

## UNSHROUDING THE ENIGMA BEHIND PRELIMINARY ASSESSMENT UNDER THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

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### Abstract

The extant Juvenile Justice Act has incorporated a provision for conducting preliminary assessment in cases of heinous offences allegedly committed by a distinct category of children. An attempt to challenge the constitutionality of the provision was thwarted at the threshold as the apex court declined to hear a public interest litigation assailing the validity of the provision. For the time being, the law, as it stands, needs to be interpreted in the right perspective, so as not to defeat the intention of the legislature. The need of the hour is to strike a delicate balance between inviolable rights of children in conflict with law, and to fulfill the legislative mandate of giving effect to the subjective, and seemingly equivocal provisions of the new law.

### I Introduction

THE ANTINOMY that law must be stable, yet the law cannot stand still, has become relevant like never before. The journey of Juvenile Justice Act of India, initially enacted in 1986, has seen two major amendments, in 2000 and 2015, ushering in sweeping changes. The law was amended presumably to 'keep up with the times'. Times that have been portrayed as ones where commission of heinous crimes are on the rise by children. The amendments in 2015 have ostensibly been brought about in light of rise in spite of incidents committed by juveniles, as reported in the media. Be that as it may, there is a perception that the new law is more likely to obfuscate people rather than enlighten them. This paper is an attempt to illuminate the reader about the manner in which the provision is being, and perhaps should be, interpreted in juvenile justice boards, and by high courts. The paper would also briefly examine cases of recent origin titled *Mumtaz Ahmed Nasir Khan v. State of Maharashtra*,<sup>1</sup> *Bholu v. Central Bureau of Investigation*<sup>2</sup> and *Navinbhai Bijalbbhai Dharmani v. State of Gujarat*,<sup>3</sup> which are verdicts of seminal importance in this avant-garde sphere of juvenile jurisprudence.

### II The background: Ramifications of the horrific *Nirbhaya* incident

The violent and macabre commissions of sexual assault on a cold 2012 December night in Delhi revulsed the conscience of the entire citizenry. The rape and murder of a young physiotherapy intern outraged people, and eventually led to an outcry for

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1 CA No 1153 of 2018 (High Court of Bombay).

2 CR No. 2366 of 2018 (High Court of Punjab and Haryana).

3 CR No.374 of 2019 (High Court of Gujarat).

amendments in the criminal law. Since one of the perpetrators was a juvenile, vociferous public clamour for stringent laws against juveniles paved the way for enactment of Juvenile Justice (Care & Protection of Children) Act, 2015 ('Act'). There were heated debates in the Parliament, and the Juvenile Justice Bill, 2014 was vehemently opposed. The provision related to conducting preliminary assessment was severely criticized by Shashi Tharoor, who spoke thus:<sup>4</sup>

In discussing the Juvenile Justice (Care and Protection of Children) Bill, I listened attentively to the Minister but I think we need to ask ourselves a basic question. What does justice seek to serve? Does the State exercise its punitive powers in order to be revengeful to extract an eye for an eye, to punish in a manner that can only be described as primitive? Or, do we hope to use the justice mechanism as a corrective to wean people from error and to rehabilitate the young? This question is all the more necessary in the case of children who commit crimes because they are not often sufficiently, mentally or emotionally developed to understand the gravity of their wrong doing. Are we as a society now starting to take revenge on children?

Tharoor, in his inimitable style, remonstrated that the law is an unjust law and remarked '*Lex iniusta non Est Lex* or an unjust law is no law at all'. However, the argument is countered by the votaries of the new rubric, with an equally forceful maxim *viz., dura Lex sed Lex i.e.,* the law is harsh, but it is the law.

India has ratified the United Nations Convention on the Rights of the Child, 1989 which requires treating every child under the age of 18 years, as equals. Thus, the amendment Bill was challenged on this score. The Bill was also assailed contending that *inter alia* it also violates the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 or the Beijing Rules, which require a child or a young person accused of an offence to be treated differently from an adult. However, the Bill was ultimately passed, received Presidential assent, and became the law of the land with effect from January 16, 2016. An attempt was made by Tehseen Poonawalla to challenge the constitutionality of the Act of 2015, however the Supreme Court declined to entertain the public interest litigation filed by Poonawalla on the ground that the petitioner had no *locus standi*, and the court allowed withdrawal of the PIL observing that the same can be filed on behalf of somebody who is affected. Whether the amendment is much to our chagrin or not, an endeavour now has to be made to interpret the statute whilst upholding the aspirations of the society coupled with the mandate of the law on one hand, and ensuring that rights of children are zealously

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4 Lok Sabha Debates on May 6, 2015, available at: [https://eparlib.nic.in/handle/123456789/758838?view\\_type=search](https://eparlib.nic.in/handle/123456789/758838?view_type=search) (last visited on Aug. 10, 2020).

safeguarded, on the other. The present paper attempts to show the way to strike this delicate balance.

