

## CONSENT OF A MINOR IN SEXUAL OFFENCES

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### ABSTRACT

*Consent plays a major part in differentiating a sexual activity from a sexual offence. This becomes a more important fact in the case of minors. This article is focused on the consent of a minor in sexual offences. It explores how consent is interpreted legally under the Indian Penal Code, of 1860, with particular attention to how it affects minors. It clarifies the meaning of consent as an expression of free will by competent parties and draws attention to certain provisions that deal with consent about minors. The Juvenile Justice (Care and Protection of Children) Act, 2015, Protection of Children from Sexual Offences (POCSO) Act, 2012 Indian Penal Code, 1860 defines a minor as anyone under the age of eighteen. The clause emphasizes that in cases of sexual offences, minors are deemed incapable of providing legitimate consent. The article goes on to discuss consent in situations where the parties involved are close to reaching adulthood. It also draws attention to the inconsistent application of marital rape exclusions for minors. In the end, the paper argues for a nuanced interpretation of consent to shield adolescents from sexual exploitation, emphasizing the significance of coordinating legal regulations with the goals of social welfare and changing legal frameworks.*

### INTRODUCTION

#### Consent In The Eyes Of Law

The general meaning of consent is to agree to something or give your permission for something<sup>1</sup>, but in legal terms, the term 'Consent' is much more comprehensive. Under Indian Penal Code, 1860 consent is an expression of autonomy and free will by competent and rational individuals who are free from coercion and pressure. It indicates that the victim granted permission for the harm to happen (section 87)<sup>2</sup>, that the conduct was carried out with the victim's advantage in mind (section 88)<sup>3</sup>, or that a guardian agreed to assume the risk on behalf

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<sup>1</sup> Oxford learner's Dictionaries 'Definition of consent verb from the Oxford Advance America Dictionary' <[https://www.oxfordlearnersdictionaries.com/definition/american\\_english/consent\\_2#:~:text=to%20agree%20to%20something%20or,Theaurus](https://www.oxfordlearnersdictionaries.com/definition/american_english/consent_2#:~:text=to%20agree%20to%20something%20or,Theaurus)> accessed 17 July 2024

<sup>2</sup> Indian Penal Code 1860, s 87

<sup>3</sup> Indian Penal Code 1860, s 88

of a minor (section 89).<sup>4</sup> Laws relating to consent about minors are unambiguous, it is broadened and explained in different cases relating to minors in various situations. Laws in India have a wide set of acts, various acts deal with minors according to the specific conditions and objectives.

### **WHO IS CONSIDERED AS A MINOR?**

Under the Indian Penal Code, 1860 section 363A<sup>5</sup> deals with the kidnapping of a minor, it specifies in the case of a male, a minor is a person under the age of sixteen years of age in the case of a male and in the case of a female a minor is a person under eighteen years of age. Under section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015<sup>6</sup> “child” is defined as a person who has not completed 18 years of age, the same is stated in the case of *Karan v. State of MP*<sup>7</sup>. A person under the age of eighteen years is also considered a child in section 2(d) of the Protection of Children from Sexual Offences (POCSO) Act, 2012<sup>8</sup>, the definition of a child is crucial as it sets the age threshold of protection and provisions in Indian law. In the case of minors the chronological or biological age is emphasized rather than the mental age of a person, the same can be seen in the case of *Eera v. State (NCT OF DELHI)* and another-<sup>9</sup>

Held per Dipak Misra, J., object of legislation is to provide remedy for malady while legislative intent relates to meaning from exposition of remedy as enacted When two constructions are reasonably possible, preference should be given to one which helps carry out beneficent purpose of Act, without unduly expanding scope of provision Further, courts while construing provision must ascertain intention of legislature, since it is an accepted principle that legislature expresses itself with use of correct words and in absence of any ambiguity or resultant consequence does not lead to any absurdity, no other interpretation tool may be looked for in name of creativity - On other hand, purposive construction is adopted in view of text and context of legislation especially while enacting social welfare legislations and in such cases courts should have broad attitude and supply word, if necessary However, courts can take aid of casus omissus only in case of clear necessity which should be discerned from four corners

