

# Judicial Transfer & Preliminary Assessments for CCLs

For Rajasthan Judicial Academy

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# On Judicial Waiver...

- It is a pre-trial determination that rests on the discretion of the JJBs and Children's Courts
- Nature and process of judicial waiver/transfer should therefore be such that ...
  1. Does not pose a threat to the natural justice and procedural rights of any given child faced with the prospect of judicial transfer
    - Procedurally, the principle of presumption of innocence stands violated as transfers under the JJ Act, 2015 can be made even before the police investigation is completed. This affects fairness and impartiality of investigation, leading to prejudicial treatment of a child as highlighted by the Punjab and Haryana High Court in **Bholu v. Central Bureau of Investigation, Crl. Rev. No. 2366 of 2018.**
  2. Is used in the most extreme of cases with a natural inclination to retain juvenile jurisdiction and allow for rehabilitation of the child
  3. **Must rule out that the rehabilitative process of juvenile justice system is no longer fit for a specific adolescent**
  4. The procedures and process followed for determining the question of judicial transfer are transparent and give the child an opportunity to be heard

# On Judicial Waiver...

- Conscious efforts are required to mitigate the inherent biases which exist in the determination of judicial waiver. Courts in their determination of the waiver, stigmatise and impose undesirable characteristics upon the juvenile, such as incorrigibility, dangerousness, and culpability, a perception likely to be carried over to the adult criminal court –
  - Studies have shown that juveniles which have been transferred to the criminal court presented a higher likelihood of receiving prison sentence than their adult counterparts, and received harsher sentences than their young adult counterparts [Suzanne O Kasaa et al, 'The Impact of Waiver to Adult Court on Youths' Perceptions of Procedural Justice' (2018) 24(4) *Psychology, Public Policy, and Law* 418, 420.]
  - Research also suggests that that sentencing is often a result of a cumulative and interrelated decision making process and thus the decision to transfer a juvenile to the adult criminal court is likely to have a direct consequence on the sentencing of the child. [Brian D Johnson and Megan C Kurlychek, 'Transferred Juveniles in the Era of Sentencing Guidelines: Examining Judicial Departures for Juvenile Offenders in Adult Criminal Court' (2012) 50(2) *Criminology* 525, 532.]
- Conscious efforts are required to also eliminate, as far as possible, subjective notions or perceptions of possibility of correction and reform, personal biases against children alleged to have committed crimes, against children belonging to certain class/caste/religion/ethnic group, biases in favour of or against judicial transfers, biases that may stem from the pressure to produce efficiency statistics or the need to quell any external political pressure, etc.

**Mumtaz Ahmed Nasir Khan v. The State of Maharashtra and Others, 2019 (4) Bom CR (Cri) 261, pp. 36 - 37, para 90**

- In this appeal before the Bombay High Court, the judge notes...  
*‘Perhaps, the gravity of the offence and the public outcry must have heavily weighed on the Report’ and warns against transfer of a child for adult trial as a ‘default choice’.*

**Smt. Durga v. State of Rajasthan, Criminal Appeal No. 27/2019, p. 8**

- When a 17-year-old girl, who suffered a violent marriage and killed her drunk husband after persistent abuse by him, was tried and convicted as an adult, the High Court of Rajasthan noted that no account had been taken of the circumstances in which the child was driven to commit the offence and concluded that the JJB passed the order for judicial transfer ‘in an absolutely mechanical and laconic manner’.

**Special Sessions Case No. 01/2017, Additional Sessions Judge -1, Children’s Court, Jhabua, Madhya Pradesh**

- Two children aged 16–17 years, were apprehended for brutally stabbing a 14-year-old to death and were transferred for adult trial. Referring to the ‘Nirbhaya’ case and the legal developments that ensued, the Children’s Court decided to try the boys as adults. The trial proceeded like any other criminal trial, convicting the boys with a life sentence. Though the ghastly murder is attributed to the boys’ drug addiction, there is nothing on record to suggest the judge interacted with the two boys in this regard.