### III The preliminary assessment

Keeping the above deliberations in perspective, a threadbare analysis of the impugned provision is done. For the said purpose, let us advert to section 15, of the Juvenile Justice (Care and protection of Children) Act, 2015 which is reproduced hereunder:

Preliminary Assessment into heinous offences by Board (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, and may pass an order in accordance with the provisions of subsection (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

*Explanation.*-For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2)Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.

The section, if broken down, basically enunciates the proposition that preliminary assessment would be conducted:

- i. In case a heinous offence is alleged to have been committed,
- ii. By a child in conflict with law (CCL) aged between 16-18 years by the Juvenile Justice Board (JJB or Board) examining the following aspects:
  - a. Physical capacity to commit the offence,

- b. Mental capacity to commit the offence,
- c. Ability to understand the consequences of the offence, and
- d. Circumstances in which the child allegedly committed the offence.

### Heinous offence

It is a lesser known fact that until 2015, the only piece of legislation that had defined 'heinous offences' was the Heinous Offences Act, 1857,<sup>5</sup> which has since been repealed. The definition of heinous offence had been conspicuously absent in the legislative framework of our country. However, now we have an authoritative definition of heinous offences, and the same is encapsulated in section 2 (33) of the Juvenile Justice (Care and Protection of Children) Act, 2015. It read thus:

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 more.

The above definition was subject to conflicting interpretations. Finally, the issue has been set to rest in *Shilpa Mittal v. State (NCT of Delhi)*<sup>6</sup> wherein it held, in trenchant terms, as follows:<sup>7</sup>

In view of the above discussion we dispose of the appeal by answering the question set out in the first part of the judgment in the negative and hold that an offence which does not provide a minimum sentence of 7 years cannot be treated to be an heinous offence. However, in view of what we have held above, the Act does not deal with the 4th category of offences viz. offence where the maximum sentence is more than 7 years' imprisonment, but no minimum sentence or minimum sentence of less than 7 years is provided, shall be treated as "serious offences" within the meaning of the Act and dealt with accordingly till Parliament takes the call on the matter.

The above pronouncement takes away majority of the offences out of the ambit of section 15, like attempt to murder, attempt to culpable homicide etc. which were hitherto

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5 Interpretation of the words "heinous offence." — The words "heinous offence" shall be deemed to include an attempt to murder, rape, maiming, dacoity, robbery, burglary, knowingly receiving property obtained by dacoity robbery or burglary, breaking and entering a dwelling-house and stealing therein, intentionally setting fire to a village, house, or any public building, stealing or destroying any property provided for the conveyance or subsistence of Troops, and all crimes against person or property attended with great personal violence, and all crimes committed with the intention of assisting those who are waging war against the State or forwarding their designs.

6 (2020) 2 SCC 787.

7 *Id.* at 802.

perceived be 'heinous' offences, but were actually 'serious' in nature, for the purposes of their interpretation qua juveniles. It would not be out of context to state that though an authoritative ruling has come in 2020 only, majority of the JJB across the country were predicating the assessment on the basis of 'minimum seven years punishment' criteria. Their foresight, compassion and incisive interpretation is worthy of commendation.

### **Assistance of experienced psychologists or psycho-social workers or other experts**

For discharging the onerous task of conducting preliminary assessment, the JJB usually calls for, and peruses the social background report, social investigation report, physical mental drug assessment report, Preliminary Assessment Report (PAR) and other relevant records filed by the police. Some of these reports contain versions of the child in conflict with law too, thus ensuring fulfilment of the mandate, to an extent, right of participation of children

The social background report (SBR) means the report of a child in conflict with law containing the background of the child prepared by the child welfare police officer.<sup>8</sup> The child welfare police officer shall record the social background of the child and circumstances of apprehension, in every case of alleged involvement of the child in an offence in form 1 which shall be forwarded to the Board forthwith.<sup>9</sup> The above Form contains vital aspects which assists in making a proper inquiry *viz.*, family details, addictions, if any in the family, history of involvement of family members in any offence, habits of the child, reasons for the child dropping out from school, reason for alleged offence such as parental neglect or over protection, peer group influence *etc.* It also contains details regarding circumstances in which the child was apprehended and alleged role of the child in the offence. In a welcome move, the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 (Rules) also provide for a column in the form where suggestions are also invited from the child welfare police officer, thus making it a participative process.

The social investigation report (SIR) is prepared by the probation officer to ascertain the circumstances in which the alleged offence was committed. The social investigation report contains information regarding the antecedents and family background of the child and other material circumstances likely to be of assistance for making the inquiry. It is a report containing detailed information pertaining to the circumstances of the child, the situation of the child on economic, social, psycho-social and other relevant factors, and the recommendation thereon.<sup>10</sup> Perhaps the most vital utility of preparation

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8 The Juvenile Justice (Care & Protection of Children) Model Rules, 2016, r. 2(xvi).