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<sup>4</sup> Indian Penal Code 1860, s 89

<sup>5</sup> Indian Penal Code 1860, s 363A(4)(b)

<sup>6</sup> Juvenile Justice (Care and Protection of Children) Act, 2015, s 2(12)

<sup>7</sup> *Karan v. State of M.P.*, (2023) 5 SCC 504

<sup>8</sup> Protection of Children from Sexual Offences Act 2012, s 2(d)

<sup>9</sup> *Eera v. State (NCT of Delhi)*, (2017) 15 SCC 133

of statute - It cannot be ready tool in hands of Judge to assume role of creative constructionist personality — Held, definition of "child" in S. 2(1)(d), Pocso Act, 2012 which mean any person below 18 yrs of age, cannot embrace in its connotive expanse "mental age" of person since stretching words "age" and "years" would be encroaching upon legislative function — Addition of word "mental" cannot come within purposive construction since it tantamounts to causing violence to legislation by incorporating words to definition and encroaching upon legislative function, which is impermissible — Respect for dignity of person has its own pedestal but that conception cannot be subsumed and integrated into definition where provision is clear and unambiguous and does not admit of any other interpretation

### **DOES THE CONSENT OF A MINOR MATTER IN SEXUAL OFFENCES?**

According to section 375 of the IPC, the consent of a minor is not valid<sup>10</sup>, it defines the offence of rape, as the law presumes a minor is incapable of giving voluntary consent due to lack of maturity. In the case of H.P v. Mango Ram<sup>11</sup>, where three judges bench established the fact that according to section 375 of IPC<sup>12</sup> voluntary involvement following the use of judgement based on understanding the importance and morality of the deed, by the virtue of the age of the minor he or she is deemed incapable of such understanding. The court stated

- Penal Code, 1860 — Ss. 375 & 376<sup>13</sup> - Rape - Consent of prosecutrix — What amounts to - Submission of a body under fear of terror does not amount to consent Whether there was resistance by the prosecutrix, held, depends upon relevant circumstances - Absence of marks of violence on the body of prosecutrix as well as accused not of much significance when accused was examined three days after the incident - On facts and in the circumstances, held, the prosecutrix had resisted the onslaught of the accused and there was no consent on her part - Words and Phrases - "Consent".
- Penal Code, 1860 S. 376 - Rape - Evidence of prosecutrix corroborated by medical and other evidence - Absence of consent on the part of the prosecutrix - In the circumstances and on facts, held, accused liable for an offence under S. 376.
- Penal Code, 1860 S. 376 - Consent - Inference of — Absence of any marks of violence on the body of accused on examination after three days of the incident, held, not

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<sup>10</sup> Indian Penal Code 1860, s 375

<sup>11</sup> State of H.P. v. Mango Ram, (2000) 7 SCC 224

<sup>12</sup> Indian Penal Code 1860, s 375

<sup>13</sup> Indian Penal Code 1860, s 376

conclusive - The same, if any, would have been obliterated and not noticeable to the Medical Officer who examined him — Medical Jurisprudence — Marks and scratches - Absence of after three days of the incident.

- Penal Code, 1860 — S. 376 The offence of rape is a serious one court should pay careful attention to and show greater sensitivity — Evidence should be appreciated on broader probabilities.
- Penal Code, 1860 S. 376 Rape - Sentence — Mitigating factors - Accused and prosecutrix were related and were immature teenagers with an age difference of 2-3 years No mark of violence found on the body of prosecutrix Long time elapsed since the happening of the incident Both trial court and High Court had acquitted the accused and after the acquittal by a passage of time the members of the two families must have buried the hatchet - On facts held, a lenient view should be taken as regards the sentence and as such sentence already undergone by the accused would be sufficient to meet the ends of justice.”

