

## CASE STUDY

# Who decides the “best interests” of the child?

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B was a frail 15-year-old girl who was brought to the hospital by the police. She had met a 22-year-old boy on a social networking site a few months earlier. They had fallen in love and she had started living with him. On finding his daughter missing, B's father reported the matter to the police station. The police caught the couple and brought them to the police station. The boy was arrested. The father sent B to a shelter home lest she run away from home again. The police registered a complaint of rape.

As per The Protection of Children from Sexual Offences (POCSO) Act (1), B was brought for a medico-legal examination to the hospital along with her father. At the hospital, B's father revealed that she was 10 weeks pregnant and had been examined by a doctor attached to the shelter home. On the basis of the nature of the violence, the responsibility of the doctor is to provide medical treatment, psychosocial support and referral to other support services, and to ensure comprehensive care. As per the hospital protocol, a counsellor from the crisis centre of the hospital was called to speak to B. The counsellor sought some time to speak to her and understand her feelings towards the pregnancy. It was explained to her that despite her relationship being one of consensual sex, the POCSO Act does not allow for those under 18 years of age to have a sexual relationship, and that this was why the police were involved and her boyfriend had been arrested. The counsellor asked B whether she was thinking of an abortion, considering that she was only 15 years old and could have a child at a later stage in life.

B told the counsellor that she wanted an abortion. She also maintained that she was in love with the boy and had gone away with him of her own free will. When the counsellor informed B's father that she wanted a medical termination of pregnancy (MTP), he flew into a rage, saying that she had run away several times. This time she had returned with a pregnancy. He claimed that she had a “bad character” and that not aborting was the only way for her to “learn a lesson”. He said that if she had an abortion, she would repeatedly run away and return pregnant.

The examining doctor required the father's consent for abortion services for B since according to the MTP Act, 1971, (2) the written consent of the guardian is required for those below the age of 18 years. The father refused to provide consent and called the shelter home where B had been put up. The authorities of the shelter home, which was run by a religious institution, reprimanded the counsellor upon hearing of abortion. They argued strongly against “killing a child in the womb”, saying that children are a blessing of God. The counsellor tried to explain that the girl herself was a child in poor physical health and that going ahead with the pregnancy could be fatal. She stressed that more importance was being given to an unborn foetus when the life of a young child was in danger. However, the in-charge paid no heed to this. All the efforts of the doctor and counsellor to help B's father understand the risk to her physical health owing to the pregnancy fell on deaf ears.

After trying different alternatives, the doctor was left with no choice and documented that termination of the pregnancy was essential but that the father was refusing permission. He also recommended that B be presented to the Child Welfare Committee (CWC) so that the CWC could grant consent for the termination of pregnancy as a guardian for B.

The counselling team impressed upon the police the urgent need to contact the CWC, explaining that B's life would be in danger if the pregnancy was not terminated.

As part of medico-legal care, consent has to be sought for examination, treatment, examination for the collection of evidence and provision of information to the police. These are distinct categories which allow a survivor to understand what each consent entails and can facilitate informed decision-making on her/his part. In the case of B, she wanted only treatment, which was medical termination of pregnancy.

The Ministry of Health and Family Welfare (MOHFW) Guidelines (3) have been developed taking into account the lack of uniform protocols, gaps in the existing practices in the response to survivors of sexual violence, recommendations of the Justice Verma Committee and laws pertaining to sexual violence, namely, the Criminal Amendment Act 2013 and the POCSO Act 2012. Under the Guidelines, consent must be sought from the survivor her/himself if s/he is above 12 years of age. This provision is in consonance with Section 89 of the Indian Penal Code.

However, the age of consent differs for MTP. In the case of those below the age of 18 years, it requires the written consent

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of the legal guardian as it is an invasive procedure. B's father, her legal guardian, laid down the condition that he would consent to MTP only if the products of conception (POC) from the abortion were given to the police for DNA examination as evidence to strengthen the case for rape against the boy. B was in a fix because undergoing MTP meant that the POC would be taken, which would implicate her boyfriend. On the other hand, not undergoing MTP would threaten her health and also saddle her with child care at a very young age.

The doctor, in consultation with the counsellor, resolved B's dilemma by informing her that even after MTP, the survivor can make a written statement that she does not want the medico-legal evidence of conception to be sent for a forensic investigation, and that she does not wish to implicate her boyfriend as the decision to engage in sexual intercourse was mutual.

The doctor was able to provide an MTP.

Despite the efforts of the doctor and counsellor, B's father and the police pressurised her into consenting to the dispatch of the POC to the forensic science laboratory.

## Discussion

This case study brings up certain points of discussion with respect to the rights of the individual while navigating through various systems in receiving healthcare.

The Indian legal system criminalises even consensual sexual activity among adolescents. Under the POCSO Act, 2012 (1), a sexual act with any individual below 18 years of age is rape. Such acts should also be reported to the local police or the Special Juvenile Police Unit. The police then try to strengthen the case by insisting on the collection of evidence. In 1992, India ratified the United Nations Convention on the Rights of the Child (UNCRC) (4), which recognises that the best interests of the child should be of primary concern when making decisions affecting her/him (Article 3). Article 12 of the UNCRC states: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

The POCSO Act, although passed a decade later, is in violation of the Convention and is regressive insofar as it criminalises all sexual activity among children, not acknowledging consensual sexual activity among adolescents. An unwanted pregnancy resulting from consensual sexual activity involving an adolescent also ends up being viewed as an outcome of sexual violence by the law.

A survivor of sexual violence has the right to grant informed consent to or refuse the components of medico-legal care. The MOHFW's Guidelines and protocols for the medico-legal care of survivors/victims of sexual violence (3) state: "The consent form must be signed by him/herself if he/she is above 12 years

of age." Consent is sought for each of the four components: medical examination for treatment, medico-legal examination, sample collection for clinical and forensic examination, and information to be revealed to the police. These Guidelines have been developed taking into account the contradictions between various laws, yet in keeping with the framework of the Indian legal system.

The Medical Termination of Pregnancy Act of 1971 (2) does not allow a woman below the age of 18 years to terminate a pregnancy without the written consent of her legal guardian. The individual, therefore, has to depend on the legal guardian to provide consent for the MTP.

In such a case, the healthcare provider is caught between upholding the survivor's right to not register a complaint against her partner and provide her an abortion for an unwanted pregnancy on the one hand, and the guardian's refusal to provide consent for MTP unless the POC is collected, on the other. As a healthcare provider acting in the best interests of the child, there is a limit to how far one can negotiate, hence the recommendation to present the matter to the Child Welfare Committee.

The way forward is to operate from an ethical framework, maintaining the rights of the individual at the core. When there is a dilemma between ethics and law, ethics must be prioritised in keeping with the international covenants and treaties that the country has ratified.

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