9 *Id.*, r. 8(5).

10 *Id.*, r. 2(xvii).

of a SIR has been laid down in the Rules, wherein it has been elaborated that SIR should provide for risk assessment, including aggravating and mitigating factors highlighting the circumstances which induced vulnerability such as traffickers or abusers being in the neighbourhood, adult gangs, drug users, accessibility to weapons and drugs, exposure to age inappropriate behaviours, information and material. Form 6 appended to the Rules contain numerous indicators which enable the JJB to understand the circumstances in which the crime was committed. Relationship with family members, history of involvement of family members in any crime, present living conditions, habits of the child, type of abuse that the child may have been subjected to and reason for commission of the crime, are some of the details which go a long way in well-nigh accurate assessment.

The physical mental drug assessment report (PMD Report) is a report prepared by child care institutions in Delhi, like the Observation Home for Boys -II, Seva Kutir, Kingsway Camp. The said report is prepared by a psychologist, mental health unit of the home, who is equipped with a masters degree in psychology. It begins with socio-demographic details of the child, recording details like name, parentage, age, education etc. The child's past legal history, family history *i.e.*, family genogram, current circumstances of living (whether living with parents, relatives, friends, on the street, in a night shelter, orphanage *etc.*), occupation, history of psychoactive substances in the family, family dynamics and structure of the family (whether nuclear, joint or broken family), whether the child was subject to ill treatment in the form of physical abuse, psychological abuse, sexual abuse, financial abuse or was neglected. Problems reported by the child pertaining to education, occupation, housing, economic etc. are also shared by the child in this report. Current socio-economic status and earnings are also reflected. History of psycho-active substances including age of initiation and pattern of substance abuse (duration, frequency, last intake, amount spent *etc.*) is also recorded. Thereafter case details are recorded in order to understand the CCL's cognition, perception and the unfolding of circumstances. The allegations in the case are explained to the child and his or her responses are recorded. Thereafter, there is a heading 'case conceptualization' wherein factors for conceptualization like predisposing factors, precipitating factors, perpetuating factors and protective factors are recorded along with possible factors of vulnerability. The report concludes with a mini mental state examination (MMSE) where simple questions are put to the child for the purpose of observing his or her orientation, registration of facts, attention *etc.* The MMSE is used as a screen tool for cognitive impairment or diagnostic adjunct in which a low score indicates the need for further evaluation for cognitive impairment, dementia, and degenerative disorder. In the end, an intervention plan for the child is prepared, prescribing family counselling, psychiatric consultation, individual counselling, sex education and sensitisation, community-based rehabilitation, group sessions or psychometric assessment

The PAR is prepared by psychologists. For conducting a preliminary assessment in case of heinous offences, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances.<sup>11</sup> A panel of such experts is made available by the district child protection unit, whose assistance can be taken by the Board, or could be accessed independently. In some homes in Delhi, non-government organisations have also been providing the services of psychologists. The said report contains 'case formulation' which is divided into subheads, namely mental and physical capacity to commit the offense, ability to understand the consequences of the offence, circumstances in which he allegedly committed the offence. Under the head mental capacity, the psychologist ascertains whether the CCL was found or not found symptomatic for psychiatric illness or intellectual disability as per International Classification of Diseases *viz.*, ICD-10.<sup>12</sup>

By this report, it is also ascertained whether CCL reported of any abuse, ill treatment, past psychiatric illness. For assessing his physical capacity, factors like visual impairment, hearing and speech impairment, physical impairment, orthopaedic impairment are noticed. Under the head 'ability for decision making' it is recorded whether the CCL has the ability to make decisions or to choose, and also whether he has understanding of the concept of cause and effect of actions once taken in accordance to age appropriate behaviour. Under the mental status examination his general appearance is recorded, attitude towards the examiner, eye contact, speech, psychomotor activity, attention and concentration, memory, judgement, abstract ability, mood and affect, perceptual disorder (hallucination/illusion/somatic passivity/delusion/ no formal perceptual disorder) and thought disorder is recorded.

It would be imperative to keep in mind that in cases of heinous offences alleged to have been committed by a child who has completed the age of 16 years, the child welfare police officer has to produce section 161 Cr PC statements of witnesses and other documents prepared in the course of investigation, within one month from the date of production of the child before the Board.<sup>13</sup> And it is trite that a child must be produced before the Board within 24 hours of his/her apprehension.<sup>14</sup> It is incumbent upon the child welfare police officer to record the information regarding the offence

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11 *Id.*, r. 10A (2).

12 The International Classification of Diseases (ICD) is a globally used diagnostic tool for epidemiology, health management and clinical purposes. The ICD is maintained by the World Health Organization (WHO), which is the directing and coordinating authority for health within the United Nations System. The ICD is originally designed as a health care classification system, providing a system of diagnostic codes for classifying diseases, including nuanced classifications of a wide variety of signs, symptoms, abnormal findings, complaints, social circumstances, and external causes of injury or disease, *available at*: [https://en.wikipedia.org/wiki/International\\_Classification\\_of\\_Diseases](https://en.wikipedia.org/wiki/International_Classification_of_Diseases) (last visited at July 29, 2020).

