

# Navigating the Grey Areas: The POCSO Act and the Complexities of Adolescent Romantic Relationships in India

Aadrika Parashar

LL.M. Student, The Indian Law Institute

**Abstract:** *The former Chief Justice of India, DY Chandrachud in his speech at the National Annual Stakeholders Consultation on Child Protection said- “As you are no doubt aware, POCSO Act criminalises all sexual activity for those under the age of 18, regardless of whether consent is factually present between the two minors in a particular case... I have observed that this category of cases poses difficult questions for judges across the spectrum.”<sup>1</sup> This is true for nearly half of the cases of “romantic relationships” registered under the POCSO Act.<sup>2</sup> According to a 2020 study, sixteen is the average age at which male adolescents in India engage in their first sexual experience.<sup>3</sup> The National Family Health Survey reported that 11% of girls had their first sexual intercourse before the age of 15, and 39% before the age of 18. These reports apparently make it clear that romantic relationships and sexual intercourse among children below 18 years of age is not an alien concept to Indian society anymore. Undoubtedly, the POCSO Act was drafted with the most noble aim of protecting the young children from any form of noble harassment. But with the growing concerns of an increasing number of cases relating to romantic relationships under the POCSO Act, it becomes imperative to point out the gap areas in the legislation that must be filled in to overcome the negative impact of the Act.*

**Keywords:** adolescent relationships, POCSO Act, consent laws, judicial challenges, sexual behavior

## 1. Introduction

The divisive topic of romantic relationship cases being charged under the POCSO Act has drawn a lot of judicial attention, as different courts have addressed the matter differently and reached varying conclusions. In cases where the accused had a consensual sexual relationship with a minor girl, some courts have found the accused guilty due to their inability to interpret the statute beyond its plain language, while the others, in applying an interpretation that goes beyond the set limits of the POCSO Act, have taken an entirely different approach. The Delhi High Court, on one hand, in the case of *Ajay Kumar v. State (NCT of Delhi)*<sup>4</sup>, opined that the POCSO Act was never intended to make consenting romantic relationships between young adults illegal, rather, its purpose was to protect the children under 18 years of age from any form of sexual exploitation. On the other hand, the Madras High Court in the case of *Ravi v. State*<sup>5</sup>, that the consent of the child is immaterial when it comes to the matters under the POCSO Act. The court in this case observed that:

“Whereas, the law defines that the person who has not completed the age of 18 years, is a child. This Court, being on Appellate Court, is a final fact finding Court and cannot traverse beyond the statute. This Court is also eagerly waiting for the amendment in the Legislature as expressed by my learned brothers. In the case on hand,

this Court finds that the victim was a minor and the appellant took the custody of the minor without the knowledge or consent of her natural guardians and had committed penetrative sexual assault on her and hence, the offence committed by the appellant falls under Section 5(l) which is punishable under Section 6 of the POCSO Act.”

Therefore, in proceedings before the High Courts as well as the POCSO Special Courts, various parties have voiced their concerns regarding the growing number of cases in which minors are punished under the POCSO Act for engaging in sexual activity that results from romantic relationships. Despite the female admitting that it was a case of romantic relationship and consensual sexual intercourse, the male accused is found guilty under the POCSO Act on the grounds that cases involving consensual sex with a minor were never meant to be outside the purview of the Act. Nonetheless, the Act has sparked discussion and controversy, especially in relation to how it addresses adolescent consensual sex. And therefore, the fallacies in interpretation of the Act need to be addressed as soon as possible to avoid any further setbacks.<sup>6</sup> This problem has can be seen under two facets: one, the law criminalising the personal behaviour of individuals while they act consensually; and second, the gendered approach of the courts that catch hold of the male in such relationships-branding them as “accused” and letting the female take the victim-disguise.

<sup>1</sup> The Indian Express, “25% of POCSO cases are romantic relations : Study”, 12.12.2022 available at [https://vajiramweb-test.s3.ap-south-1.amazonaws.com/media/2023/3/23/12/30/14/25\\_of\\_POCSO\\_cases\\_are\\_romantic\\_relations.pdf](https://vajiramweb-test.s3.ap-south-1.amazonaws.com/media/2023/3/23/12/30/14/25_of_POCSO_cases_are_romantic_relations.pdf).

<sup>2</sup> *Ibid.*

<sup>3</sup> Santosh Kumar Sharma and Deepanjali Vishwakarma, “Transitions in Adolescent Boys and Young Men’s Highrisk Sexual Behavior in India” 20 BMC Public Health (2020) available at <https://bmcpublihealth.biomedcentral.com/articles/10.1186/s12889-020-09191-6> (Last visited on February 5, 2024).