## So what is needed and how?

- A coherent objective system which mitigates the potential for bias to skew the determination of the judicial waiver
- **The question to ask...**
  - Should such objective system be prescribed through guidelines and formats or should it evolve through case by case approach and experience?

**Let us examine what we have, what is lacking and what do we need to do...**

# Judicial Waiver through Preliminary Assessment

The 'child' for the purposes of judicial waiver is an adolescent. Therefore, the role of the JJBs and Children's Courts that acknowledge the developmental nature of juveniles is to determine the circumstances that brought the adolescent before a judge and what could be done to prevent reappearance.

- Here, the question is not *who* the child is, not the race, ethnicity, or economic status, etc., but rather, *what* exactly *is* a child for the purposes of judicial waiver.
- The crux of the assessment by JJB / Children's Courts in their determination of the waiver thus lies in the following:
  - the severity of the crime
  - age of the child being > 16 years
  - circumstances in which the offence is alleged to have been committed
  - and most importantly, the individual circumstances of the child -
    - (a) whether the child has developed moral culpability and capacity;
    - (b) whether they understand good from bad and the ramifications of their actions

## Section 15(1) –

- i. mental and physical capacity to commit such offence;
- ii. ability to understand the consequences of the offence;
- iii. the circumstances in which he allegedly committed the offence.

**Mumtaz Ahmed Nasir Khan v. The State of Maharashtra and Others [2019 (4) Bom CR (Cri) 261, Judgement dated 15.07.2019, para 82]**

“physical capacity, mental ability, understanding, and the circumstances-- none is dispensable. They all must be present, for they are not in the alternative.”

## **Determining Mental & Physical Capacity of the Child to Commit Alleged Offence & Understand its Consequences**

- **For physical capacity**, JJBs have access to MLC of the CCL, SIR, SBR and other documents.
- **For determining mental capacity**, JJBs “**MAY**” take assistance of psychologists or psycho-social workers or other experts.

# The Experience with Psychological Assessments so far...

Psychological assessments are increasingly relying on these to transfer the CICL to the adult system, without evaluating their admissibility

- **Bholu Vs Central Bureau of Investigation in Crl. Rev. No. 2366 of 2018 dated 11.10.2018** - Hon'ble High Court of Punjab & Haryana concluded that the *“assessment is based on inappropriate tests, namely, coloured Progressive Matrices (CPM) and Malin's Intelligence Scale for India Children (MISIC) meant for children between the ages of 5-11½ and 5-15 has been taken as the basis for the determination of the mental capacity of a child of 16½ years”* It directed JJB, Gurugram for *“afresh consideration after assessing the intelligency, maturity, physical fitness as to how the juvenile in conflict with law was in a position to know the consequences of the offence”* (stay order passed by Hon'ble Supreme Court of India in the instant case.)



# Over reliance on Psychological Assessments

- There is no one psychological test or tool - different tools have different purposes
- Even if the tools for psychological assessment are standardised, reliance on psychological assessments as empirical evidence in a legal system requires great caution given they can have far reaching consequences for a person

# Challenges of Psychological Assessments

## Psychological Assessments ≠ Preliminary Assessment

- **Navinbhai Bijalbhai Dharmani (Dalit) vs. State of Gujarat [R/Criminal Revision Application No. 374 of 2019, Judgement dated 08/05/2019]**
- Held...

*“The Principal Magistrate has believed that the preliminary assessment is required to be done by the Psychologist ... This is an erroneous belief as well as misconception of law of the learned Principal Magistrate JJB.”*

## **Navinbhai Bijalbhai Dharmani (Dalit) vs. State of Gujarat [R/Criminal Revision Application No. 374 of 2019, Judgement dated 08/05/2019]**

- As a general matter, however, laboratory and psychological tests have much less relevance to the MSO evaluation
- We urge forensic examiners to acknowledge the limited use of these techniques for reconstructing mental states.
- Report of the psychologist can be said to be an opinion of expert under Section 45 of the Evidence Act.
- Expert witnesses should be prepared to concede the limitations on reliability and validity of tests they use, and to make other appropriate qualifications to prevent the trier of fact from being misled about the precision of these techniques.