13 *Supra* note 8, r. 10A.

14 The Juvenile Justice (Care & Protection of Children) Act, 2015, s.10.

alleged to have been committed by the child in the general daily diary or *rojnamcha* followed by a SBR of the child and forward it to the Board before the first hearing.<sup>15</sup> Further, the child welfare police officer, immediately after apprehending the child, is duty bound to inform *inter alia* the probation officer, for preparation and submission of SIR to the Board within two weeks of apprehension.<sup>16</sup> Further, the JJB is empowered to direct the probation officer to act with alacrity, and to submit a SIR *qua* a child within 15 days from the date of first production before the Board.<sup>17</sup>

The above timeline is reflective of the fact that for a preliminary assessment, which must be conducted by the Board within a period of three months from the date of first production of the child before the Board,<sup>18</sup> the Board is ordinarily in seisin of relevant documents. Thus, all relevant material is placed before the Board to make an informed decision.

#### **Preliminary assessment is not a trial**

First, the preliminary assessment is “not a trial”. Second, it is, instead, an inquiry to assess the child’s capacity to commit the alleged offence and to understand its consequences.<sup>19</sup> Further, there is always a disclaimer *viz.*, the observations on the four aspects of preliminary assessment under section 15 are predicated solely on the facts as alleged by the prosecution, and are not findings on merits. Moreover, while making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.<sup>20</sup> Moreover, unlike in a trial, there is no cross-examination of the authors of various reports, like psychologists *etc.*, though it is desirable to do so, whenever the situation warrants. An example of such a situation is the Gurgaon school case, discussed in the *Bholu’s* case in this paper later on.

After having narrowed down the scope of heinous offences, after having collected the requisite tools to enable correct interpretation, and after understanding the fact that the assessment is an inquiry, one then would embark on the quest to disinter the four key ingredients of the provision. It must be borne in mind that the four ingredients must co-exist, for they are not in the alternative.

To comprehend the methodology which a Board undertakes to conduct a preliminary assessment, it would be useful to illustrate the concept with the help of six real life examples/situations. Situations one and two involve the allegations of committing murder, a heinous offence, where situation two relates to commission of murder by

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15 *Supra* note 8, r. 8(1).

16 *Supra* note 14, s. 13(1)(ii).

17 *Id.*, s. 8 (3)(e)

18 *Id.*, s. 14(3).

19 *Supra* note 1 at 15.

20 *Supra* note 8, r. 10A(3).



more than one perpetrator. Situation three and four relate to allegations of committing rape, another heinous offence. Lastly, situation five relates to commission of robbery and murder by adult associate of the juvenile.

*Situation 1:*

The child in conflict with law (child) A harboured an intention to make a quick buck. He hatched a plan along with an adult accomplice/associate and kidnapped his friend. After kidnapping the friend, the duo strangled the friend, put his body in a bag, and disposed of the bag on a secluded highway. Thereafter, the child A made ransom calls to the father of the deceased, making phone calls from different locations, asking for Rs 1 crore ransom. The child was apprehended later on.

Child A was charged for the offence of murder.

*Situation 2:*

Child B along with two other children C and D, hatched a plan to kill the elder brother of B, as the elder brother used to torture B, take away his savings and beat their mother regularly. The father had died long ago. As per the plan, children C and D, who were previously involved in the commission of a few offences, lured the victim on the pretext of having drinks together, took him to a secluded park, and stabbed the victim around 46 times. Thereafter they disposed off the knife and blood stained clothes in a nearby drain.

All the three children *viz.*, B, C and D were charged with the offence of murder.

*Situation 3:*

Child E had friend, a girl, who was picked by him from outside her school. The child made her sit on the bike apparently against her wishes, took her to another place, where another friend met them. The friend had a car, and the friend, child and the girl sat in the car. The child made the girl consume beer on the way, and thereafter took her to flat and had sexual intercourse with her and made a video of the same. After the commission of the act, he threatened her to not divulge this fact to anyone, else he would upload the video on the internet, and would kill her brother.

Child E was charged with the offence of rape.

*Situation 4:*

Child F and a girl aged 15 years were in a love relationship. They were neighbours. The victim alleged that she was in a friendship with child F and had physical relations with him with mutual understanding. They had even eloped but were later apprehended.

Child F was charged with the offence of kidnapping and rape.

*Situation 5:*

Four adults and child G together planned to rob any person coming on foot near a secluded spot. When a person walked by, the five assailants caught hold of him and started searching him for valuables, whereupon the victim raised an alarm for help. To silence him, one of the adult persons stabbed the victim near the heart with a button actuated knife, and they all ran away while taking the victim's mobile phone and money. The victim later succumbed to his injuries.

