ The Juvenile Justice (Care and Protection of Children) Act 2015, s 18

¹⁴ The Juvenile Justice (Care and Protection of Children) Act 2015, s 21

¹⁵ The Protection of Children from Sexual Offences Act 2012

¹⁶ The Protection of Children from Sexual Offences Act 2012, s 2(d)

him or any other person; or he inserts, to any extent, any object or a part of the body, not being the penis, or he manipulates any part of the body of the child so as to cause penetration or he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person¹⁷.

Section 4 - Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine¹⁸.

Section 5 - Whoever, being a police officer, officer of armed forces, or security forces, commits penetrative sexual assault on a child within the limits of the police station or premises at which he is appointed or within the limits of the area to which the person is deployed so on and so forth is said to have committed aggravated penetrative sexual assault¹⁹.

Section 6 - Whoever commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to a fine²⁰.

Section 7 - Whoever, with sexual intent touches the vagina, penis, anus, or breast of the child or makes the child touch the vagina, penis, anus, or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault²¹.

Section 8 - Whoever commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to a fine²².

Section 13 - Whoever uses a child in any form of media (including program or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such program or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, including representation of the sexual organs of a child, usage of a child engaged in real or simulated sexual acts (with or without penetration) or the indecent

¹⁷ The Protection of Children from Sexual Offences Act 2012, s 3

¹⁸ The Protection of Children from Sexual Offences Act 2012, s 4

¹⁹ The Protection of Children from Sexual Offences Act 2012, s 5

²⁰ The Protection of Children from Sexual Offences Act 2012, s 6

²¹ The Protection of Children from Sexual Offences Act 2012, s 7

²² The Protection of Children from Sexual Offences Act 2012, s 8

or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes²³.

Section 14 - Whoever uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine²⁴.

The act suggests that there is no tolerance policy in the cases of sexual offences on a child. Punishment under this act may extend from a fine and range up to 10 years of rigorous imprisonment. The act takes into consideration a wide range of offences such as assault, and harassment and includes the degree of it as well by mentioning terms like penetrative, and aggravated to further impose stringent punishments. Themes like abetment and attempt are also inclusive. The establishment of special courts, special provisions, etc. reaffirms the firm belief of the act to set up a framework that could act for the betterment and protection of children against sexual offences.

PENAL FOR CRIMES

The act shall be called the Indian Penal Code, 1860²⁵ as it acts to provide a general penal code that enlists offences, its definition, and its punishments. Every offence and punishment is to be applicable to every individual if held liable according to its provisions, except for the exceptions mentioned under 'General Exceptions'²⁶.

Sections of relevance:

Section 10 - The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age²⁷.

Section 375 - A man is said to commit "rape" if he penetrates his penis, to any extent, into the vagina, mouth, urethra, or anus of a woman or makes her do so with him or any other person; or inserts, to any extent, any object or a part of the body, not being the penis, manipulates any part of the body of a woman so as to cause penetration or applies his mouth to the vagina, anus,

²³ The Protection of Children from Sexual Offences Act 2012, s 13

²⁴ The Protection of Children from Sexual Offences Act 2012, s 14

²⁵ Indian Penal Code 1860

²⁶ Indian Penal Code 1860, chap IV

²⁷ Indian Penal Code 1860, s 10

urethra of a woman or makes her do so with him or any other person, against her will or without her consent²⁸.

Section 376 - Whoever commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine²⁹.

Section 376(B) - Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine³⁰.

The act uses words like man and women and conditions wherein the consent has been obtained. It is applicable to all male offenders irrespective of age. But we do know the category of age group below 18 years of age falls under the category of child and is dealt with with different statutes. It can be said that Indian Penal Code revolves around the belief that an adult male can only be the offender in cases of rape. As the name of the act suggests, penalizing criminals for the offences they undertake is the sole base of this act.

WHAT WE DERIVE?

To summarise we may say that the application of the maxim 'Doli Incapax³¹' – is one of the important principles of Criminal Jurisprudence, which enunciates the criminal liability of the Juvenile. The doctrine of 'Doli Incapax' means the incapability of committing a crime. It finds its basis in article 40 (3) (a) of the United Nations Convention on the Rights of Child, which states that every country must mention the minimum age for children who should be exempted from any kind of criminal liability because of their inability to decipher the nature and consequences of the act.) When applied and interpreted with regards to the Indian Laws, the result it gives is that no juvenile under or of the age of 7 years should be prosecuted for the commission of a crime.

²⁸ Indian Penal Code 1860, s 375

²⁹ Indian Penal Code 1860, s 376

³⁰ Indian Penal Code 1860, s 376 (B)

³¹ Anmol Singh Khanuja and Purti Vyas, 'An Analytical Study of Juvenile Justice System in India' (Ipleaders, 24 April 2018) <[Juvenile Justice System and Laws in India - A Detailed study \(ipleaders.in\)](http://www.ipleaders.in/juvenile-justice-system-and-laws-in-india)> accessed 16 October 2023

In the Juvenile Justice Act,³² the actions of care and protection along with rapid slashing down of punishment were undertaken to provide basic needs to the children in conflict with the law. The prevalence of sections depicting the formation of child courts, special remand homes, and juvenile boards provides for the protection of criminals who are juveniles. The age of juveniles lies in the age group of 16 to 18 years, the consideration of level of maturity and treatment as an adult also comes up. Is there a mention of what about offenders below 7 years of age? The answer is no.