## **Psychological Assessments = Forensic Psychological Assessment ≠ Psychological Assessments in Clinical Settings**

- Psychological assessments in the juvenile criminal justice system are meant to be forensic assessments. They are different from clinical assessments. In a clinical setting, clinicians are required to be supportive and empathetic, whereas forensic evaluators are required to be neutral and objective.
- Psychological assessments are not implemented universally.

### **Recent research carried out by students of Macquarie University for HAQ: Centre for Child Rights suggests...**

- Currently the majority of the psychological assessments used by forensic psychologists are designed to function in a clinical setting. When applying these assessments to legal contexts to answer psycho-legal questions, the findings and results they produce are warped as they were not designed to function in a legal setting.
- Presently both judges and prosecution / lawyers lack any guidance, education or knowledge concerning context and the contents of most psychological assessments and the courts rely solely on the expertise of forensic psychologists to apply the most appropriate assessment.
- The same applies for psychologists, who are not legally trained and do not have the resources to make determinations as to which assessments are most appropriate for a particular legal question.
- In practice, because of their lack of knowledge of each other's domains, while judges and prosecutors are unable to understand the content of psychological assessment reports, and rely fully on experts for the same, psychologists have little knowledge of law to determine which tests to apply for a specific legal question
- There is still a long way to go, particularly in ensuring that both legal practitioners and forensic psychologists have a cohesive comprehension of suitable assessments given the objective circumstances and applicability to each case.

- A psychological test may have its normative group as individuals who are from different economic, social and cultural context. Due to this, any changes to the scale or results are left to the discretion of the individual administering or interpreting the test.
- This lack of standardisation can result in an interpretation of results based on an individual's judgement rather than scientific method.
- Since discretion comes to play in a therapeutic setting due to lack of standardisation, in a judicial process which has significant consequences, it is inappropriate to rely on such assessments.
- Besides, the Board must satisfy itself in its preliminary assessment about the juvenile's mental and physical capacity, his ability to understand the consequences of the offence, and so on

**Even if psychological assessment formats and tools are developed and standardized, the fact is that...**

### **Psychological assessments allow self incrimination**

- Penal Codes across various countries reiterate that a statement made by a person subjected to a psychiatric examination or treatment shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his mental condition.
- However, psychological assessments invariably lead to children accepting their actions which impacts the decision on judicial transfer, amounting to self-incrimination.
- The law has no provision for seeking consent of children before subjecting them to an intrusive assessment, and no process is built in to inform the child that such psychological assessment could amount to waiving the right to self-incrimination.

**General Comment 24  
of the Committee on  
the Rights of the Child  
(CRC Committee), para  
71**

Guides against  
compelling children  
into self-incriminatory  
testimony or  
confession of guilt in  
any manner.

# Questions for consideration

1. Can the Board make an assessment of mental capacity without seeking a psychological assessment?
2. Does the Board know what tools of psychological assessment should be used to assess the mental capacity of the child with respect to commission of a particular offence?
3. What if the same tool of assessment when used by different and equally qualified experts gives different results?
4. How much reliance can and should be placed on psychological assessments?
5. Should the psychological assessment reports be accepted without examining the concerned psychologist as expert witness and examining the admissibility of the report as evidence?
6. How will the Board satisfy itself about the findings of the various reports and expert opinions sought?