The four adults and child G were charged with the offence of robbery and murder.

In the five situations portrayed above, some of the above children were sent to the adult court and some were not. Now let us evaluate the outcome of these situations on the anvil of four parameters laid down in section 15 of the JJ Act.

**Physical capacity to commit the offence**

Relationship between physical ability to commit an offence and common physical traits:<sup>21</sup>

Physical capacity or ability relates to strength, vitality, and gross motor coordination. Physical ability tests have also been used in personnel selection, especially in certain jobs such as firefighting and police work. Although there is a vast empirical literature on cognitive ability, the research on physical ability in selection contexts is more limited. Researchers have identified several dimensions of physical ability. One classification conceptualizes physical ability as being composed of nine dimensions: static strength, explosive strength, dynamic strength, trunk strength, extent flexibility, dynamic flexibility, gross body coordination, gross body equilibrium, and stamina. Tests have been devised for these nine dimensions based on common physical tasks. Other researchers have categorized physical ability assessments into two major dimensions: endurance and maximum strength measures. The validity and usefulness of physical ability as a predictor of job performance has been empirically investigated.

Though the benchmark for ascertaining physical capacity, for the purpose of preliminary assessment, is not at the scale as mentioned above, it is suffice to say that, if the CCL was physically capable of committing the crime, and the other conditions are also fulfilled, the child would be transferred to an adult court.

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21 Deniz S. Ones, Chockalingam Viswesvaran, in *Encyclopedia of Applied Psychology*, 2004, available at: <https://www.sciencedirect.com/topics/medicine-and-dentistry/physical-capacity> (last visited on June 29, 2020).

In *Situation 1*, the postmortem report of the deceased revealed that death was caused by ‘asphyxia as a result of strangulation’. Further, the dead body was stuffed in a bag. The entire act of strangulation and disposing off the body is reflective of the fact that the CCL had the physical capacity to commit the crime. Moreover, his reports were to the effect that no physical disability was observed/ reported in the CCL indicative of any hindrance in physical capacity to commit the crime.

In *Situation 2*, the postmortem report of the deceased revealed that there were 46 stab injuries on various parts of the body of the deceased. The entire act of holding the victim from behind and stabbing him, reflects that the CCLs C and D had the physical strength or capacity to commit the offence. A perusal of PAR of the CCLs would reveal that none of them suffered from any visual, physical, or orthopedic impairment nor suffered from hearing or speech disability. Under the ‘occupation’ column, one was shown to be engaged as a factory worker, one was an actor in dramas, and the third one was a rickshaw puller. Thus, physical capacity aspect was established.

In *Situation 3*, the general appearance was observed in the PAR and it was observed that the CCL was tall and had medium built. It was further opined in the MLC of the CCL that ‘there was nothing to suggest that person is incapable of performing sexual intercourse’

In *Situation 4*, the child was physically capable of performing the act of sexual intercourse. However, as stated before, all the four aspects of preliminary assessment must co-exist together, and thus the Board carefully evaluated other parameters too before giving a finding.

In *Situation 5*, again, the physical capacity of the CCL was not in doubt, however the ultimate analysis by way of preliminary assessment gave a different picture.

### **Mental capacity to commit the offence**

The simple definition of mental capacity has been given in Merriam Webster dictionary thus:<sup>22</sup>

- i. sufficient understanding and memory to comprehend in a general way the situation in which one finds oneself and the nature, purpose, and consequence of any act or transaction into which one proposes to enter
- ii. the degree of understanding and memory the law requires to uphold the validity of or to charge one with responsibility for a particular act or transaction. *Mental capacity* to commit crime requires that the accused know right from wrong.

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22 Available at: <https://www.merriam-webster.com/medical/mental%20capacity> (last visited at July 29, 2020).

There is a plethora of literature and myriad medical findings which advocate the opinion that a child in conflict with law demonstrates deviant behaviour and sometimes commits an egregious offence *inter alia* because of his or her inherent nature of risk taking, impulsiveness, immaturity, lack of foresight, impressionability *etc.*, and because of socio-economic factors *viz.*, abject poverty, abuse, exploitation, negative influence *etc.* Under these circumstances the benefit of doubt must undoubtedly be given to the child in conflict with law. In some of the situations given above, it was however observed, based on documents and reports placed before the Board, that the above-mentioned grounds were not instrumental in compelling the CCL to commit the offence.

In *Situation 1*, the CCL had participated in the whole act of calling out the deceased from his house and taking him to the scene of the crime. It is axiomatic that this act would require considerable planning and cannot be said to be an impulsive or reckless act. Further, as per the psychologist's evaluation, psychiatric illness or intellectual disability was ruled out. The CCL was in a normal state of mind, and it was not a case where he was provoked or pressurized to commit the act. The psychologist had further opined that there was no perceptual abnormality in the CCL, no signs of delusion or thought dysfunctionality, and that he was well oriented as to time, place and person. Moreover, there was no history of psychiatric illness, medical illness of either him or his family, which would interfere in his ability to understand his involvement in criminal activity. Thus, it is explicit that child A had the requisite mental capacity.