Furthermore, in the case of *Deelip Singh v. State of Bihar*<sup>14</sup>, a minor girl was raped by her neighbour but later consoled by the promise of marriage. Later they continued their sexual relationship on several occasions. After she became pregnant and revealed the matter to her parents. Even after the intimacy continued to the knowledge of the parents, as they were under the impression that the accused would marry the girl, but later, the accused rejected the offer of marriage. The trial court found that the girl was aged 16 and 17 years at the relevant point of time and the case went on to the High Court the Supreme Court noted that-

The trial court recorded an alternative finding that she was forcibly raped on the first occasion and after the incident, the accused went on making false promises to marry her. It was therefore held that either there was no consent or the consent was involuntary. Thus, according to the trial court, it was a case of having sexual intercourse against the will of the victim girl or without her consent. If so, irrespective of the age of the girl, the offence is deemed to be committed. As regards this latter aspect, the High Court did not enter into any discussion. Accordingly, the appellant was convicted under Section 376 IPC.

In brief, the court reiterated minor lacks intelligence and moral effect of the act for constituting consent, resulting in the minor's consent is not valid in the eyes of the law section 90 of the

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<sup>14</sup> *Deelip Singh v. State of Bihar*, (2005) 1 SCC 88

IPC<sup>15</sup> states that consent given under fear or misconception of the fact by the minors is considered not valid as a minor is incapable of giving valid consent because of lack of maturity.

### **WHAT IF A PERSON HAD ALMOST ATTAINED THE AGE OF MATURITY AND CONSENTED TO THE SEXUAL OFFENCE?**

The age of consent is a crucial factor for determining whether a sexual act committed on a person is an offence or not. Section 375 of the IPC<sup>16</sup> the age of consent is 18 years old, sexual acts committed against a person below 18 years old will be considered statutory rape. Consent does not matter in this case, it will be considered a sexual offence. In many cases, the prosecution tries to prove that the victim is under 16 years of age at the time of sexual intercourse as the consent given by the person has no importance under section 365(6) of IPC<sup>17</sup>. In this context, if the victim is between 16 to 18 years of age the sexual activity will be still considered a sexual offence. In the case of *Independent Thought v. UOI*<sup>18</sup> exception of marital rape was challenged where the age of the wife was uncertain. After the medical examination, the wife's age was presumed to be 15 to 18 years old. According to this case section 375 Exception 2, Ss. 5<sup>19</sup> and 41<sup>20</sup>, being inconsistency with the Pocso Act<sup>21</sup>. Section 375 Exception 2 should be read down accordingly, as the offence of commission of rape with a minor girl below the age of 18 years under IPC section 375 and punishment therefor under section 376 IPC<sup>22</sup> and offence of aggravated penetrative sexual assault and punishment under section 5(n)<sup>23</sup> and 6<sup>24</sup> of Pocso Act same, a commission of sexual intercourse by a man with own wife aged between 15 to 18 years old excepted from rape under IPC section 375 Exception 2. There is no rationale for this distinction as a rapist cannot get converted into a non-rapist merely because of his marriage with the victim. Given inconsistency with section 42-A of the Pocso Act<sup>25</sup>, being a special law by sections 5<sup>26</sup> and 41<sup>27</sup> IPC and Art. 15(3) of the Constitution<sup>28</sup> and sections 5(n) and 6 of Pocso Act would override Exception 2 to section 375 to extent of the

<sup>15</sup> Indian Penal Code 1860, s 90

<sup>16</sup> Indian Penal Code 1860, s 375

<sup>17</sup> Indian Penal Code 1860, s 375(6)

<sup>18</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800

<sup>19</sup> Indian Penal Code 1860, s 375(5)

<sup>20</sup> Indian Penal Code 1860, s 42A

<sup>21</sup> Prevention of Children from Sexual Offences Act 2012

<sup>22</sup> Indian Penal Code 1860, s 376

<sup>23</sup> Prevention of Children from Sexual Offences Act 2012, s 5(n)