# Case Vignette

**Adapted from ‘Training Module for Legal Services Lawyer and Probation Officers Attached to the Juvenile Justice Boards Under the Juvenile Justice (Care and Protection of Children) Act 2015’**

“K” is a 16-year-old boy who was residing in the Observation Home (OH) charged with murder of another 16-year-old boy in his neighborhood. “K” was an orphan and used to stay with an old uncle in the outskirts of Jaipur. The SIR suggests that he was part of a gang of boys who would often trouble other people in the village. “K” was not as smart as the other children. He could barely write his name, could not read and write, and dropped out of school in the 6th standard. In his early childhood and during his schooling he was noted by his uncle and teachers to be extremely hyperactive. He started working from the age of 14 years as a mechanic. He would often leave work incomplete, forget instructions given to him and was often beaten up by the owner of the mechanic shop. He started using solvents and alcohol with the other boys in the gang. “K” felt the solvents and alcohol made him feel calm and helped his mind relax. He began using these substances in the past 2-3 years with his friends and then even alone.

According to “K’s” SIR and MH report, one day, an altercation broke out between two gangs and “K” went to fight with the rival gang after consuming a significant amount of alcohol. During the fight one of the boys died and “K” was charged with murder. “K” could not remember the details of the fight due to his intoxicated state. After he was brought to the Observation Home (OH), K had nightmares and couldn’t sleep at night. He stopped eating and would not interact with the staff or the other boys in the OH. He would often get flashbacks (as though the events were occurring again). He would often engage in self-injurious behavior and slit his wrists. He would often startle to small sounds and was often irritable and angry with the staff and the other boys in the OH.



# Questions

- Should his SIR and Mental Health Assessment report be used to transfer him to the adult system?
- How can we understand “K”?
- What were the reasons why “K” came into conflict with the law?
- What kind of personality traits is the boy developing as an adolescent?
- Does “K” have a psychiatric disorder?

# What documents are available for scrutiny?

**Navinbhai Bijalbhai Dharmani (Dalit) vs. State of Gujarat [R/Criminal Revision Application No. 374 of 2019, Judgement dated 08/05/2019]**

- It is relevant to note here that the JJB may take into consideration the documentary evidence on record that may be:
  - a) Statement of witnesses recorded by police and other documents prepared during the course of investigation within a period of one month from the date of first production of the child before the Board including:
    - i. Panchnama of scene of offence – which may reflect circumstances.
    - ii. Arrest panchnama of the CCL – for physical capacity to commit offence.
    - iii. Medical history given by the CCL before the Doctor – for mental capacity or ability.
    - iv. Contents of the statement of CCL except the confession part recorded by the police under Section 161 of Cr.P.C. for circumstances in which he allegedly committed the offence.
    - v. Statement of the victim – for one or more aspects.
  - b) Social Investigation Report (Form 6) submitted or which must be called for under Section 8(3) (e) of the Act 2015 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 – for any or all the aspects.

# Circumstances in which an offence is allegedly committed

**Smt. Durga Vs. State of Rajasthan [Criminal Appeal No. 27/2019, Judgement dated 15.04.2019]**

*“While invoking section 15 of the Act and directing the trial of the child as an adult, the Board must remain alive to the situation that the offence had been committed by the child in such a manner which gives rise to an inference that the act was done in a cold blooded or calculated manner which does not co-relate to the child like behaviour of the offender.”*

- In this case CCL was married to the deceased at a tender age and the deceased who was alcoholic used to beat the CCL on daily basis. On the night of the incident also the deceased came home in drunken state and started to beat the CCL. He further poured kerosene oil on the CCL upon which she slashed the neck of the deceased who succumbed to the injuries.

# Understanding the Consequences of one's action

The modern approach is to consider whether a child can live up to the moral and psychological components of criminal responsibility, that is, whether a child, by virtue of his or her individual discernment and understanding can be held responsible for essentially anti-social behaviour.