In *Situation 2*, like in the previous situation, the CCLs C and D arranged for a knife, lured the victim out of his house, got him intoxicated, and then brutally stabbed him 46 times. The psychologist had inferred that the CCLs did not demonstrate any guilt or remorse over the act, and that there is a possibility that it was a pre-planned murder which is indicative of mental capacity and knowledge of consequences post involvement in a criminal act. The preliminary report opined that one of the CCLs planned and discussed the sequences and manner of murder and realized that psychoactive substances would be required to overpower the victim in order to execute the plan of murder. Also, the report also concluded that after consulting a psychiatrist, no mental or psychological disorder or disability was found in the CCLs. Thus, mental capacity is *prima facie* established.

In *Situation 3*, it was observed that the CCL was in a normal state of mind, and that he did not suffer from any hallucination, delusion or thought or perception dysfunction as per his mental status examination. He himself got the victim in an inebriated state, facilitating the commission of the crime. In the PAR, the psychologist had observed that the CCL had particularly planned the circumstances that led to the situation and which could be a ground for commission of the crime.

In *Situation 4*, a perusal of the PMD Report, containing the version of the CCL, would reveal that the child and the girl were friends and used to meet regularly. Further, he

had established physical relations with the girl at her home, and other places whenever they used to meet. The statement of the victim recorded under section 164 Cr PC also revealed that they used to meet each other after bunking school.

In *Situation 5*, it would be imperative to first understand that the Act envisages the mental capacity to commit an offence, and the offence committed must be a heinous one. In this case it was divulged by the CCL that they wanted to rob the stranger, but when the victim resisted, one of the accomplices stabbed him. As per the case summary the CCL stated that he and his associates were in an intoxicated state after consumption of alcohol and cannabis when while strolling around they decided to rob someone. What is discernible from the above report is that the CCL had an intention to commit robbery, but not to commit the heinous offence of murder. He had no inkling whatsoever that the adult accused would be in possession of a knife and would use the knife in stabbing and causing death of the victim.

#### **Ability to understand the consequences of the offence**

In *Situation 1*, the psychologist described the behaviour of child A to be manipulative, and it was reported that the CCL kept changing his version. The mendacity of his statements probably led the psychologist to believe so. Further, the act of disposing off the body to avoid detection is indicative of the thought process that the CCL knew that adverse consequences would ensue if he got caught.

In *Situation 2*, the act of leaving the body in the park, concealing of weapon of offence and the factum of not informing anyone is indicative of the thought process that the CCLs knew that legal consequences would ensue if they were caught. Further, after perusing the previous involvement of C and D, it cannot be gainsaid that they were unaware of legal repercussions; rather their recalcitrant ways spoke volumes of recidivist tendencies.

In *Situation 3*, it was brought on record that the victim was lured and was asked to take alcohol to facilitate the commission of the offence. Further, immediately after commission of the act, the CCL went away to another city.

In *Situation 4*, a perusal of the record gave an impression that the CCL did not anticipate that he would be prosecuted for an offence which, in his opinion, was merely a consensual sexual act between two lovers.

#### **Circumstances in which the offence was allegedly committed**

In *Situation 1*, the SIR of the CCL reflected that child A belonged to a financially well-off family. It was reported that the CCL shared a cordial relationship with his parents. It was not a case where there was any abuse by parents or anyone, nor was there any exploitation or economic deprivation. The CCL and his accomplice, without any compunction, made the demand for ransom, even after the murder of the deceased.

Avarice was the only factor which impelled the child to commit the offence, and there were no other compelling circumstances justifying the commission of the offence. Thus, the child was sent to the adult court.

In *Situation 2*, the SIR of the CCLs revealed that though they were not financially well-off, they managed to make their ends meet. It was not the case that there was acute poverty or economic deprivation that could justify their taking such a radical step of snuffing out the life of another human being. The PMD Report revealed that CCLs C and D had cordial relationships with parents and other family members, and only lack of communication was present. Further, the PMD Report of CCL C revealed that he had initially refused to execute the plan of CCL B, but when he saw that money was offered, he agreed to murder the brother. Thus, greed is the only factor that can be attributed to the CCLs C and D and which impelled them to commit such an offence, and there were no other compelling circumstances justifying the commission of the offence. However as far as CCL B is concerned, the SIR revealed that he wanted to kill his brother as the behaviour of the elder brother had caused stress and conflict among family members. The psychologist had concluded that from the case intake it was inferred that there was a possibility of sibling rivalry. Further, under the headings 'type of abuse met by child', it was shown that CCL was subject to verbal abuse by siblings, and under the head 'type of ill treatment', it was shown that he was beaten mercilessly by his elder brother. At this juncture it would be imperative to peruse the article by K M Banham Bridges, an English psychologist, who specialized in developmental psychology, wherein effect of teasing and bullying on juvenile delinquency is explained:<sup>23</sup>

Unhappy relationship with siblings.