<sup>24</sup> Prevention of Children from Sexual Offences Act 2012, s 6

<sup>25</sup> Prevention of Children from Sexual Offences Act 2012, s 42A

<sup>26</sup> Indian Penal Code 1860, s 5

<sup>27</sup> Indian Penal Code 1860, s 41

<sup>28</sup> Constitution of India 1950, art 15(3)

inconsistency. IPC Section 375 Exception, the age of consent for sexual intercourse is raised to 18 years under section 375 to bring it on a par with evolving laws under the Prohibition of Child Marriage Act<sup>29</sup> and Juvenile Justice (Care and Protection of Children) Act<sup>30</sup>, girl child below 18 years, if married, protected under Protection of Women from Domestic Violence Act<sup>31</sup> and her marriage is voidable at her instance under section 3<sup>32</sup> of Prohibition of Child Marriage Act and person marrying her commits offence of aggravated penetrative sexual intercourse under section 5(n)<sup>33</sup> and 6<sup>34</sup> of Prevention of Children from Sexual Offences Act. Exception 2 to section 375 of IPC also creates an artificial distinction between married and unmarried girl children without any real rationale, thereby it does away with the wife's consent for sexual intercourse by the husband. IPC Section 375 Exception 2, arbitrary Object stated to be to maintain tradition and sanctity of early marriage in India. Classification of the age of 15 to 18 years to decriminalize rape with a wife of that age has no nexus with the object of maintaining the sanctity of marriage when pro-girl child laws mandate that such marriage is a criminal offence. In view that law providing sexual intercourse with a minor wife as rape has the potentiality of destroying the institution of marriage cannot be accepted as marriage is not institutional but personal.

## CONCLUSION

Under Indian law, permission is not legally recognised in cases of sexual offences if given by a minor; hence, any sexual conduct with a minor, even if he/she seems to have given consent, is illegal. In cases of sexual offences, Indian law does not recognise a minor's consent. Minors are incapable of giving informed permission, and any sexual conduct with a minor is considered a serious violation according to the legal framework and judicial rulings. Under Indian law, if a person is under the age of 18, even if they have nearly reached the age of maturity and consent to sexual activity, it is still deemed statutory rape. Furthermore, if the agreement is acquired by fraud or coercion is deemed involuntary, further constituting rape. Indian law is very strict when it comes to minor's permission for sexual offences, which is understandable given the need to shield them from exploitation. The Indian Penal Code (IPC), the Juvenile Justice (Care and Protection of Children) Act, 2015, and the Protection of Children from Sexual Offences

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<sup>29</sup> The Prohibition Of Child Marriage Act 2006

<sup>30</sup> The Juvenile Justice (Care and Protection of Children) Act 2015

<sup>31</sup> Protection of Women from Domestic Violence Act 2005

<sup>32</sup> The Prohibition Of Child Marriage Act 2006, s 3

<sup>33</sup> Prevention of Children from Sexual Offences Act 2012, s 5(n)

<sup>34</sup> Prevention of Children from Sexual Offences Act 2012, s 6

(POCSO) Act, 2012 all have laws that complicate and nuance the interpretation of consent. This page explains these laws and their implications. Minors—those under the age of eighteen—cannot give legally binding permission since they are not mature enough or understand enough. The discourse surrounding diverse law provisions and seminal cases highlights the intransigent position adopted by Indian courts when it comes to matters concerning children. The legal premise that a minor's permission is unlawful in cases of sexual offences is essential in preventing minors from being exploited under the pretence of giving their assent. The article also looks at situations in which people who are almost adults are engaged and reiterates that having intercourse with a juvenile, even if it appears to be voluntary, is illegal. A critical examination of the inconsistent application of marital rape exclusions for children is conducted, with a focus on the necessity of legal revisions that are in line with social welfare goals. The Independent Thought v. UOI case emphasises how crucial it is to have uniform legal protections for youngsters, regardless of a parent's marital status.

In conclusion, a sophisticated and strict legal approach is necessary to protect minors from sexual offences. The laws must always change to meet new issues and guarantee that children are protected from sexual exploitation of any kind. This necessitates a concerted effort to align legal requirements with the general objectives of social welfare and the defence of children's rights.