**How do we decide this question for a child falling in the age range of 7 to 12 years – Section 83 IPC?**

## ***R. v. Kershaw***

- For determining the mental state of the accused, the **court may rely on the facts and circumstances that occurred before and after the crime**

## **Some examples...**

- whether he took any precautionary measure, ganged up with other people, purchased weapons
- whether there was any provocation
- whether prima facie, the crime or parts of the crime can be attributed to fear or panic or nervousness or provocation (degree of malice)

## **Mumtaz Ahmed Nasir Khan v. The State of Maharashtra and Others [2019 (4) Bom CR (Cri) 261, Judgement dated 15.07.2019]**

Two juveniles, one aged 17.5 years and the other 16.5 years, faced allegation of murder of a 3.5-year-old child. Para 82 of the judgement mentions that the mental health assessment report from the hospital concluded that the older CICL was 'normal' and 'suffers from no mental incapacity to commit the offence'. Based on this, the JJB ordered that the older of the two CICLs be treated as an adult and the Children's Court upheld this view.

- **On appeal, the High Court disagreed with the transfer and held ...**
  - The Board, in the first place, has mechanically relied on the Social Investigation Report and MH Report, without analysing the older adult's case on its own.
  - A single incident not revealing wickedness, human depravity, mental perversity, or moral degeneration may not be enough

# Mumtaz Ahmed Nasir Khan v. The State of Maharashtra and Others [2019 (4) Bom CR (Cri) 261, Judgement dated 15.07.2019]

- Erikson's (1959) theory of psychosocial development has eight distinct stages, taking in five states up to the age of 18 years and three further stages beyond, well into adulthood.
- Like Freud and many others, Erik Erikson maintained that personality develops in a predetermined order, and builds upon each previous stage. This is called the epigenetic principle.
- During each stage, the person experiences a psychosocial crisis which could have a positive or negative outcome for personality development.
- According to the theory, successful completion of each stage results in a healthy personality and the acquisition of basic virtues. Basic virtues are characteristic strengths which the ego can use to resolve subsequent crises.
- Failure to successfully complete stage can result in a reduced ability to complete further stages and therefore a more unhealthy personality and sense of self.
- According to Elizabeth S. Scott et al, first, available scientific knowledge confirms what parents of adolescents surely know--that although teenagers are not childlike, they are less competent decision makers than are adults. Indeed, adolescents' capacities for reasoning and understanding (what might be called "pure" cognitive abilities) approach adult levels by about age sixteen. But the evidence suggests they may be less capable than are adults of using these capacities in making real-world choices. More important perhaps is that the juvenile's emotional and psychosocial development lags behind their cognitive maturation.

# Boards must deal with the Causes of Delinquent Behaviour

## Individual Factors

- Family environment
- Identity; Gender Norms.
- Substance Abuse (*can also be treated as a social factor*)

## Psychological Factors

- Childhood Trauma.
- Clinically significant mental health issues.

## Social Factors

- School Environment
- Peer Influence
- Media

## Socio-Economic Factors

- Family's socio-economic background
- Economic Strain Theory

# The Paradigm of Causation

| <b>Predisposing Factors</b><br>“Why this child?”                                                                                                                                                                                                                               | <b>Precipitating Factors</b><br>“Why Now?”                                                                                                                                                                                          | <b>Perpetuating Factors</b><br>“Why does it continue?”                                                                                                                                                                                                                                   | <b>Protective Factors</b><br>“What can I rely on?”                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>Factors that make someone more likely to behave in a particular way.</li> </ul> <p><b>Example:</b></p> <ul style="list-style-type: none"> <li>History of being sent to a hostel at a very young age. Feeling of abandonment.</li> </ul> | <ul style="list-style-type: none"> <li>Factors that make a behaviour happen sooner without enough thought or preparation.</li> </ul> <ul style="list-style-type: none"> <li>Constant arguments that took a violent turn.</li> </ul> | <ul style="list-style-type: none"> <li>Factors that causes the behaviour to continue.</li> </ul> <ul style="list-style-type: none"> <li>Parents keep reprimanding and punishing the child for misbehaving.</li> <li>Continued feeling of lack of attachment with the parents.</li> </ul> | <ul style="list-style-type: none"> <li>Factors like skills, strengths, resources, support or coping strategies, in individuals, families, communities or the larger society that help people deal more effectively with stressful events and eliminate risk of maladaptive behaviour from occurring again.</li> </ul> <ul style="list-style-type: none"> <li>Parents are willing to come for individual as well as group therapy sessions with the child.</li> <li>The child enjoys painting, which can be used as a tool to displace his anger.</li> </ul> |