The following are among the unhappy relationships which are found to lead to delinquency:

Teasing and bullying. The child who is bullied and teased by brothers or sisters because of some inferiority or defect or for some other reason, is constantly being stimulated to express his instincts of pugnacity and self assertion. If he is prevented from expressing them to his satisfaction, which is usually the case, he will develop a 'get-even' complex or an inferiority complex, which may ultimately lead to serious delinquency.

It was apparent that child B was reeling under the apprehension of hurt to him by his brother and when he realised that even the elders of the home could not intervene, he may be driven to take such a drastic step. Naturally, the case of this child was retained in the JJB whereas Children C and D were sent to the children's court.

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23 K.M Banham Bridges "Factors Contributing to Juvenile Delinquency" 17 *Journal of Criminal Law and Criminology* 566 (1927).

In *Situation 3*, the circumstances were created by the CCL, and it was not a case of some conducive or instigating circumstances. There was not an iota of evidence on record that the relationship was consensual. The prosecutrix took a consistent stand with respect to the factum of rape by the CCL. The injuries on the body of the victim further substantiated this version. Here also, the case of the child was transferred to the adult court system.

In *Situation 4*, the victim had categorically stated that her father wanted to implicate the CCL in a case and due to pressure of her father and because of fear, she gave wrong statement to the police against the CCL. The case of the child was understandably retained in the JJB.

In *Situation 5*, even though the circumstances under which the offence was committed seemed to be impelled by sheer greed, propelled by intoxication of psychotropic substances albeit self induced, yet it is explicit that CCL never had the mental capacity to commit murder. Thus, the matter was dealt with by JJB itself.

#### ***IV Bholu v. The Central Bureau Investigation***

This case primarily highlights the fact that right to participation is a vital right that inheres in each child, as per the Juvenile Justice Act. The High Court of Punjab and Haryana was dealing with a revision petition filed by the CCL to challenge an order passed by the children's court which had upheld the order of JJB to send the CCL to an adult court, after conducting a preliminary assessment. The matter was ultimately remanded back to the JJB for fresh consideration. The list of witnesses and documents were not supplied to the CCL or his parents, which was a contravention of the Act and the Rules. The court observed that copy of witnesses and other documents along with the copy of final report is to be supplied to the child before making a preliminary assessment, and that the legislature in its wisdom has prescribed the period of one month to produce the statements of witnesses and other documents. This would surely aid in conducting a speedy inquiry as well. Further, the assessment of the child was made on the basis of inappropriate tests namely Coloured Progressive Matrices (CPM) and Malin's Intelligence Scale for Indian Children (MISIC), which are meant for children between the ages of 5-11.5 and 5-15 years of age. Clearly, the results would not be applicable to the CCL, who was 16 and a half years old. Moreover, the CCL was not allowed to cross-examine the psychologist, despite the factum of the psychologist having prepared dubious reports.

#### ***V Mumtaz Ahmed Nasir Khan v. State***

In this matter, the high court delved into the aspect of preliminary assessment. It discussed the position in various countries, and ultimately relied upon a case from the United States *Kent v. United States*,<sup>24</sup> to give a finding. The relevant extract needs

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24 383 US 541(1966).

reproduction, as it succinctly lays down the parameters, which would serve as a beacon for those engaged in the process of preliminary assessment:<sup>25</sup>

When Kent's challenge eventually reached the U.S Supreme Court, it has considered the factors to be considered before transferring juveniles to criminal court. According to it, the judges must assess the following factors thoroughly before waiving a juvenile to criminal court:

1. The seriousness of the alleged offense to the community and whether protecting the community requires waiver;
2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willed manner;
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted;
4. The prosecutive merit, i.e., whether there is evidence upon which a [court] may be expected to return an indictment;
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults;
6. The sophistication and maturity of the juvenile by consideration of his home, environmental situation, emotional attitude, and pattern of living;
7. 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;
8. 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 to the juvenile court.

The above parameters, would surely guide and assist the JJBs in making a correct preliminary assessment.

#### **VI *Navinbhai Bijalbhai Dharmani v. State***

The main challenge against the orders of the JJB and children's court in this case was that the preliminary assessment was not conducted within the three months period specified under the Act, and the fact that the order was signed by only the principal

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25 *Supra* note 1 at 27.



magistrate. The latter contention was redressed by referring to section 7(3) of the Act which mandates that there shall be at least two members including the principal magistrate at the time of passing a final order or an order under section 18(3), *i.e.*, an order whereby the JJB transfers the case to the children's court. Further, this judgment reiterated the proposition that one-month period is prescribed for investigation and the remaining two months for preliminary assessment. Significantly, it delved on the issue whether the three months period mentioned in section 15, to complete the preliminary assessment inquiry, is mandatory or precatory. It concluded by laying down that the time limit for conducting preliminary assessment is three months from the date of first production of the child before the Board, and the same is mandatory under normal circumstances. However, if retrospective preliminary assessment is done, done beyond the period of three months, then the provision can be said to be directory. It was opined that psychology is a science and the science is not undeveloped in this era, rather the faculty of psychology is advanced. It held thus:<sup>26</sup>

Now, if the preliminary assessment is not done within a prescribed time limit and it is done at a later point of time and the finding under Section 18(3) of the Act, 2015 reveals that preliminary assessment is done considering the retrospective effect *i.e.* prevailing circumstances at the time of the incident, the CCL will not be prejudiced.