Talking about the POCSO³³ takes into consideration the prevention of sexual offenses, assault, or harassment of children who are below 18 years of age. The mention of terms like police, armed personnel, public servant, and management staff in the act somewhere or the other puts forward its intention of belief that the offenders are all majors i.e. above 18 years of age for the fact to occupy any of these positions in India a person needs to have some basic qualifications which takes time. It also has provisions for child involvement in pornographic content, criminalises non-reporting, and bans mentioning of names of victims. But does it mention anything about offenders being below the age of 7? Not really. We may say that POCSO is from a point of view that believes only adults can commit sexually violent crimes.

Section 375³⁴ describes the definition and criterion for a sexual offence to be referred to as rape, paying the most heed to the concept of consent. A consent which when obtained through coercion or fear is not considered true consent. The act provides for punishment which may range from fines at the least to life imprisonment at the most. In cases of gang rape, it may even range up to 10 years. There is no mention of age as such in these sections but Indian Penal Code does mention Article 82³⁵ which absolves the liability of children below 7 years of age. So does there lie any liability of rape for children below 7 years of age, a clear 'no' would be the answer.

There is no such law in India that holds children below 7 years of age accountable not only for petty offences but also for heinous offences like rape. Rape is not just any other offence that took place randomly, let's say a child went and picked up chocolate. It is a kind of offence that

³² The Juvenile Justice (Care and Protection of Children) Act 2015

³³ The Protection of Children from Sexual Offences Act 2012

³⁴ Indian Penal Code 1860, s 375

³⁵ Indian Penal Code 1860, s 82

is of a severe nature and some way or the other proves that there was a pre-requisite knowledge of what the act meant or what results it may draw.

CONCLUSION

No one is born with the potential to be a criminal; circumstances shape them into who they are. There are a number of factors that go into making a social monster. Socio-economic conditions like broken houses, poverty, friends and companions, beggary, and psychological factors like mental illness, personality traits, and individualized emotional issues are considered as basic bifurcation of the factors responsible. According to Uday Shankar's research³⁶, 13.3% of juveniles came from broken households, while some say that delinquency is a revolt and an expression of aggressiveness aimed at damaging, breaking down, or altering the environment. This tends to suggest that it is not just what it is at the surface but also that the tendency to commit crimes involves sociological, economic, and psychological aspects as well. Here the victim and accused, both of whom are minors pose a grieving concern. The accused minor has all of his life ahead of him, but by being involved in this vicious cycle of crime, they tend to lose their innocence at a very early age. With the advent of the internet and social media, children's maturity levels have not remained the same as they were 10-20 years ago. A child's mental maturity comes early in today's milieu. The causes of these ever-increasing horrendous crimes according to Healy and Bronner could be bad company, adolescent instability and impulses, early sex experience, mental conflicts, love of adventure, impulse, etc³⁷.

But taking into consideration all these social factors, the Indian Judicial system asks to forget about the very fact that a heinous act like rape has taken place, and that too by a kid of not even 7 years of age. Sounds terrifying, right? When looked at, it is the ground reality for Section 82 of the Indian Penal Code³⁸ suggests the same. The Supreme Court ruled in Ram Prasad Sahu v. State of Bihar (1979)³⁹, that a minor criminal can be convicted of both rapes and attempted rape. If a youngster is not eligible for punishment but is capable of committing rape or murder, granting him blanket immunity violates the principles of fairness and proportionality of punishment. Even if people agree to the fact that minors below 7 years of

³⁶ Oishika Banerji, 'Juvenile crimes in India' (Ipleaders, 17 January 2022) < [Juvenile crimes in India - iPleaders](#)> accessed 17 October 2023

³⁷ Oishika Banerji, 'Juvenile crimes in India' (Ipleaders, 17 January 2022) < [Juvenile crimes in India - iPleaders](#)> accessed 17 October 2023

³⁸ Indian Penal Code 1869, s 82

³⁹ Oishika Banerji, 'Juvenile crimes in India' (Ipleaders, 17 January 2022) < [Juvenile crimes in India - iPleaders](#)> accessed 17 October 2023

age do have the mental maturity to do the crime, what next? In limine with the Mukesh and Anr vs. State of NCT of Delhi & Ors (2017)⁴⁰, also known as the Nirbhaya rape case, the court quoted that the accused's age should not be used as a shield for the level of cruelty he perpetrated on the victim. The laws were changed for Nirbhaya will it be changed for that innocent 5-year-old girl as well?



⁴⁰ Oishika Banerji, 'Juvenile crimes in India' (Ipleaders, 17 January 2022) < [Juvenile crimes in India - iPleaders](#)> accessed 17 October 2023