# Some Vulnerability factors that may be looked for and considered...

- Age and developmental problems, if any
- Childhood trauma
- Child's social and familial background
- Relationships within family and outside
- Criminal background of child and family
- Self Harming behaviour
- Substance Abuse
- Physical or Sexual Abuse inside the Observation/Shelter Home
- Any other form of abuse of exploitation faced by the child
- Any history of mental illness or psychological disorders
- Reasons behind alleged offence – peer influence, use by a gang, for survival, any provocation, etc.
- Environmental factors impacting behaviour and decision-making e.g. information received by the child from the lawyer/PO/police/others
- Conditions that made crime the most viable option for the child
- Child's goals and aspirations
- Formal or vocational education
- Scope for rehabilitation

## **Absence of Vulnerability does not make every case of 15-16 year old booked for a heinous offence fit to be transferred ...**

### **Mumtaz Ahmed Nasir Khan v. The State of Maharashtra and Others [2019 (4) Bom CR (Cri) 261**

The juvenile knew the victim as she used to stay in the same building and often visited his house asking for chocolate, which he regularly kept in the house. Once he ignored the child's request (on the fateful day), she started to snatch at his phone; then he pushed her. When she fell down, a wooden plank fell on her. In that process, she got "accidentally strangulated due to computer wire." He is said to have panicked and hidden her body in a bag (in his house) and threw it from the window to the terrace of a neighbouring structure to evade suspicion... He announced the news of the missing girl in the local Masjid. He claims to have tried to keep track of the search operations for the missing child. Some people started voicing concerns that as no ransom calls were made, the child must be in the locality. So he made ransom calls along with his friend, the second juvenile. He further claims to have never gone to the place where he asked the child's father to drop the ransom money.

Since PA is not a trial and larger questions of mens rea cannot be determined at this stage, the version of the child must be relied upon to decide the question of judicial transfer.

The principle of presumption of innocence applies as much to the stage of PA.

JJBs and Children's Courts must consider whether there is material available on record which could prima facie dispel the presumption of innocence if that were allowed and attribute malice and criminal intent.

Therefore scrutiny of available documents and interaction with the child become important.

# Words of Caution...

- Individuals impacted by Judicial waiver are also subject to the detriment and vulnerabilities incurred by virtue of the physical, mental and emotional changes that mark adolescence
- However, some children may not have faced any adverse circumstances in their life. This should not imply a judicial transfer. In **Mumtaz Ahmed Nasir Khan v. The State of Maharashtra and Others**, the SIR and MH report clearly established that the child came from a good family, had history of psychological treatment for behavioural issues, which was discontinued, but had no history of abuse, passed his board examination while in the observation home and had all the ingredients that did not make him appear as vulnerable. On the contrary, his admittance of his actions and will to continue with his education provided every reason to believe in the possibility of his rehabilitation.
- Therefore, vulnerability assessment can be a tool, but not the only tool just like psychological assessment cannot be the only tool.
- Several studies show that children who enter the adult system, in most instances remain in a cycle of crime as they are subjected to exponentially harsher conditions.
- Therefore, public policy, legislation and judicial practice demand adequate consideration of the available facts, child's version, expert assessments where available, a close scrutiny of all documents and their admissibility.
- **All factors have to be weighed by application of judicial mind to the circumstances of each case and each child. There can be no straight jacket formula.**