#### **VII Second chance**

It would be apposite to refer to section 101 of the JJ Act, which provides for a mechanism for appeal against the orders of preliminary assessment. The CCL has the right to appeal against the order of the JJB before the children's court, and can also challenge the orders of Sessions Court before the High Court. It is noteworthy to mention that the High Court of Delhi Legal Services Committee has taken the initiative to provide legal aid counsels to challenge the orders of preliminary assessment before the High Court of Delhi.

It must also be borne in mind that the new enactment gives another chance to a child in conflict with law who has been sent to the adult court. As per section 20 of the Act 2015 the child in conflict with the law who has been incarcerated in a place of safety by a children's court, attains the age of 21 years and is yet to complete the term of stay, the children's court shall provide for a follow up by the probation officer or the district child protection unit or a social worker or by itself. The purpose is to evaluate if such child has undergone reformatory changes, has given up his contumacious ways, demonstrated sufficient contrition, and if the child can be a contributing member of the society. For this purpose, the progress records of the child/ periodic follow up report along with evaluation of relevant experts are taken into consideration. After

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<sup>26</sup> *Supra* note 3 at 49.

the completion of this procedure, the children's court may decide to release the child on such conditions as it deems fit which includes appointment of a monitoring authority for the remainder of the prescribed term of stay; thus, a child gets opportunities of reformation and can be released earlier. To ensure effectiveness of this provision, it is axiomatic that child care institutions especially the places of safety provide requisite support for rehabilitation.<sup>27</sup>

### VIII Conclusion

The amendment to the law may not be to our liking and may even prick the conscience of many. But as adjudicators, and as adherents of law we have to interpret it in the best way possible all the while ensuring rights of children are protected. The above discussion makes it pellucid that the exercise of assessment is no mean feat, and a lot of deliberation is involved. The three verdicts of the high courts have further evolved guidelines with respect to right of participation, supply of documents, administration of appropriate tests, parameters to assess mental capacity, and issues with respect to retrospective preliminary assessment. The evolution would be continual. Further, the number of reports furnished to and perused by the Board, the in-depth analysis undertaken, would demonstrate that a lot of thought is given before making such a crucial decision. Moreover, despite the amendment only a miniscule number of cases are actually being sent to adult courts, which is reflective of a sensitive and vigilant judiciary. It is truly a sentinel on the *qui vive*, a crusader against injustice. However, no system is perfect, and evolution is always desirable. To make the system more robust and to give effect to the intention of the legislature more can be done. Standardization and uniformity in preparation of reports across all JJBs, ensuring appointment of psychologists, equipped with necessary tools, and their permanent attachment with all JJBs, compulsory training in child psychology, of not only all principal magistrates and social members, but also presiding officers of children courts, training of all stakeholders who prepare the reports mentioned above are some of the significant recommendations. Further, an inter-disciplinary and multi-disciplinary approach is a desideratum. Law cannot operate in isolation, especially when provisions like section 15 JJ Act, 2015 are to be interpreted:<sup>28</sup>

In conferences and seminars one keeps talking about inter-disciplinary approaches; and social sciences have to a large extent created a culture of inter-disciplinary studies. However, law remains insulated from that influence especially in India. Legal education trains students (future lawyers and judges) to read and apply law in a rational manner derived from legal texts – the black letter law. ...it is important to develop and encourage critical and interdisciplinary study of laws. ... It is important

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27 The role of a rehabilitation-cum-placement officer, assumes significance in this arena.

28 Jyoti Dogra Sood, "Confirmation Bias-Pitfalls" *Journal of Indian Law Institute* 61 (2019).

to discuss and engage with this case through the lens of psychology in training programmes for judges and lawyers. The role of psychological science needs to be taken seriously in criminal law. Engagement with psychological sciences may go a long way in preventing wrongful convictions

The above extract makes a succinct point that in certain cases, law and psychology have to work in tandem. While psychology's goal is to understand behavior and law's goal to regulate it, both fields make assumptions about what causes people to act the way they do.<sup>29</sup> Once we know why children do what they do, perhaps we may be able to take requisite steps to extirpate the issue of juvenile delinquency from the bud.

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29 Available at: <https://www.apa.org/topics/law/> (last visited on July 3 2020).