<sup>4</sup> Bail Application No- 2279/2022

<sup>5</sup> CrI. Application .No.627 of 2021

<sup>6</sup> Bhatia, Gautam “The Age of Consent and the POSCO Act”, 10 *The Indian Journal of Law and Technology* (2014).

## 2. Criminalisation of Romantic Relationships and Consensual Sexual Intercourse

### 2.1. Rationale behind fixed age of consent under POCSO Act

Why does the law take age into account when assessing consent? The idea behind age-based consent for sexual activity is that a minor's mental capacity is too immature to comprehend sexual behavior, making them incapable of giving their consent. Since the minor's consent depends on "competence", it is useful to examine what competence means in this context. The ability to consent and the actual act of consenting are two different things. It has been interpreted as "giving informed consent, after taking in information, understanding it, and balancing it."

Competence is defined as the "understanding, wisdom, and autonomy to make decisions that lead to a reasonable outcome" in the 2007 Ministry of Women and Child Development study that served as the foundation for the POCSO (also known as the "POCSO Study"). It even acknowledges that, despite their age, minors may be capable of giving their consent. Nonetheless, POCSO continues to uniformly criminalize any sexual activity involving a minor. Consensual relationships are not an exception. What can be the policy justification for this blanket criminalization?<sup>7</sup>

First, there is a protectionist justification for this criminalization. A minor's consent might not be informed. The law, by making sexual activity under the age of eighteen illegal, aims to protect minors who might not be competent enough to give informed consent. Second, because ex-post application of a consent standard is more likely to be abused, an ex-ante rule of consent—which is what the POCSO's fixed age rule is—has been preferred. The possible negative effects of making it illegal for young adults to have consensual relationships were recognized by POCSO lawmakers. They realized that making all sexual activity under the age of eighteen illegal would put innocent young adults under the purview of the POCSO.<sup>8</sup> In light of this, the first draft of the POCSO acknowledged that minors between the ages of sixteen and eighteen could have consensual relationships if they had the "capacity" to do so. Here, "capacity" was not defined; rather, it was up to the courts to decide. Nevertheless, the final draft eliminated this clause. Lawmakers were worried that permitting a clause that would allow the victim's actions to be tried would allow the minor's "capacity" to be tried. They believed that the victim would be "revictimized" as a result. And hence, the POCSO lawmakers decided on an ex-ante rule because they thought it would be ineffective for the court to apply an ex-post capacity standard.

<sup>7</sup> Syed Raiyyan, "POCSO Act and Adolescent Relationships", 4 *Jus Corpus Law Journal* (September-November 2023)

<sup>8</sup> Vasundhara Mehta, "On POCSO and the Need for a Balancing Act to Navigate the Quandary Posed by Consensual Adolescent Relationships", *NLUJ Law Review* (2023).

<sup>9</sup> Shraddha Dhanwate, "Right to Engage in Consensual Sexual Activity", *Juris Centre Review* (2023)

<sup>10</sup> *Supra* note 7.

<sup>11</sup> Bar and Bench, "De-criminalising romantic adolescent relationships under the POCSO Act" published on 10. 05.2024 available at <https://www.barandbench.com/columns/exposing->

### 2.2. Effect of blanket criminalisation under the POCSO Act

The fixed age rule criminalizes relationships in which both parties are competent to give their consent in an overly broad manner. This results from the fact that the rule uses age as the sole proxy to assess the minor's capacity for consent.<sup>9</sup>

Criminalisation of consensual sexual intercourse under the POCSO Act is a subject that has been long debated. Although it is undoubtedly true that the intent of the law more often than not is to give protection to the individuals from what can be harmful for them. However, the fact that these laws sometimes hinder the personal life and liberty of the individual can also not be denied. And the interpretation of the POCSO Act to include the consensual sexual relationships under its ambit is one such example of extension of law to regulate private relationships, leading to infringement of individual autonomy and personal liberty. And the issue arises when such unintended interpretation of the laws and their severe consequences create social, psychological and legal hardships for the individuals involved in the consensual sexual intercourse.