**Mumtaz Ahmed Nasir Khan v. The State of Maharashtra and Others [2019 (4) Bom CR (Cri) 261, Judgement dated 15.07.2019]**

- **Questions raised and suggested for consideration by Boards and Children's Courts while determining the question of adult like trial...**
  1. The seriousness of the alleged offense to the community and whether protecting the community requires waiver?
  2. Is he a predator on the prowl and out to repeat the offence with or without provocation?
  3. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willed manner?
  4. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted
  5. The prosecutive merit, i.e., whether there is evidence upon which a [court] may be expected to return an indictment?
  6. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults?
  7. The sophistication and maturity of the juvenile by consideration of his home, environmental situation, emotional attitude, and pattern of living
  8. The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions?
  9. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services, and facilities currently available

# Case Vignette 2

- 17 year old “A” elopes with his 16 year old girl friend and the girl’s parents file a police complaint. The police search team is able to trace them “A” after a few months, by which time they are living like husband and wife in a small rented accommodation in a rural township near Kota. The boy is subsequently booked for penetrative sexual assault under the POCSO Act in addition to kidnapping since sexual relationship with a minor is a statutory offence with strict liability under the POCSO Act. The JJB transfers the boy’s case to the Children’s Court as he is in the 16-18 year age group and booked for a heinous offence. The grounds for transfer are that the boy fits in the category of children whose cases can be transferred and that his SIR and MH report clearly record that he was in a sexual relationship with the girl for over a year and that he had the maturity to understand his actions and was also aware that such a relationship could lead to pregnancy for the girl.

# Questions for Discussion

- Is this a fit case for judicial transfer? Why / Why not?
- Would this boy have met the same fate had he and the girl been above the age of 18 years?
- Can this be called a status offence?
- Should a status offence be treated in the same vein as other offences?

## General Comment No. 24

CRC Committee

CRC/C/GC/24 [IV.A.12]

A systemic approach to prevention also includes closing pathways into the child justice system through the decriminalization of minor offences such as school absence, running away, begging or trespassing, which often are the result of poverty, homelessness or family violence. Child victims of sexual exploitation and adolescents who engage with one another in consensual sexual acts are also sometimes criminalized. These acts, also known as status offences, are not considered crimes if committed by adults. The Committee urges States parties to remove status offences from their statutes.

# Judicial Transfer – Does it lead to Discriminatory Treatment or Differential Treatment???

- Differential treatment in law for the same offences is not arbitrary per se. However, when it is incumbent on the results of a PA that depends on a judge's discretion exercised before the police investigation is complete and on psychological tests that are self-incriminatory, arbitrariness seeps into practice, making it discriminatory.
- For example,
  - There can be life imprisonment for some just because their psychological assessments point to information that may or may not have been scrutinized
  - CRC Committee's recommendation (2019, 80) on removal of criminal records of children when they turn 18 or at the request of the child, in cases of serious offences. But Section 24(2) of the JJ Act, 2015 carves out an exception for children tried and convicted as adults
  - Judicial waiver and corresponding changes in the law provides a weapon in the hands of police to pick up young boys and subject them to torture, particularly in conflict areas and generally for speaking publicly against state policies. It required a High Court intervention in the state of Karnataka to question interrogation of school children by the police for staging a play against the CAA
  - Increased criminalization of adolescents in consensual sexual relationship or in under age marriage as per POCSO Act and PCMA

# Remember the Doctrine of Rarest of Rare???

## Bacchan Singh v. State of Punjab

- The Supreme Court dealt with the ambiguity for courts regarding when to go award death penalty.
  - Constitutionality of death penalty was upheld by the majority of 4:1.
  - The principle of death penalty in the “rarest of rare cases” emerged.
  - However, the scope of this phrase was left undefined and evolved with judicial decisions over time.
- 
- **Macchi Singh v. State of Punjab; Santosh Kumar Bariyar v. State of Maharashtra; Prajeet Kumar Singh v. State of Bihar...**
    1. Manner of commission of murder – When the murder is committed in an extremely brutal, ridiculous, diabolical, revolting, or reprehensible manner so as to awaken intense and extreme indignation of the community
    2. Motive for the commission of murder – When total depravity and cruelty are the motives behind a murder;
    3. Socially abhorrent nature of the crime – When a murder of a person belonging to one of the backward classes is committed.
    4. Magnitude of the crime – When the proportion of the crime is massive
    5. Personality of victim of murder – When the murder victim is an innocent child, a helpless woman or person (due to old age or infirmity), a public figure, etc.



# Evolution through application of judicial mind or use of standardised tools for mental assessments???

*So long as procedural elements are maintained which permit the adolescent to make their case, be heard in an unbiased forum, and have the right to appeal decisions, judicial discretion in this aspect is the most appropriate legal mechanism to decide when the original jurisdiction of juvenile courts is to be waived*

*Most value will be reaped through further training of judicial officers presiding over the juvenile court, so as to **emphasise the need to understand the juvenile's personal situation rather than the crime in isolation***

Hannan, William, 'Judicial Waiver as the Only Equitable Method to Transfer Juvenile Offenders to Criminal Court' (2014) 22(1) *Notre Dame Journal of Law, Ethics and Public Policy* 193, 197

# The Guiding Principles...

Treatment of CICL must be tested fundamentally on the principles of equality, non-discrimination, best interests of the child, and opportunity for fresh start

- At least 59 countries have been urged by the CRC to reform their laws to ensure that persons below 18 years are dealt with under the juvenile justice system and not as adults
  - Raha, S., 2019. Treatment of Children as Adults under India's Juvenile Justice (Care and Protection of Children) Act, 2015, A Retreat from International Human Rights Law. *International Journal of Children's Rights* 27(2019), 757–795

# The Litmus Test... The Age Old Theory of Elimination

All other possibilities have been considered and rejected

- In relation to juvenile; and
- In relation to public safety considerations

# Important Provisions of Law w.r.t. Judicial Transfer and Preliminary Assessment

## Section 3(1) (i) of JJA 2015

- every child shall be presumed to be innocent of any mala fide or criminal intent

## Rule 10(A)(3) of JJR 2016

- While making the preliminary assessment, the child shall be presumed to be innocent unless otherwise proved.

## Section 3(ix) of JJA 2015

- no waiver of any right of the child is permissible or valid

## Explanation to Section 15(i) of the Act 2015

- preliminary assessment is not a trial

## Section 3(iii) of JJA 2015

- every child shall have right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child

## Section 8(3) (a)

- it is the responsibility of the JJB to ensure the informed participation of the child and the parent or guardian, in every step of the process

## Section 19(1)(i) of JJA 2015 read with Rule 13 of JJR 2016

- After receipt of the preliminary assessment from the Board, the Children's Court has to come to the conclusion independently that there is a need for trial of the child as an adult or as child.

# What can happen after a Preliminary Assessment?

- Child to be inquired by the JJB if order under section 18(1) or 18(2) is passed by it.
- Child is ordered to be tried as an adult under section 18(3)
  - Children's Courts to do reassessment under section 19(1) of the Act.
  - Children's Court to act like a Board if disagrees with the transfer order of the Board and conduct inquiry under section 14 of the Act and pass dispositional orders under section 18(1) or 18(2) of the Act.
- With transfer to the adult criminal justice system: Will the Child become Adult in records/procedures? **A.C. Vs State of Delhi** (Application of Section 12 before Children's Court)
- What orders Children's Courts cannot pass even if a child has been tried as an adult?
  - Capital Punishment
  - Life Sentence without subject of review
- Mandatory review at the age of 21 years of the child.

**Thank You!**