The blanket criminalisation of sexual relationships below a fixed age limit is what has caught the attention of several experts who argue that three main concerns arise from such blanket criminalisation : one, it fails to take into account sexual curiosity and experiences as the consequences of natural physical and psychological changes that takes place in the age of adolescence, thereby, denying them the ability to consent for such act.<sup>10</sup> Secondly, such blanket criminalisation takes away from the adolescents to distinguish between a consensual and a forced activity and creates a stigma in the society leading to hindrances in their development. And lastly, the POCSO's mandatory reporting requirements and blanket criminalization of any underage sexual activity expose counselors, medical professionals, and educators to legal repercussions for failing to report such incidents, even if the adolescent requests it leading to adolescents having fewer options for getting assistance.<sup>11</sup>

Making consenting relationships illegal gives parents and guardians a means of harassment. Most often, guardians who are unhappy with their child's relationship file complaints.<sup>12</sup> For example, in *Ajay Kumar v. State (NCT of Delhi)*<sup>13</sup>, the father of the seventeen-year-old victim filed a rape complaint. After further investigation, the child went to court and asked to be released because they were married. The low conviction rate and the fact that most of these cases involve minors refusing to testify serve as testimony to the fact.

double-standards-of-law-towards-adolescents-de-criminalising-romantic-adolescent-relationships-under-pocso (Last visited on February 5, 2024).

<sup>12</sup> Vidhi Centre for Legal Policy, "Decade of POCSO: Developments, Challenges and Insights from Judicial Data" available at <https://vidhilegalpolicy.in/research/a-decade-of-pocso-developments-challenges-and-insights-from-judicial-data/> (Last visited on February 5, 2024).

<sup>13</sup> (2022) 6 HCC (Del) 530.

### 3. The Gendered Approach in Penalisation under the POCSO Act

Although the POCSO Act was aimed at creating a safe environment for the children below the age of 18 years irrespective of their gender, in doing so, the Act and its implementation has itself reinforced the gender-bias. It is unfair and based on stereotypes to categorise the accused (the minor male in this case) as just belonging to one certain gender. While it is true that in cases of penalising an adult for an offence committed under this Act, the provisions have been drafted in a way to reflect gender-neutrality, the problem arises when the accused himself is a minor male.

The executive and the judiciary has time and again, under the POCSO Act, reinforced the stereotype that only a man can persuade a female into having sexual intercourse. The penalisation of only one gender when both the persons involved in the 'prohibited' act are minors makes little to no sense. Moreover, the case becomes more critical where the 'victim' (girl) testifies that the sexual intercourse was entered into by her voluntarily. It might also be a case that the male child has been persuaded into committing such an act by the female child, but the judgements by various Sessions and High Courts show that the courts have refrained from accepting the fact of consensual sexual intercourse as a valid defence.

The two main loopholes under the POCSO Act, therefore, are: *one*, penalising consensual sexual intercourse between adolescents and *second*, the gendered approach of the enforcement agencies in the implementation of the Act. Both these issues are so concerning that their existence under a legislation as important as POCSO raises serious questions on what Packer called the 'due process model' of criminalisation.<sup>14</sup> With due regard to the laws, the law-making body should have reconsidered legislating an Act providing for blanket criminalisation paying attention to the natural behaviour of adolescents at a certain age. Moreover, limiting the age of consent to 18 years on one hand and not making child marriage void under personal laws also creates an area of conflict under the law. While the intention of the POCSO Act is not being questioned, it is necessary to provide for measures dealing with the impediments created by the Act itself and also by other laws for swift implementation of the Act.

### 4. Conclusion

The Protection of Children from Sexual Offences (POCSO) Act was created in good faith to protect children from exploitation and sexual abuse. However, it criminalizes any sexual activity involving minors despite the existence of consent. Although problematic in general, it is particularly notable in the case of consensual relationships between adolescents, in which the law does not delineate the difference between situations that are exploitative or otherwise. Criminally addressing all sexual activity does not take into account the level of agency young people may have, nor does it take into account the implications of the strict application

of the Act for minor boys, who are almost always treated as offenders, and minor girls, who are almost always presumed to be victims. This manner of enforcement leads us to regard law in a gendered dichotomy that is reflective of unequal societal attitudes toward boys and girls. It fails to acknowledge young girls' agency and autonomy while considering minor boys in all cases criminal offenders. To be more consequential, the Act's intention, which is to offer protection to children, is only diminished as it contributes to the risk of discouraging reporting, creating fear, and criminalizing normal adolescent behavior. A more nuanced approach is necessary.

It is therefore necessary to make reforms to the Act by removing the blanket criminalisation and assessing each incident on a case to case basis without setting a common standard for all. It is high time that the law-making bodies realised the importance of agency and autonomy in cases as crucial as those under the POCSO Act.

<sup>14</sup> Herbert L. Packer, "Two models of Criminal Process" 113 University of Pennsylvania Law Review (1964).